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NOTE

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Introduction

1. The object of the present document is to submit solutions and draft articles on the various aspects of the legal regime of countermeasures as identified and illustrated in the previous (third) report of the Special Rapporteur on State responsibility.[1] As foreseen in that report, the solutions and draft articles proposed are based on the further study of practice and of the literature.

CHAPTER I

I. CONDITIONS AND FUNCTIONS OF COUNTERMEASURES

A. Existence of an internationally wrongful act as a basic condition

2. As explained in the third report,[2] the most basic requirement for lawful resort to any countermeasure is the existence of an internationally wrongful act which infringes a right of the State taking the countermeasure. Subject to any relevant provisions of existing dispute settlement instruments (see chapter II below, especially paras. 16-26), this does not mean that the existence of such an act and the allegedly injured State's right to take countermeasures have to have been the subject of a prior determination by an arbitral or judicial procedure or of action by a political or fact-finding body. Nor does it mean that there has to have been prior agreement between the allegedly injured State and the alleged wrongdoing State as to the existence of an internationally wrongful act. On the other hand, it would not be sufficient for the allegedly injured State to believe in good faith that an internationally wrongful act has been committed in violation of its right. Any State resorting to countermeasures on the basis of any such presumption of wrongfulness of the other party's conduct will do so at its own risk. The allegedly injured State would run the risk of being held responsible for an internationally wrongful act if the alleged prior violation proved not to have occurred or not to be in violation of its right. All that can be said in such a case is that the good faith or excusable error of an allegedly injured State which had resorted to countermeasures in the absence of any prior internationally wrongful act would obviously be relevant in evaluating the extent of its responsibility.

B. The function of countermeasures

3. A further point to be considered is the function which general international law assigns, and which the Commission's draft articles should assign, to countermeasures.[3] The study of international practice seems to indicate that in resorting to countermeasures injured States affirm that they are seeking and, indeed appear to seek, cessation of the wrongful conduct (in the case of a wrongful act having a continuing character) and/or reparation in a broad sense (possibly inclusive of satisfaction) and/or guarantees of non-repetition.[4] In other words, the function of countermeasures would not go beyond the pursuit by the injured State either of cessation of the wrongful conduct and guarantees of non-repetition in the interest of the protection of the so-called primary legal relationship, or of *naturalis restitutio*,

[1] *Yearbook ... 1991*, vol. II (Part One), p. 1, document A/CN.4/440 and Add.1.
[2] Ibid., p. 14, paras. 37-38.
[3] Ibid., pp. 16-17, paras. 39-45.
[4] The international practice referred to here will be considered throughout the present report.

pecuniary compensation, and the various forms of satisfaction in order to erase the injurious consequences—material or moral—of the infringement of that relationship. As no other aims may lawfully be pursued, any countermeasure designed to go beyond those aims would, in turn, constitute an unlawful act, according to international practice. This is presumably the point that the Institute of International Law intended to make when it emphasized, in article 6, paragraph 5, of its well-known 1934 resolution on reprisals, that an injured State should not *détourner les représailles du but qui en a déterminé initialement l'usage* [deflect reprisals from the original purpose for which they were intended].[5] It would notably follow from this that in no case could the taking of countermeasures in the form of actions or omissions by an injured State in order to inflict punishment upon the State which committed the internationally wrongful act be lawful. The only lawful punishment that could be inflicted on the *latter* State would be the material or moral damage deriving either from the injured State's reaction and its coercive effects with regard to cessation or reparation or, possibly, from the self-inflicted harm it incurs in giving satisfaction and guarantees of non-repetition under pressure of the injured State's reaction.

4. It is difficult to express an opinion on the question whether (and possibly to what extent) the above description correctly reflects the state of general international law on this point, or, for that matter, to determine whether the state of the law is satisfactory. It is easy to presume, of course, that any State resorting to countermeasures against a wrongdoing State does not do so without some measure of punitive intent. In most cases such an intent will be so totally subsumed by the intent to seek cessation/reparation that it will not overstep the bounds of perceptible legal relevance. The situation may well appear to be different in cases where the main concern of the injured State is to seek satisfaction and/or guarantees of non-repetition. An intent to chastise may in such cases become more pronounced and, although satisfaction will be a self-inflicted penalty, the harm inflicted by the countermeasure designed to obtain satisfaction will come close to being a penalty inflicted by the injured State.[6] Another hypothesis is that of a countermeasure taken by one State against another in a situation where no cessation or reparation is sought or possible and the only conceivable function of the reaction is chastisement. In considering international practice it has only been possible to identify a few cases which seem to reveal an explicit punitive intent.[7] It should be noted, however, that more numerous

[5] "Régime des représailles en temps de paix", *Annuaire de l'Institut de droit international, 1934*, p. 710.

[6] As clearly explained by Morelli:

"The analogy with penalty in municipal law is, in the case of reprisals, stricter than in the case of satisfaction. Indeed, while the latter ... consists of conduct of the law-breaking State itself, such conduct being the object of an obligation of the said State, reprisal, like penalty, constitutes harm lawfully inflicted on the law-breaking State by another State." (*Nozioni di diritto internazionale*, p. 363 (Trans. by the Special Rapporteur).)

[7] A "punitive" element seems to characterize, for example, some cases of expropriation of foreign property. One such case was the Cuban expropriation of United States property following the cutback in Cuban sugar import quotas by the United States of America (Whiteman, *Digest of International Law*, vol. 8, pp. 1041-45; *Keesing's ... 1959-1960*, vol. XII, pp. 16902, 17538, 17542, 17591, and 17787). Another case was the Libyan expropriation of British assets following the allegedly wrongful toleration by the United Kingdom of the Iranian occupation of three Persian Gulf islands (see De Guttry, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale*, pp. 83-89). A similar function seems to have been attributed by Indonesia to the seizure of Dutch property by way of reaction to the alleged violation by the Netherlands of the "Round-table Conference" agreements concerning the future status of

and more significant cases of punitive measures would presumably emerge from the study of practice concerning those types of internationally wrongful acts that draft article 19[8] places in the fairly clearly defined separate category of international crimes of States. More generally, the cases where a punitive intent may be more apparent are possibly those where the internationally wrongful act is characterized, if not by *dolus*, then by a high degree of fault.[9] Be that as it may, even if it were found that a punitive intent frequently underlies the decision of injured States to resort to countermeasures, it would be very difficult to conceive of the presence of such an intent as more than a *factual characterization* of the function of countermeasures. As a matter of law—whether *lex lata* or *lex ferenda*—it would not seem appropriate to provide for any permissive rule within the framework of the draft articles on State responsibility to cover such a hypothesis. It is felt that to lay down a rule with the explicit intent of prohibiting any punitive function of countermeasures would be equally inappropriate. The principle of proportionality and the other limitations placed on the injured State's *faculté* of reprisal should be adequate to prohibit any qualitative or quantitative over-reaction on the part of the injured State.

5. In a different sense the function of countermeasures is of relevance to interim measures of protection. As will be shown in the following chapter, resort to such measures may be lawful—subject to limitations—*before* any settlement procedure has been initiated and even in the course of such a procedure.[10] This is the position of the former Special Rapporteur, Willem Riphagen.[11] In accepting such a position,

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West Irian. The Indonesian Government declared in fact at the United Nations General Assembly on 29 September 1958 that the measures had been adopted because, "being denied the opportunity to negotiate our differences with the Dutch, we are compelled to take other measures short of war" (*Official Records of the General Assembly, Thirteenth Session, Plenary Meetings*, 762nd meeting, para. 83). The Indonesian President himself asserted in connection with the same matter:

"While the Dutch attitude in the case of West Irian is still stubborn, I sound [a] warning that, if, in the question of West Irian, the Dutch remain stubborn, if, in the question of our national claim, they remain headstrong, then all the Dutch capital, including that in mixed enterprises, will bring its story to a close on Indonesian soil." (Speech by the President of the Republic of Indonesia, 17 August 1959, cited in the Netherlands note regarding nationalization of Dutch-owned enterprises of 18 December 1959. Extracts in English in AJIL, vol. 54, No. 2 (April 1960), p. 486.)

A "punitive" aim—that is to say, the mere condemnation of the wrongful act—seems at times to characterize some of the measures taken by States against serious violations of human rights. Subject to further analysis of cases of this kind in due course (namely in connection with international crimes of States), suffice it to recall, for the time being, the measures taken by France against the Central African Empire in May 1979 following the killing of 85 young people by Emperor Bokassa's personal guard ("Chronique ...", RGDIP (1980), pp. 361 *et seq.*); by the United States of America against China in June 1989 following the Tien An Men incidents (ibid. (1990), p. 484); and by Belgium against Zaire in May 1990 following the murder of about 50 students by President Mobutu's personal guard (ibid., p. 1051).

[8] For the text of articles 1-35 of part 1 of the draft adopted by the Commission on first reading, see *Yearbook ... 1980*, vol. II (Part Two), pp. 30-34.

[9] On the impact of fault on the degree of gravity of an internationally wrongful act, see *Yearbook ... 1989*, vol. II (Part One), pp. 47-55. document A/CN.4/425 and Add.1, paras. 164-190, and Arangio-Ruiz, "State fault and the forms and degrees of international responsibility: questions of attribution and relevance", *Le droit international au service de la paix, de la justice et du développement : Mélanges Michel Virally*, pp. 25 *et seq.* For further developments, particularly with regard to the importance of fault to the characterization of international crimes of States, see Palmisano, *La* "*colpa dello Stato*" *ai sensi del diritto internazionale: problemi preliminari allo studio della colpa nella responsabilità internazionale*, chapter XII.

[10] See paras. 41 and 48 below, and proposed draft article 12, paragraphs 2 (*b*) and (*c*), as set out in para. 52 below.

[11] See sixth report (*Yearbook ... 1985*, vol. II (Part One), pp. 11-12, document A/CN.4/389), draft article 10, paragraphs 2 (*a*) and (*b*) and commentary thereto.

however, the present writer dissociates himself from the position of those writers who believe that interim measures of protection are characterized by the *subjective* aim of the State resorting thereto, either to avoid prejudging the possibility of reparation or to induce the other party to submit to a dispute settlement procedure to which it may be committed.[12] Rather, the measures in question—and the special regime to be envisaged for them even in the presence of third-party settlement procedures—are more precisely characterized by the protective function they *objectively* perform within the framework of the relevant settlement procedure. Thus, they will presumably consist of reversible measures, mostly economic in character, and such as to ensure that the injured State receives an amount not exceeding that of the compensation it may claim through the relevant settlement procedure.

C. Protest, intimation, *sommation* and/or demand for cessation and reparation

6. Although scholars generally seem to be inclined to accept the notion that under existing law countermeasures ought in principle to be preceded by some form of protest, intimation, claim, or *sommation*,[13] they remain exceedingly vague when it comes to both the identification of such requirements and the conditions under which they may vary or be dispensed with.[14] As stated earlier, the indications in the literature concerning the impact of the nature either of the wrongful act or of the measures envisaged need to be tested by further analysis of State practice in order to obtain a more accurate picture.[15]

7. Nineteenth century practice concerns mainly those military countermeasures which, while admittedly extreme, were not at that time prohibited by law. The very seriousness of such measures (combined with the fact that they were frequently subject to constitutional requirements within the municipal law of the acting State) forced Governments to exercise some degree of caution.[16] This explains in part the particular care taken by Governments to emphasize that they had only resorted to force following an unsuccessful demand for cessation and/or reparation.[17] The same

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[12] *Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above), paras. 56-57.

[13] Ibid., paras. 46-49.

[14] Ibid., para. 50. An interesting study by Gianelli, entitled *Adempimenti preventivi al ricorso a misure di reazione all'illecito internationale*, has recently been presented as a doctoral thesis at Rome University.

[15] *Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above), para. 51.

[16] For instance, it may be recalled that, in 1807, the British envoy to the United States of America for the "*Chesapeake*" case stated, in general terms, that

"... if, when a wrong is committed, retaliation is immediately resorted to by the injured party, the door of pacific adjustment is closed and the means of conciliation are precluded" (Wharton, *A Digest of the International Law of the United States*, vol. III , p. 72).

In 1862, the United States Secretary of State, Seward, declared that the United States would not use armed reprisals in order to obtain damages due for tort to a citizen of the United States by a foreign nation "unless no other mode of prosecution remains" (ibid., p. 100).

In 1883, during a parliamentary debate, the Italian Foreign Minister, Pasquale Stanislao Mancini, stated that reprisals in general constituted

"... the last resort that international law allows States, and even a civilized Government is at times constrained to resort to them, but only after having exhausted all the peaceful and amicable means at its disposal" (*La prassi italiana ...*, 1st series (1861-1887), vol. II, p. 905).

[17] It must be noted, however, that the cases in question are examples of so-called gunboat diplomacy. To mention them here does not mean either that such a practice is considered to be a legally admissible countermeasure, or, in particular, that the actions of the allegedly injured States may be

practice reveals that a protest or intimation also precedes such temporary forcible measures as the seizure of vessels or customs buildings by the allegedly injured State by way of an interim or provisional measure against unlawful conduct that has taken or is continuing to take place.[18]

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assumed to have followed an actual internationally wrongful act. These cases are recalled simply in order to stress that, even where there was resort to this reprehensible policy, the allegedly injured States felt that they could not dispense with the requirement of a prior demand for cessation or reparation and with *sommation.*

In the "*Water Witch*" case (1855-1859) the United States of America demanded reparation from Paraguay for having opened fire on a United States warship, killing a sailor. The United States Congress, at President Buchanan's request, authorized him "to adopt such measures and use such force as, in his judgment, may be necessary and advisable, *in the event of a refusal of just satisfaction by the Government of Paraguay**". The United States envoy in charge of presenting the demand for reparation was escorted by a naval force, and this circumstance persuaded Paraguay to satisfy the United States demands in very short order (Wharton, op. cit., vol. III, pp. 113-114).

In 1861, the United Kingdom demanded reparation from Brazil for the looting of a British ship, the "*Prince of Wales*", off the Brazilian coast, and for the offences suffered by three British officers. *Following Brazil's refusal to satisfy the requests*, the United Kingdom blockaded the port of Rio de Janeiro and confiscated five Brazilian ships. Brazil, while not accepting the British authorities' version of the facts, made reparation for the damage (Moore, *A Digest of International Law*, vol. VII, pp. 137-138).

In 1865, following an attack on Italian fishermen off the coast of Tunisia, the Italian consul presented a request for reparation to the Tunisian Government. That Government refused, stating that the fishermen who had been the victims of the attack were to be considered responsible. *After having insisted upon his request to no avail*, the consul arranged for a frigate to be sent in his support. At that point, the Tunisian authorities proceeded to satisfy the Italian requests. (*La prassi italiana ...* (see footnote 16 above), p. 894).

In 1902, Venezuelan authorities arrested seven French nationals who had refused to pay customs duties which they had previously paid to a different revolutionary faction. The commander of a French warship intimated that the local Government should release the French nationals who had been arrested. *Following the authorities' refusal*, the commander stopped a Venezuelan warship, and, while keeping it under fire, renewed his request. The French nationals were released very shortly afterwards ("Chronique ...", RGDIP(1902), pp. 628-629).

In 1914, Mexican soldiers arrested an officer and two United States sailors while they were anchoring their ship in the port of Tampico. Notwithstanding the immediate reversal of the steps taken and the apologies offered to the United States of America by General Huerta, the then Head of State, the United States additionally required a salute to the flag accompanied by a volley of cannon shots. Huerta refused, considering the requests to be excessive. The United States Congress authorized the President to employ the armed forces "... to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United States". As a consequence, United States forces took over Vera Cruz ("Mediation in Mexico" (editorial comment), AJIL, vol. 8 (1914), pp. 582-585). The armed actions by the United States were followed by a long interruption of diplomatic relations between the two countries. The situation improved as a result of the mediation of certain Latin American countries (ibid.).

[18] In 1840, within the context of the dispute between the United Kingdom and the Kingdom of the Two Sicilies over the exploitation of Sicilian sulphur mines, it was *only after long and repeated exchanges* between the two Governments and the expiry of a deadline that the United Kingdom proceeded to seize Neapolitan ships at anchor in Malta. The seizure was to be maintained until the British claim was met (Moore, op. cit., p. 132).

In 1901, in response to a number of unlawful acts committed against French nationals and companies in the Ottoman Empire, the French Government decided to seize the Mitilini customs office only *after a protracted period of reiterated demands to obtain reparation and following a precise intimation that in the event of any further refusals or* fins de non recevoir *France would resort to forcible measures.* The seizure was maintained until the Ottoman Government had met the French demands. In its official declaration, the French Government explained that it had decided to *saisir la douane de Mytilène, de l'administrer et d'en retenir les produits nets jusqu'au jour où le gouvernement du Sultan nous aura accordé toutes les satisfactions devenues nécessaires* (Moncharville, "Le conflit franco-turc de 1901", RGDIP (1902), p. 692).

8. Even as regards non-forcible measures, nineteenth century cases may be recalled in which an injured State resorted to countermeasures only after its repeated demands for reparation from the allegedly wrongdoing State had been unsuccessful.[19] Reiteration of the demand indicates that a minimum requirement of prior intimation was met.

9. It appears that a protest or intimation was dispensed with in a number of instances of resort to force in order to protect nationals in danger on foreign soil.[20] Although it is doubtful whether such cases should be classified under "self-defence", as some scholars maintain,[21] they are not without interest for the topic: the fact that a protest or an intimation to cease seems to be lacking, may well be justified by the urgency of finding a remedy and the persistence of the injurious conduct. In general, however, the presence of some form of intimation is clearly evident in cases of forcible measures. The awareness on the part of the States taking the action of the legally binding nature of such a requirement is apparently less clear. This uniform pattern, combined with the absence of statements to the contrary, would indicate, nevertheless, that if a customary rule did not yet exist at that time, it was, however, at an advanced stage of development. This is confirmed by later practice.

10. In the twentieth century, the period prior to the Second World War was notorious for attempts to strengthen bilateral and multilateral peaceful settlement obligations.[22] It is of interest to note here that, on the one hand, the existence of such obligations subsumes, so to speak, the more basic requirement represented by some

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In 1906, following the murder of an Italian soldier guarding a polling station on the island of Crete, the Italian Government claimed from the local Government, *inter alia*, compensation for the damage suffered. The Government responsible refused. The Italian consul arranged for the seizure of some customs posts with a view to securing direct compensation, but only after the original demand for compensation had been followed by a *fruitless intimation* (*sommation*) on his part. The seizures were revoked as soon as the local Government had complied with the demand for compensation. (*La prassi italiana* ..., 2nd series (1887-1918), vol. III, pp. 1703-1704.)

[19] In 1855, it was only after formal protests and after the Chinese authorities had admitted a breach but refused to make good the injury to the United States for the ill-treatment of one of its nationals, that the United States Secretary of State authorized the American Ambassador to withhold any payments due to China up to the amount of the reparation payable. (Wharton, op. cit., vol. II, p. 576).

[20] Various of the cases in question concern the United States of America. For example, in 1895, the United States feared that its nationals, missionaries in particular, might be massacred in certain areas of the Ottoman Empire. For this reason the United States Government authorized warships to enter Ottoman territorial waters. The Ottoman Ambassador in Washington asked for an explanation and was told that it was a "long established usage of this Government to send its vessels, in its own discretion, to the ports of any country which may for the time being suffer perturbation of public order and where its countrymen are known to possess interests. This course is very general with all other Governments ..." (Moore, op. cit., vol. VI, pp. 342-343).

Other cases concern similar action threatened by Brazil against Uruguay in 1864 (Bruns, *Fontes Juris Gentium*, p. 65) and by Italy against Uruguay in 1875 (*La prassi italiana* ..., 1st series (see footnote 16 above), vol. II, p. 938). A concerted action by Great Britain, France and Spain against Mexico in 1861 was also motivated by the alleged need to protect nationals in danger (Moore, op. cit., vol. VII, pp. 133-134). Likewise, and probably with more reason, there was the action by various Western Powers which intervened in China at the time of the Boxer uprising in 1891 (*La prassi italiana* ..., 2nd series (see footnote 18 above), vol. IV, pp. 1782-1783). On this practice see also Gianelli, op. cit., chap. II, No. 6 (*b*).

[21] See especially Bowett, *Self-Defence in International Law*, pp. 87 *et seq*.; and, for a survey of doctrine on the point, Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity*, pp. 3 *et seq.* On the legal categorization of this practice, see paras. 14 and 65-68 below.

[22] See paras. 25-31 below.

form of protest or *sommation* and, on the other hand, that only the latter requirement (unlike that of peaceful settlement obligations) is mandatory under general international law during the period under review. Practice during the period clearly indicates general acceptance of the notion that, under customary international law, an injured State could not lawfully resort to measures without previously making some form of demand for cessation and/or reparation. Indeed, as in the previous century, resort to force was frequently preceded by a demand for reparation and/or cessation. This took place even in the case of the otherwise inexcusably disproportionate measures taken in the Tellini (Janina) case: some aspects of which were referred by the League of Nations to a Committee of Jurists.[23] The binding nature of the requirement had notably been emphasized in the Naulilaa decision, according to which *la représaille n'est licite que lorsqu'elle a été précédée d'une* sommation *restée infructueuse* [reprisais are lawful only when they have been preceded by a *sommation* that has proved fruitless].[24] While rejecting the charge that it had not met that requirement, the accused State did not contest the rule. With regard to the same case, it is also worth noting that the arbitral tribunal stressed in its decision that notification of the injured State's initial reaction should be communicated in an appropriate form to the Government of the State against which measures were to be taken.[25] The obligation of the injured State to [*m*]*ettre au préalable l'État auteur de l'acte illicite en demeure de le faire cesser et d'accorder éventuellement les réparations requises* [first demand cessation by the wrongdoing State and payment of any reparation required] was also stressed by the Institute of International Law in article 6 of its 1934 resolution on reprisals.[26] Practice during this period also includes cases of forcible measures of protection of nationals in danger on foreign soil. The

[23] League of Nations, *Official Journal*, 4th year, No. 11 (November 1923), Minutes of the Twenty-sixth Session of the Council (31 August-29 September 1923), pp. 1278 *et seq.* See also Politis, "Les représailles entre Etats membres de la Société des Nations", RGDIP (1924), pp. 5-16.

Other cases of armed reprisals were the actions taken by France against Germany in 1920-1921. On 2 April 1920, Germany had sent troops into the Ruhr in order to curb disorders in what was a neutral zone. Invoking the neutrality provided for by the Treaty of Versailles, France demanded, to no avail, that the troops should be withdrawn. The French Prime Minister then informed the German Chargé d'affaires that *since the French demand for compliance with the Treaty had been ineffective*, he had ordered the French army to occupy Frankfurt, Hamburg and other German cities. He specified that the occupation *prendra fin aussitôt que les troupes allemandes auront complètement évacué la zone neutre* [will cease as soon as the German troops have been completely withdrawn from the neutral zone] (Kiss, *Répertoire de la pratique française en matière de droit international public*, vol. VI, p. 30). A further French occupation of German cities took place in 1921. The French Premier stated that the measure had been taken after two years of German failure to comply with its obligations under the Treaty of Versailles and after repeated French demands for compliance, including threats of resort to coercive measures. It should be noted that the motivation given by the French Prime Minister indirectly extends to less serious situations not requiring the use of force. According to him, the action was an expression of *un droit qui n'a jamais été contesté, qui a toujours été pratiqué dans tous les pays et qui permet à un créancier non payé d'exercer sur son débiteur de mauvaise foi les coercitions nécessaires* [a right that has never been contested, that has always been exercised in all countries and which enables an unpaid creditor to use the requisite coercion in regard to a debtor who acts in bad faith] (ibid., vol. I, p. 131).

A further confirmation of this principle is to be found in a United States Naval War College textbook of 1938, where it was stated with regard to reprisals in time of peace that "[f]orce is not justified legally unless there has been *a refusal to make redress after due notice** ..." (Hackworth, *Digest of International Law*, vol. VI, p. 152).

[24] *Portuguese Colonies* case (Naulilaa incident), United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.l), p. 1027.

[25] Ibid., pp. 1027-1028.

[26] See footnote 5 above.

fact that an intimation to cease the injurious conduct is not always present,[27] would seem to be justified by the urgency of reaction to offences of a serious and continuing character.

11. Having established the state of the law prior to the Second World War and the fact that a prior demand or *sommation* was due at that time as a matter of legal obligation, it is relatively easy to see how the question may stand in law at present. The combined effect of principles such as those embodied in Article 2, paragraphs 3 and 4, of the Charter of the United Nations and of any analogous principles or rules of general international law—not to mention the reiteration and spelling out of those principles in United Nations resolutions—could not but consolidate the binding force of the requirement for a prior demand for reparation (and *sommation*) as a condition of lawful resort to measures against internationally wrongful acts. This seems to be clearly confirmed by the prevailing practice.

12. It is significant, to take a first set of examples, that even in the cold war period, despite the large number of disputes between States belonging to the rival blocs with regard to violations of their air space, resort to reprisals was almost always avoided. This was precisely because the initial representations, in the form of demands for reparation or satisfaction, were followed by a search for a negotiated or arbitral solution, the pursuit and attainment of which allowed States to avoid resort to unilateral measures.[28] It is equally significant that, in the period under review, not only acts of reprisal[29] but also acts of retortion by way of reaction to an internationally wrongful act have often been preceded by a demand for reparation.[30]

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[27] For example, in March 1927, during the civil strife in China a United States national was killed in Nanking, another wounded, and the United States consulate attacked. United States troops, who were on board ships anchored in the harbour, immediately intervened and opened fire on the soldiers and on the crowd which, at the same time, was continuing to attack a group of Americans. The American citizens were brought to safety on board the ships. The United States Government later demanded complete reparation and full satisfaction. It should be noted that the Chinese authorities, while accepting the United States Government's demand, requested the Government to apologize for having opened fire. The United States final response was that "its naval vessels had no alternative to the action taken, how ever deeply it deplores that circumstances beyond its control should have necessitated the adoption of such measures for the protection of the lives of its citizens at Nanking" (Dennis, "The settlement of the Nanking incident", AJIL (1928), pp. 593-599, particularly p. 596). Similar cases are described in Gianelli, op. cit., chap. III, No. 7.

[28] On the episodes in question, ibid., chap. IV, sect. II, paras. 9-11 (*c*).

[29] For example, in view of the rough treatment to which Indian residents were being subjected by South Africa, India, following protests and contacts, declared itself authorized to adopt countermeasures and sent South Africa advance notice of the termination of a 1945 trade agreement (*Keesing's ... 1948-1950*, vol. VII, pp. 9859-9860).

[30] In 1963, following the nationalization of oil plants belonging to United States companies in Ceylon, the Department of State declared that it would suspend the aid to Ceylon which had already been planned unless "adequate compensation" was paid. The United States did actually suspend such aid for two years (*Keesing's ... 1963-1964*, vol. XIV, p. 19667 and *Keesing's ... 1965-1966*, vol. XV, p. 20868).

In 1967, during anti-Chinese demonstrations in Burma the office of the Chinese press agency, as well as houses and shops belonging to Chinese nationals, were attacked. The national emblem was also destroyed. The Chinese Government protested, demanding various forms of satisfaction. As it was not satisfied with the Burmese authorities' attitude following the events, China suspended its aid programme to that country (*Keesing's ... 1967-1968*, vol. XVI, p. 22277).

In 1981, the European Community, after repeatedly warning the Turkish Government of the negative consequences the deterioration of democratic institutions and the suspension of some

13. Further evidence of the belief that a prior *sommation* is required if resort to measures is to be admissible may be found in the official positions taken by States in a number of well-known disputes or situations. For example, in the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council*,[31] while Pakistan complained that the measures taken by India had been put into effect "simultaneously with the demand for compensation",[32] India insisted that since "no positive and satisfactory response was made by the Respondent", it had felt obliged to adopt the contested measure.[33] In the well-known *Air Service Agreement* case, France, in an attempt to demonstrate the unlawfulness of United States measures, cited the international rule that an unsuccessful formal request for reparation was an indispensable prerequisite for lawful resort to reprisals[34] (based on the Naulilaa decision).[35] Commentators have noted that the United States, for its part, while maintaining that the theory of reprisals as represented by France only applied to armed reprisals,[36] contended that it had nevertheless complied with the requirements which France deemed to be indispensable before implementing the measures in question. Within the context of the case concerning *United States Diplomatic and Consular Staff in Tehran*,[37] the United States took the trouble to specify before ICJ that the United States Chargé d'affaires in Tehran had protested to the Iranian Government immediately after the taking of the hostages and had demanded full protection for the embassy and its staff. Also, according to the United States, representations had been made for days[38] before the political and economic measures of reprisal and retortion referred to in paras. 34, 39, 79 and 106 below were undertaken. Furthermore, the conclusions reached by the American Law Institute in its *Restatement of the Law Third* should not be overlooked. According to the comment to section 905, devoted to "Unilateral Remedies":

> ... countermeasures in response to a violation of an international obligation are ordinarily justified only when the accused State wholly denies the violation or its responsibilities for the violation; rejects or

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fundamental freedoms in that country would have on its relations with the Community, suspended the granting of a loan package (*Keesing's ... 1982*, vol. XXVIII, p. 31287).

[31] *I.C.J. Reports 1972*, p. 46. The case was brought following the suspension of overflights of its territory by Pakistani civil aircraft, which Pakistan claimed was in breach of two treaties. The suspension had taken place following the hijacking and destruction of an Indian aircraft in Lahore in February 1972. India accused Pakistan of favouring the hijackers and of failing to do everything necessary to save the aircraft (*Keesing's ... 1971-1972*, vol. XVIII, pp. 24561-24562).

[32] *I.C.J. Pleadings, Appeal Relating to the Jurisdiction of the ICAO Council*, p. 73, para. 12.

[33] Ibid., p. 7, para. 11.

[34] *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), p. 427, para. 17.

[35] See footnote 24 above.

[36] See *Case concerning the Air Service Agreement* (footnote 34 above), p. 428, para. 18. The United States notably maintained that it had unsuccessfully demanded that France should discontinue its air traffic treaty violation and that an ad hoc agreement for arbitration should be concluded (Nash, *Digest of United States Practice in International Law, 1978*, p. 773).

[37] *I.C.J. Reports 1980*, p. 3.

[38] Two days after the taking of the hostages, a special envoy of the United States Government arrived in Tehran in order to negotiate their release. Despite the prohibition by the Iranian Head of State of any contact with the United States envoy, the latter was able to engage in telephone conversations with senior Iranian officials and lodged the unequivocal protest of his Government at the events. Attempts to make contact with the Iranian Government continued for another four days (*I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*, pp. 260-261).

ignores requests to terminate the violation or pay compensation; or rejects or ignores proposals for negotiations or third-party resolution.[39]

14. It must also be recognized that, notwithstanding the prohibition of the use of force contained in the Charter of the United Nations, armed reactions to internationally wrongful acts of a continuing character which threaten to place the nationals of a State on foreign soil in serious personal danger have, in a few cases, continued to take place. These cases, however, differ significantly from similar cases in the previous period in so far as the injured State has usually resorted to forcible action only *after* an intimation of cessation or reparation addressed to the wrongdoing State has proved fruitless.[40]

15. The cases considered in the preceding paragraph—as well as some of those considered in paragraph 7 above—obviously involve problems related to the lawfulness of resort to armed force. From the point of view of the subject-matter of the present chapter they do nevertheless demonstrate the belief of States that, even in cases characterized by a high degree of wrongfulness *and* continuity, and which call for very *urgent* remedy, resort to measures on the part of the injured State must be preceded, under the law of responsibility, by appropriate demands, *sommations* or intimations.

16. On the other hand, examples of resort to measures where no prior communication or intimation is apparent may also be found in contemporary practice, such as the freezing of assets of the wrongdoing State which are within the reach of the injured State. Such measures are in general characterized by their temporary nature (although the freezing of some assets has lasted for decades) and by their purely economic targets (usually bank deposits).[41] It is these features of those

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[39] *Restatement of the Law Third—The Foreign Relations Law of the United States*, vol. 2 (St. Paul, Minn., American Law Institute Publishers, 1987), pp. 380-381.

[40] This is what happened in the "*Mayaguez*" dispute of 1975, in which the United States of America resorted unsuccessfully to military action in order to rescue the crew of a ship detained by Cambodian troops. The United States action was preceded by a 24-hour ultimatum transmitted to Cambodia through the Chinese liaison office in Washington and was carried out only after the expiry of the ultimatum (*Keesing's ... 1975*, vol. XXI, pp. 27239-27240). The United States also resorted to military action in its attempt to rescue its citizens held hostage in Tehran. In this case, while the United States Government had tried and was still trying to settle the matter through peaceful means, it also announced, through a Presidential statement, that in view of the unsuccessfulness of the attempts at peaceful settlement and of the ineffectiveness of the economic measures, forcible action appeared to represent the only possible remedy. On this case, see Ronzitti, op. cit., pp. 41-49. United States interventions in Grenada (1983) and Panama (1989) too were partially justified by that Government as actions to protect United States citizens abroad. On the Grenada case, see Davidson, *Grenada: A Study in Politics and the Limits of International Law*. On the Panama action, see official statements of President Bush and the State Department as reported in AJIL, vol. 84 (1990), pp. 545-549.

[41] Among the examples of resort to such measures are the freezing of bank deposits and other assets of Bulgaria, Hungary, Poland and Romania by the United States of America shortly after the Second World War (*Keesing's ... 1948-1950*, vol. VII, p. 10623). The freezing of Romanian assets was revoked in 1959 (*Keesing's ... 1959-1960*, vol. XII, p. 17349), that of Polish assets in 1960 (ibid., p. 17559), and that of Hungarian assets in 1973 (*Keesing's ... 1973*, vol. XIX, p. 25827), following the conclusion of the respective lumpsum agreements; see also Whiteman, op. cit., vol. 8, pp. 1126-1128). Other examples are those relating to the Albanian gold seized by the United Kingdom (*Keesing's ... 1948-1950*, vol. VII, p. 10426, *Keesing's ... 1950-1952*, vol. VIII, p. 11294, and *Keesing's ... 1952-1954*, vol. IX, p. 13634) and to the freezing of Iranian bank deposits and other assets by the United States following the taking of the hostages in Tehran (*I.C.J. Reports 1980* (see footnote 37 above), pp. 16 *et seq.* and pp. 43 *et seq*.). Although this case refers to unlawful conduct generally characterized as a crime, the freezing of Iraqi assets by

reactions which are generally referred to in the literature as interim (or provisional) measures of protection and with regard to which a number of writers take the view that no intimation is required. It is apparently for this reason that the previous Special Rapporteur excluded an obligation of either intimation or prior resort to settlement procedures with regard to measures of this kind.[42] It should be noted, however, that the measures taken by Cuba against the assets of United States nationals in response to the cutback in sugar imports by the United States[43] and those taken by the Libyan Arab Republic against British assets in response to the United Kingdom's withdrawal from certain islands in the Persian Gulf are not really significant.[44] The absence of any prior intimation may be explained, *inter alia*, by the fact that the measures in question were resorted to within the context of an actual, open dispute in the course of which the States involved had already exchanged charges and arguments. The circumstances rendered any intimation superfluous.

17. The draft articles proposed in 1986 by the former Special Rapporteur deal with the matter within the framework of part 3.[45] Article 10 of part 2[46] only deals with those dispute settlement procedures to which resort is had prior to the measures contemplated in draft article 9[47] (other than the so-called reciprocal measures which are covered by draft article 8),[48] with the exception of certain kinds of "interim measures of protection".[49] He dealt with the problem of conditions, under discussion here, in articles 1 and 2 of part 3. Draft article 1 provided that:

> A State which wishes to invoke article 6 of part 2 of the present articles must notify the State alleged to have committed the internationally wrongful act of its claim. The notification shall indicate the measures required to be taken and the reasons therefor.

Draft article 6 of part 2[50] provided for pecuniary compensation and guarantees of non-repetition. With regard to countermeasures, draft article 2, paragraph 1, of part 3 provided for another notification:

> 1. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification prescribed in article 1, the claimant State wishes to

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the United States, the United Kingdom and France immediately following the announcement of the invasion of Kuwait in 1990 should also be recalled. These measures were adopted simultaneously with Security Council resolution 660 (1990) of 2 August 1990 condemning the invasion but before resolution 661 (1990) of 6 August 1990 adopting measures envisaged in Article 51 of the Charter against Iraq. A case where, instead, measures were carried out only after repeated protests, is that of the freezing of French assets by Ghana in 1960 in protest at nuclear tests carried out by France in the Algerian Sahara (*Keesing's ... 1959-1960*, vol. XII, p. 17280).

[42] *Yearbook ... 1984*, vol. I, 1867th meeting, para. 34.

[43] Whiteman, op. cit., vol. 8, pp. 1041-1045; *Keesing's ... 1959-1960*, vol. XII, pp. 17538, 17542 and 17591.

[44] De Guttry, op. cit., pp. 83-89.

[45] For texts of articles proposed for part 3, see *Yearbook ... 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

[46] For text, see *Yearbook ... 1985*, vol. II (Part Two), pp. 20-21, footnote 66.

[47] Ibid.

[48] Ibid.

[49] This exception covered the measures "taken by the injured State within its jurisdiction, until a competent international court or tribunal ... has decided on the admissibility of such interim measure of protection" (art. 10, para. 2 (*a*)) and the "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" (ibid., para. 2 (*b*)).

[50] See footnote 46 above.

invoke article 8 or article 9 of part 2 of the present articles, it must notify the State alleged to have committed the internationally wrongful act of its intention to suspend the performance of its obligations towards that State. The notification shall indicate the measures intended to be taken.[51]

Draft article 3 of part 3 provided that if objection was raised by the State alleged to have committed the internationally wrongful act the parties (without prejudice to their rights and obligations under any provisions in force between them with regard to the settlement of disputes) "... shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations" or the further means provided for under draft articles 4 and 5 of part 3 and the annex thereto. The former Special Rapporteur explained that the exchanges between the parties carried out according to the said "notification/objection" mechanism would "serve to narrow the issues" and allow alleged wrongdoing States to consider the situation and possibly accede to the allegedly injured State's demands.[52] He further explained, however, that there could be cases of special urgency in which the injured State immediately had to protect its interests and which required such urgent remedy as to justify immediate resort—without any prior notification—to the kind of (interim) measures contemplated in his draft article 10, paragraph 2 (*a*) of part 2.[53]

18. In its debate on these proposals, the Commission found that draft article 10 of part 2 placed too heavy a demand upon the injured State and was thus too lenient towards the wrongdoing State.[54] With regard to draft articles 1 and 2 of part 3, some members expressed the view that the system envisaged would not rule out the possibility of prior exchanges other than the proposed notifications. Other members thought that a system based on a double notification was too burdensome. Some demanded a higher degree of precision with regard to the hypothesis of particular urgency.[55]

19. The present writer, beginning with his preliminary report, has from the outset expressed the opinion that the so-called implementation or *mise en oeuvre* in a narrow sense should not be combined with the provisions of part 3 concerning the settlement of disputes arising over the interpretation and application of the articles on State responsibility.[56] Any duties to be fulfilled by the injured State as a condition of lawful resort to countermeasures are a part of the consequences of an internationally wrongful act and must be covered as such within the framework of part 2 of the draft. This applies in particular to any protest or any claim for cessation or reparation and any intimation, *sommation* or notification. It could be argued that an ad hoc provision could be dispensed with, the duty to demand cessation or reparation being subsumed under the duty of prior compliance with dispute settlement obligations. However, a

[51] Riphagen had previously expressed the view that no prior notification was required by the Vienna Convention on the Law of Treaties in respect of the suspension or termination of the operation of a treaty (*Yearbook ... 1983*, vol. II (Part One), p. 19, document A/CN.4/366 and Add.1, para. 101).

[52] Sixth report (*Yearbook ... 1985*, vol. II (Part One) (footnote 11 above)), para. 15; and seventh report (*Yearbook ... 1986*, vol. II (Part One), p. 4, document A/CN.4/397 and Add.1), commentary to article 2 of part 3.

[53] Seventh report (see footnote 52 above), para. 2 of the commentary to article 2 of part 3.

[54] Statements by Flitan (*Yearbook ... 1985*, vol. I, 1893rd meeting, para. 3); Tomuschat (ibid., 1896th meeting, para. 39); and Mahiou (ibid., 1897th meeting, para. 13).

[55] *Yearbook ... 1986*, vol. II (Part Two), paras. 51-54.

[56] *Yearbook ... 1988*, vol. II (Part One) p. 10, document A/CN.4/416 and Add.1, para. 19. See also Arangio-Ruiz's comments on part 3 of the draft as envisaged by Riphagen (*Yearbook ... 1985*, vol. I, 1900th meeting, paras. 26-27).

specific rule appears to be preferable, for several reasons. In the first place a dispute might not even arise if the wrongdoing State acknowledged wrongdoing and met the injured State's demands totally or in part (a possibility not to be ruled out).[57] In addition, it would be improper not to give an alleged wrongdoing State a chance to answer the allegation before a possibly "public" settlement procedure was resorted to and the situation may have further deteriorated. A prior direct exchange between the parties might reduce the possibility of an early escalation of the dispute. Moreover, stringent third-party settlement procedure obligations might not exist between the parties.

20. The precise content and form of the provision is less easy to define. First of all, a decision has to be made whether or not to specify the channel of the required communication (diplomatic channels, transmission of the document by post or other means). Although the realities of international relations indicate that States often communicate less formally, legal certainty might require a written form. However, it is opined that the draft should not take a stand in that regard.

21. In so far as the substance of any communication is concerned, Riphagen, as already mentioned (para. 17 above), envisaged two notifications: one for "the measures required to be taken" (cessation, restitution in kind, etc.) "and the reasons therefor"; the other for the intention of the injured State "to suspend the performance of its obligations" with the indication of the "measures intended to be taken". A less cumbersome solution might be to impose upon the allegedly injured State the duty to submit its protest or demands to the alleged wrongdoing State together with the indication of the essential facts and any suitable warning of possible countermeasures. The injured State would of course remain at liberty to make any additional communications or specifications it may deem useful in the light of the nature of the wrongful act, of the condition of its relations with the alleged wrongdoer, and any other circumstances it may judge to be relevant. It is believed that the injured State should also remain free to choose whether or not to specify the measures envisaged.

22. Another problem is whether any specific time limits should be indicated by the injured State. It is believed that the articles should not go beyond the indication of the possibility of setting such a limit, the limit depending on the nature and the circumstances of the case. It might be indicated that any time limit should be reasonable.

23. As regards the problem of possible exceptions to the requirement of a prior demand for cessation or reparation and of timely notification/intimation, the question could arise with respect to interim measures of protection.[58] However, while it is believed that measures of such a nature could actually constitute an exception in so far as the impact of dispute settlement obligations upon the admissibility of countermeasures is concerned,[59] they should not be exempted from meeting the minimum prerequisite in question. The obvious reason is that the State which has committed the internationally wrongful act should be given the possibility of complying spontaneously with its obligations of cessation and/or reparation (*lato sensu*) before the "countermeasures stage" is reached.

[57] On this hypothesis, see Gianelli, op. cit., introduction, para. 3.
[58] On this notion, see para. 5 above.
[59] See para. 48 below.

CHAPTER II

II. THE IMPACT OF DISPUTE SETTLEMENT OBLIGATIONS

A. State practice prior to the First World War

24. The impact of the availability of dispute settlement procedures upon the lawfulness of resort to countermeasures does not emerge with any significant degree of clarity from international practice preceding the First World War. Of course, there are cases, even in that period, in which the injured State recognized at least the political expediency, if not a legal obligation, not to resort to countermeasures prior to an unsuccessful attempt at a mutually agreed or, more rarely, at an arbitral solution.[60] In no instance, however, did a State contest the lawfulness of a reprisal of which it was the target on account of the fact that the counterpart had omitted previously to attempt a dispute settlement procedure. Two of the reasons for this state of affairs may have been the total freedom that persisted for States to resort to forcible action, including war, in the pursuit of their rights or interests, and the scarcity (as compared to the subsequent period) of relatively effective third-party dispute settlement procedures. In any event, significant elements relating to the impact of dispute settlement procedures upon the liberty of States to resort to unilateral measures do not seem to emerge from the dispute settlement instruments of the first two decades of the present century.[61]

B. State practice between the wars

25. Treaty practice subsequent to the First World War reveals some progress. In 1925, for example, in addition to negative obligations regarding resort to force,[62] the Locarno treaties also introduced positive peaceful settlement obligations for legal disputes in order to prevent resort to unilateral action by the injured State before the settlement procedure had been tried.[63] Some provisions also envisaged the possibility for the competent "third party" to indicate interim measures of protection. The parties in dispute were actually bound to accept such an indication and to

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[60] In the case between the United Kingdom and Greece (1847-1851), concerning acts of violence committed on Greek territory against a British subject (Don Pacifico) (Wharton, op. cit., vol. III, pp. 100-101), the United Kingdom pursued *diplomatic exchanges* unsuccessfully with Greece for more than two years. Finally, claiming that it had tried unsuccessfully all the amicable means at its disposal to obtain reparation, it presented Greece with a 24-hour ultimatum and then sent a naval force to blockade ports and seize Greek vessels. It is worth recalling that, as a result of French good offices, the British naval commander suspended the blockade and maintained only the seizures. However, following the lack of success of the French interposition, the blockade was resumed (Calvo, *Le droit international théorique et pratique*, p. 524). On this point see also para. 7 above.

[61] Reference is made to the numerous general arbitration treaties concluded prior to 1917, to the Hague Conventions of 1899 and 1907, to the Drago-Porter Convention, and to the so-called Bryan conciliation treaties. (For discussion of the Bryan treaties, see the report of the Secretary-General on methods of fact-finding (A/5694) of 1 May 1964, paras. 62-78.)

[62] See, for example, article 2 of the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy.

[63] The parties generally undertook to submit to arbitration or to PCIJ legal disputes not resolved by diplomacy. If the parties did not manage to conclude a special agreement (*compromis*) each party could submit the matter to PCIJ unilaterally. The "losing" State was obliged to refrain from reacting unilaterally even in the case of non-compliance with the Court's decision. It would have to refer the matter to the Council of the League of Nations for the latter to decide the measures to be adopted with binding effect.

... abstain from all measures likely to have repercussions prejudicial to the execution of the decision or arrangements proposed by ... the Council of the League of Nations, and, in general, to abstain from any sort of action whatsoever which may aggravate or extend the dispute.[64]

In addition to the well-known renunciation of war as a means of resolving international disputes, the Briand-Kellogg Pact of 1928 provided in article II that:

... the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them [the high contracting parties], shall [never] be sought except by pacific means.[65]

Certainly the Pact's principal aim was to condemn direct resort to unilateral use of armed force on the part of the injured State. But it would perhaps not be too difficult to assume that it also condemned direct resort to means other than the use of armed force in the presence of other means of settlement, especially if it is considered that, at that time, "pacific means" also included those forcible measures which, because they did not lead to a state of war, were characterized as coercive measures "short of war".[66] Some of the provisions of the so-called Saavedra Lamas treaty, signed in 1933 by a number of Latin American States, are also significant. In addition to condemning wars of aggression, article I of that instrument stated that:

... the settlement of disputes and controversies shall be effected only through the pacific means established by international law.[67]

Furthermore, the treaty envisaged a conciliation procedure for any kind of dispute and article XIII prohibited for the duration of the conciliation process

... any measure prejudicial to the execution of the agreement that may be proposed by the commission and, in general, ... any act capable of aggravating or prolonging the controversy.[68]

26. The stipulations considered in paragraph 25 above would seem to indicate the existence, between the wars, of a tendency on the part of States to condemn unilateral reaction to an internationally wrongful act—whether involving armed force or not—when the case was actually subject to a conciliation or arbitral procedure. At the same time, the fact that this was the only restriction of the right of reprisal to be explicitly covered by treaty provisions would appear to suggest that the restriction was not implied by the mere existence of dispute settlement obligations. It is opined that this was particularly the case for measures not involving armed force.

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[64] Article 19 of the Arbitration Convention between Germany and Belgium (League of Nations, *Treaty Series*, vol. LIV, p. 303). A very similar provision was introduced, only for legal disputes, in article 33 of the 1928 General Act (Pacific Settlement of International Disputes).

[65] General Treaty for Renunciation of War as an Instrument of National Policy.

[66] On the controversial meaning of "pacific means", as used at the time, see *inter alia*, Forlati Picchio, *La sanzione nel diritto internationale*, pp. 116-117; Brownlie, *International Law and the Use of Force by States*, pp. 84-88; Žourek, *L'interdiction de l'emploi de la force en droit international*, p. 41.

[67] Anti-War Treaty (Non-Aggression and Conciliation).

[68] Ibid. The latter prohibition, already present in the Locarno treaties and in the 1928 General Act (see footnote 64 above), appears in a number of bilateral arbitration treaties concluded in the period 1924-1931. These instruments frequently introduced the so-called optional clause of compulsory jurisdiction, under which matters could be brought before PCIJ unilaterally. See references in Gianelli, op. cit., chap. III, sect. I, para. 3.

27. A look at other elements of State practice in the same period on the whole confirms, although not without inconsistencies, the evidence drawn from treaty instruments. A case in point is the Tellini (Janina) case between Italy and Greece. It was—and still is—generally agreed that, despite the gravity of the incident, the demands of the Italian Government were unreasonable and the forcible measures excessive. As pointed out by Greece before the Council of the League of Nations:

> If the engagements entered into under the Covenant are to be respected ... steps should be taken to stop the measures of coercion which have begun ...
> [...]
> ... between Members of the League of Nations there was no longer any place for measures such as an ultimatum and coercion.
> According to article 12, the Members of the League of Nations have entered into a solemn undertaking to follow a judicial procedure or a political procedure before the Council at their own discretion. There is nothing outside these alternative procedures.[69]

28. While conforming with the Italian wish that the conflict should be left in the hands of the Allied Ambassadors' Conference, the Council referred to a Committee of Jurists the well-known issue about the admissibility, under the Covenant, of measures short of war.[70] The answer was that:

> Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.[71]

Despite this bland opinion, however, the majority of commentators contested the admissibility of any armed reprisals in the context of the peaceful settlement obligations set forth in the Covenant of the League of Nations.[72] The whole episode nevertheless shows that even within a context such as that of the Covenant—a relatively advanced legal instrument in comparison with general law—the Governments of that time were, to say the least, reluctant unambiguously to admit the existence of obligations under which resort to unilateral measures short of war—whether or not involving armed force—would be subject to prior resort to, and exhaustion of, amicable settlement procedures.

29. The opinion expressed in 1928 by the Swiss Département politique was decidedly progressive and very clear. According to Swiss diplomacy (with reference to the Covenant of the League of Nations):

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[69] League of Nations, *Official Journal* (see footnote 23 above), p. 1281. The Italian side maintained that the measures taken had been "pacific", admissible as such by both general international law and the Covenant, only war being condemned by the latter (ibid., pp. 1313-1314).

[70] "Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in those articles?" (Ibid., p. 1351.)

[71] Ibid., 5th Year, No. 4, Minutes of the Twenty-eighth Session of the Council (10-15 March 1924), p. 524.

[72] See, *inter alia*, Politis, loc. cit., pp. 5-16; Hill, "The Janina-Corfu Affair", comment in AJIL (1924), pp. 98-104; De Visscher, "L'interprétation du Pacte au lendemain du différend italo-grec", *Revue de droit international et de législation comparée* (1924), pp. 213-230; Hoijer, *Le Pacte de la Société des Nations*, p. 218. A contrary view is taken by Strupp, "L'incident de Janina entre la Grèce et l'Italie", RGDIP (1924), pp. 255-284.

... les représailles ne peuvent être envisagées que si la procédure d'arbitrage prévue par l'article 13 a été proposée en vain. Toutefois, le refus de la procédure d'arbitrage ... n'autorise pas encore l'exercice de représailles; car l'article 15 prévoit l'appel au Conseil de la Société des Nations [... reprisals may be envisaged only if the arbitration procedure provided for in Article 13 has been proposed in vain. However, rejection of the arbitration procedure ... still does not authorize the use of reprisals, for Article 15 provides for an appeal to the Council of the League of Nations].[73]

The same Département, with reference to arbitration commitments in general, further stated that for resort to reprisals to be lawful:

Il faut admettre ici également que la condition prévue par le droit des gens n'est pas remplie si l'on n'a pas essayé vainement de résoudre le différend selon la procédure prévue. La conclusion de traités stipulant l'arbitrage obligatoire pour les différends juridiques exclura les représailles. [It should also be acknowledged here that the requirement under the law of nations is not fulfilled unless an attempt has been made, to no avail, to settle the dispute in accordance with the procedure established. Concluding treaties by stipulating compulsory arbitration for a legal dispute will rule out reprisals].[74]

30. Important, albeit less coherent, statements were to be made two years later in reply to the questions put to States in preparation for the Conference for the Codification of International Law. Belgium, for example, replied that a State could lawfully resort to reprisals if it could show that it would not have been possible "to obtain satisfaction by pacific means".[75] Denmark affirmed that "reprisals would be entirely excluded" if the parties were bound by treaty not to exacerbate their disputes.[76] More cautious, the United Kingdom expressed the view that "[w]ith the improved machinery now provided by international agreements for the investigation and pacific solution of disputes, the cases where resort to acts of reprisals would be legitimate must be very few".[77]

31. In brief, the period *between the wars* seems to offer two sets of indications. On the one hand, the rather vague language of treaty provisions dealing expressly with the impact of dispute settlement obligations upon the liberty of States to resort to unilateral measures[78] seems to confirm the reluctance of States to recognize the existence of legal limits to their liberty to resort to measures short of war, despite the availability of more amicable means of settlement. On the other hand, there was apparently a *growing current of opinion* during that same period, not only in the literature but also in the context of diplomatic exchanges, to the effect that whenever treaty-based settlement procedures were available an injured State could not lawfully resort to reprisals—whether amicable or forcible—without first trying and exhausting the available procedures.

C. Principles and rules emerging after the Second World War

32. Following the entry into force of the Charter of the United Nations, a certain, albeit limited, degree of clarification seems to have been achieved:

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[73] *Répertoire suisse de droit international public*, Documentation concernant la pratique de la Confédération en matière de droit international public, 1914-1939 (Basel), vol. III, p. 1787.

[74] Ibid., p. 1788.

[75] League of Nations, *Conference for the Codification of International Law: Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III, p. 128.

[76] Ibid., pp. 128-129.

[77] Ibid., p. 129.

[78] As indicated, these provisions were intended to condemn resort to unilateral measures when the dispute was *sub judice* and the competent body was empowered to order interim measures of protection.

(a) In the first place, as noted earlier, the combined effect of the sweeping language and spirit of Article 2, paragraph 4, and the pronouncements which will be referred to in this section (para. 33) has, at least in principle, dispelled any doubt as to the unlawfulness of armed reprisals,[79] despite the contradictions mentioned above which emerge from the practice of a number of States, and with the exception, of course, of self-defence measures;[80]

(b) Secondly, it would appear that the above prohibition, based as it is exclusively on the letter and spirit of Article 2, paragraph 4, of the Charter of the United Nations, does not represent the full extent of the efforts of the drafters of the Charter (and their successors) to reduce the scope of the discretion given to States with regard to the choice of unilateral remedies. If the specific provision of Article 2, paragraph 3, of the Charter is to have any significance other than merely to render Article 2, paragraph 4, redundant, it must perhaps be recognized that the Charter does not really confine itself to the prohibition of armed measures (for which Art. 2, para. 4 is sufficient). By virtue of the letter and spirit of Article 2, paragraph 3, and the whole of Chapter VI (Arts. 33-38), it would seem to extend to any unilateral measures which may endanger—if not "friendly relations" and "cooperation"—international peace and security, *and justice.* It follows that even measures not involving *resort to armed force*, if not prohibited, are subject to some kind of "legal control";[81]

(c) Thirdly, it is presumably not just by chance that in opening Chapter VI, on settlement of disputes, Article 33, paragraph 1, firmly states that parties to a dispute "*shall, first of all**, seek a solution ..." by one or more of the various means listed thereafter. It seems reasonable to infer, at least from that phrase and its context, that there is some duty to negotiate and that, failing a negotiated solution, an *attempt* to use any other of the means listed in Article 33, paragraph 1, should in principle *precede* any resort to unilateral measures if the latter are to be lawful. The opinion of the Swiss Département politique cited in paragraph 29 above is at least as valid for the procedures before the United Nations Security Council and the General Assembly.

33. The major General Assembly resolutions concerning peaceful settlement lend some support to the kind of interpretation of the Charter indicated in paragraph 32 (*c*) above. Reference is made to the 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.[82] Despite its grave inadequacies[83]—including with respect to the matter

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[79] It is worth recalling that in addition to Article 2, paragraphs 3 and 4, due account must be taken of Article 1, paragraph 1, according to which it is one of the purposes of the United Nations

"to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".

[80] See paras. 58-69 below.

[81] On this point see Gianelli, op. cit., chap. IV, sect. I, para. 6, and the literature cited therein, and especially: Kelsen, *The Law of the United Nations*, pp. 359 *et seq.*; Goodrich, Hambro and Simons, *Charter of the United Nations*, pp. 41-43; and Charpentier, Commentaire du paragraphe 3 de l'Article 2, in *La Charte des Nations Unies*, pp. 103-113.

By placing upon States the *positive* obligation it enunciates, Article 2, paragraph 3, could hardly be considered as condoning the adoption by States of lines of conduct which, in addition to endangering "justice", might jeopardize friendly relations (Art. 1, para. 2) or create threats to the peace (ibid., para. 1).

[82] General Assembly resolution 2625 (XXV), annex. A similar formulation is included in Principle V of the Final Act of the Conference on Security and Cooperation in Europe, adopted at Helsinki on 1 August 1975:

under discussion here—that formulation felicitously adds to the important injunction ("shall *first of all**") contained in Article 33, paragraph 1, of the Charter the further duty of the parties to ' 'refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security". The same duty to refrain from measures which may "make more difficult or impede the peaceful settlement of the dispute", is referred to—albeit in different language—in section I, paragraph 8, of the more recent (and more articulate) Manila Declaration on the Peaceful Settlement of International Disputes.[84] Although both these resolutions could have usefully set forth more specific conditions to be complied with by an injured State before resorting to unilateral measures, they both lend support to an interpretation of the Charter provisions on peaceful settlement under which resort to unilateral remedial measures would, at least in principle, be subject to the compliance with stricter *onera* of the injured party with regard to the prior use, or bona fide attempt to make use, of available settlement procedures.

34. Although the Charter does not explicitly deal with the impact of its general dispute settlement provisions on the conditions of resort to unilateral measures,[85] it can nevertheless be argued that the regime of peaceful settlement in the law of the United Nations does, indirectly, mark a progressive development in the matter.

(a) First, based on the letter and spirit of Article 2, paragraph 3, of the Charter, the condemnation of unilateral measures extends to any reactions likely to endanger "peace and security, and justice", even in the absence of any treaty-based settlement obligations going beyond Article 2, paragraph 3, and Article 33, paragraph 1. This certainly does not mean that an injured State has no means at its disposal to protect its infringed rights. It simply means that whenever the procedures listed in Article 33, paragraph 1, or unilateral measures compatible with Article 2, paragraph 3, designed to induce the other party to accept resort to such procedures, have been taken to no avail, no *further* unilateral action shall be taken without prior resort to the procedure envisaged in Articles 34 to 38 of the Charter;

(b) Secondly, where the internationally wrongful act is of such a nature as to create a danger to international peace and security, a Member State of the United Nations may not resort to any kind of measures—even those not likely to endanger international peace and security (except, of course, for self-defence measures under Art. 51)—unless it has first attempted to obtain cessation and reparation in a broad sense through any of the means listed in Article 33, paragraph 1, which are available to it. The expression "first of all" in paragraph 1 of Article 33 needs to be stressed;

"Participating States, parties to a dispute among them, as well as other participating States, will refrain from any action which might aggravate the situation to such a degree as to endanger the maintenance of international peace and security and thereby make a peaceful settlement of the dispute more difficult." (Lausanne, Imprimeries réunies, n.d., p. 79).

[83] See, for example, the Italian representative's statement in the Report of the Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States, 31 March-1 May 1970 (*Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18* (A/8018), paras. 125 *et seq.*).

[84] General Assembly resolution 37/10, annex. This text, which is almost identical with the Helsinki formulation, reads:

"States parties to an international dispute, as well as other States, shall refrain from any action whatsoever which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute, and shall act in this respect in accordance with the purposes and principles of the United Nations."

[85] On this point, see Gianelli, op. cit., chap. IV, sect. I, para. 8.

(c) Thirdly, based on the tenor of the relevant Articles of the Charter, as supported by the *lex lata* or *lex ferenda* of section I, paragraph 8, of the Manila Declaration, the United Nations system may be assumed to embody the principle which was set forth in some of the dispute settlement instruments predating the Second World War,[86] namely that pending the actual initiation of the procedures envisaged or pending the outcome of an initiated procedure, the injured State (*a fortiori*, of course, the wrongdoing State) is under the obligation to refrain from any action (whether reprisal or retortion) likely to "make more difficult or impede" the settlement which is to be sought by the relevant procedure or procedures. The very general obligation of Member States, set forth in Article 2, paragraph 3, of the Charter of the United Nations, to settle disputes in a manner such as not to endanger "justice", as well as peace and security, could also be fruitfully seen in this light.

D. State practice since the Second World War

35. The contemporary practice of States conforms, at least in part, with the legal developments subsequent to the Second World War as described in section C above.

(a) An example which conforms to the regime briefly outlined above is to be found in a United States Government statement of 1954. A Chinese military tribunal had imposed penalties involving detention on a group of American airmen captured in Manchuria and charged them with espionage. The United States of America protested at the allegedly unlawful action, stating that those involved were members of the United Nations forces engaged in military operations in Korea and adjacent areas, and the United States Senate suggested a blockade of the whole Chinese coast, with or without the consent of the United Nations. The United States Administration, however, rejected the Senate's idea, recalling the obligation deriving from the Charter of the United Nations to "try to settle international disputes by peaceful means in such a manner that international peace is not endangered, and stated that "*our first duty is to exhaust peaceful means** of sustaining our international rights and those of our citizens rather than resort to war action such as naval and air blockade of red China".[87]

(b) Another interesting example is that of the so-called cod war between Iceland and the United Kingdom.[88] In August 1971 Iceland extended its exclusive fishing zone from 12 to 50 miles and notified the United Kingdom of its position with regard to the abrogation of the agreement reached by the 1961 exchange of notes. The extension was immediately characterized as internationally unlawful by the United Kingdom which, following unsuccessful exchanges with the other party, presented a joint application to ICJ with the Federal Republic of Germany, including a request for

[86] See paras. 25-26 above.

[87] *Keesing's ... 1952-1954*, vol. IX, pp. 13927-13928. The United States brought the case to the United Nations General Assembly, where a resolution entrusting the Secretary-General with the task of trying to obtain release of the airmen was adopted (General Assembly resolution 906 (IX)). The frequency, in the cold war period, of cases where resort to settlement procedures has helped to avoid resort to unilateral measures has already been noted in para. 12 above. See also Gianelli, op. cit., chap. IV, sect. II, paras. 9-11 (*c*).

[88] On the numerous episodes of this "war", see *Keesing's ... 1957-1958*, vol. XI, pp. 12760, 15251 and 16478-16480; *Keesing's ... 1959-1960*, vol. XII, pp. 17314 and 17476; *Keesing's ... 1961-1962*, vol. XIII, p. 18109; *Keesing' ... 1971-1972*, vol. XVIII, pp. 25234-25236; *Keesing's ... 1973*, vol. XIX, pp. 25869-25877, 26028-26032 and 26237-26239; and *Keesing's ... 1976*, vol. XXII, pp. 27511-27515, 27637-27639 and 27824-27825.

interim measures. It is well known that while Iceland decided not to appear, the Court did proceed to the indication of interim measures of protection to the effect, *inter alia*, that the 12-mile limit should remain in force pending the Court's final decision. Iceland refused to comply and contested the Court's jurisdiction. Only then, and following the *negative outcome of further exchanges with the other party*, did the United Kingdom engage in naval operations. A temporary settlement was subsequently reached between the two States on the fishing rights within the Icelandic 50-mile zone. Respect for the principles in question (negotiation, *sommation* and resort to available means of settlement) seems to have been clearly demonstrated by the United Kingdom.

(c) The well-known position taken by ICJ in the case of *United States Diplomatic and Consular Staff in Tehran* with respect to the attempt by United States military units to rescue the hostages is equally significant. The Court disapproved of the operation because it was contrary to its previous Order that no action was to be taken by either party "which may aggravate the tension between the two countries" and, mainly, because "an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations".[89] It is particularly significant in this case that, despite the military nature of the operation, the Court felt it necessary to emphasize not the fact that the measure could be envisaged as a violation of the prohibition of the use of armed force, but that resort to the action in question was not in conformity with the obligation of a State not to jeopardize the outcome of a settlement procedure to which the injured State itself had submitted.

36. There are, however, a number of cases in which, on the contrary, the requirement of prior resort to a settlement procedure, and abstention from reprisals pending the conclusion of such a procedure, has not been complied with. These cases involved measures which were unlikely to affect significantly either the respective positions of the injured and wrongdoing State, or the maintenance of peace.

37. Typical examples are measures which involve the freezing of assets of the alleged wrongdoing State or of its nationals. For instance, the United States of America has repeatedly resorted to the freezing of bank deposits in response to the nationalization by other States of the assets of United States nationals without compensation. These measures have not been preceded by attempts at amicable dispute settlement.[90] Another instance is that of the British and French measures to freeze assets, adopted without any prior attempt at peaceful settlement, in response to the Egyptian nationalization of the Suez Canal Company in 1956, as well as other measures concerning French and British nationals.[91] A similar case concerns the expropriation of British property by the Libyan Arab Republic in 1971 by way of reaction to the allegedly wrongful act committed by the United Kingdom in withdrawing from a number of islands in the Persian Gulf and thus allowing their occupation by Iran. The Libyan measure was adopted without any *prior contact* or

[89] *I.C.J. Reports 1980* (see footnote 37 above), p. 43, para. 93. Judge Lachs in his separate opinion was more categorical:

"... the Applicant *having instituted proceedings**, is precluded from taking unilateral action, *military or otherwise**, as if no case is pending" (ibid., p. 48).

It should be recalled, however, that the United States resorted to armed action by way of *ultima ratio*, following the failure of various previous attempts at a solution by peaceful means (see para. 13 above).

[90] On these cases, see para. 16 above.

[91] Whiteman, op. cit., vol. 12, pp. 320-321.

communication.[92] Reference should also be made to the freezing of Iranian property and deposits following the taking of American hostages in Tehran in 1979. These measures were taken *prior* to the application to ICJ and *simultaneously* with attempts at negotiation and the request for a meeting of the Security Council. It is well known that, with regard to that course of action, the Court did not express the same disapproval as it did with regard to the rescue operation carried out later by the United States. ICJ thus implicitly indicated that it did not consider the measures in question to be reprehensible in the context within which they had been taken.[93]

38. Although the measures considered in paragraph 37 above are frequently adopted without any prior settlement attempt, there are nevertheless some instances, even where the measures appear unlikely to endanger the maintenance of peace, where the parties believe that some steps towards a peaceful settlement are required. In 1948, for example, Yugoslavia protested vehemently against the freezing of Yugoslav assets by the United States of America as a reaction to the expropriation of United States assets in Yugoslavia. The allegedly wrongdoing State claimed the unconditional revocation of the United States measure, release of the assets which, according to Yugoslavia, constituted an *indispensable condition for the continuation of the negotiations* (which were already under way) *concerning the compensation due to dispossessed American nationals.* Had the release not been granted, the Yugoslav Government threatened to submit the matter to the United Nations or to ICJ.[94] Following the French nuclear explosion in the Algerian desert in 1960, Ghana proceeded to freeze French assets in its territory. But before doing so, the Ghanaian Government had *repeatedly protested* to the French Government and *brought the question before the United Nations General Assembly*, which had adopted a resolution demanding cessation of nuclear tests.[95] The well-known cases of measures taken in the course of the last decade by States not materially affected by the infringement of *erga omnes* obligations are equally interesting. These include the measures taken by the member States of the European Community against Iran during the hostages' crisis; by the same States and the United States of America against the Union of Soviet Socialist Republics following the latter's intervention in Afghanistan; by British Commonwealth and European Community members and the United States of America against Argentina during the Falkland Islands (Malvinas) conflict, and by some NATO States and Japan against the Soviet Union following the tragedy involving a Korean airliner.[96]

39. Although these cases concerned measures of little gravity (retortion or suspension of specific treaty obligations), the reacting States, while not resorting to settlement procedures in the true sense, have often submitted the issue to international institutions in an attempt to reach a solution in a diplomatic context. There have been one or more pronouncements by the Security Council and the General Assembly in

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[92] See para. 16 above.

[93] *I.C.J. Reports 1980* (see footnote 37 above), pp. 16, 28 and 43-44.

[94] *Keesing's ... 1946-1948*, vol. VI, p. 9097 and *Keesing's ... 1948-1950*, vol. VII, p. 9416. The United States, however, maintained its position and an agreement was ultimately reached concerning compensation for the expropriations and release of the frozen assets.

[95] General Assembly resolution 1379 (XIV). See also *Keesing's ... 1959-1960*, vol. XII, p. 17280.

[96] Some of these cases might be considered to be examples of international crimes, according to article 19 of part 1 of the draft (see footnote 8 above). This practice will be discussed further when dealing with the consequences of crimes.

the Tehran hostages case,[97] and in the cases of Afghanistan[98] and the Falkland Islands (Malvinas) war.[99] In the Korean airliner case the Security Council resolution was vetoed by the Soviet Union.

40. An opposing position—according to which even existing dispute settlement obligations do not have any restrictive impact upon the injured State's *faculté* to take unilateral measures under general international law—emerges rather firmly from the 1978 award in the *Air Service Agreement* case. According to France, the unilateral measures taken by the United States of America:

> ... could have taken place [under both the theory of reprisals and the law of treaties] only if the injured State had had no other means to ensure respect [for the rights infringed by an internationally wrongful act].[100]

The United States maintained that the French argument was valid only for *armed* reprisals. In any other case it would represent a drastic change from the existing state of customary international law and:

> ... could not be accepted until institutions of international adjudication have evolved to the point where there are international tribunals in place with the authority to take immediate interim measures of protection.[101]

The United States did not accept the proposition that an injured party must defer all action until after the outcome of an arbitration. This proposition finds no support in the theory of non-forcible reprisals ... and is likewise unsupported by treaty-law doctrine.[102] The arbitral tribunal, for its part, based itself on the assumption that:

> Under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties. ... [a] State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through "countermeasures".[103]

The tribunal concluded in particular that: (*a*) "it is not possible [in the presence of *a mere obligation to negotiate*] to lay down a rule prohibiting the use of countermeasures during negotiations, especially where such countermeasures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute";[104] (*b*) no rule of general international law prohibits unilateral measures in cases "where there is arbitral or judicial machinery which can settle the dispute". *Only* "*[i]f the proceedings form part of an institutional framework ensuring some degree of enforcement of obligations**, the justification of countermeasures will undoubtedly disappear, but *owing to the existence of that framework** rather than

[97] Security Council resolution 457 (1979) of 4 December 1979.

[98] General Assembly resolution ES-6/2.

[99] Security Council resolutions 502 (1982) and 505 (1982) of 3 April and 26 May 1982 respectively.

[100] See *Case concerning the Air Service Agreement* (footnote 34 above), p. 428, para. 17.

[101] Ibid., para. 18.

[102] Nash, op. cit., p. 774.

[103] See *Case concerning the Air Service Agreement* (footnote 34 above), p. 443, para. 81.

[104] Ibid., p. 445, para. 91.

solely on account of the existence of arbitral or judicial proceedings as such";[105] (*c*) in cases where a special agreement (*compromis*) between the parties is required for an arbitral procedure to be set into motion, "it must be conceded that under present-day international law States have not renounced their right to take countermeasures ... [T]his solution may be preferable as it facilitates States' acceptance of arbitration or judicial settlement procedures";[106] (*d*) when the adjudicating body is "in a position to act" and to the extent that it has the actual power to order *interim measures of protection*, "the disappearance of the power to initiate countermeasures" must be accepted, as well as "an elimination of existing countermeasures to the extent that the tribunal so provides as an interim measure of protection".[107] The tribunal adds: "As the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the Parties to initiate or maintain countermeasures, too, may not disappear completely."[108]

E. Conclusion

41. The uncertainty surrounding the status of practice and jurisprudence, combined with the generality—and frequent vagueness—of treaty language, does not permit the drawing of easy conclusions with respect to the precise impact of dispute settlement obligations on the liberty of States to resort to reprisals. The following inferences can, however, be drawn from the practice in terms of *lex lata*:

(a) In the first place an injured State must refrain from unilateral measures that may jeopardize an amicable solution until it becomes clear that the means of settlement, other than negotiation, at the disposal of the parties[109] have failed to bring about or are unlikely to bring about any concrete result;

(b) Secondly, whenever a settlement procedure likely to lead to a binding decision is under way before an international body, an injured State must refrain from any unilateral measure other than interim measures of protection until that body has reached its decision and the wrongdoing State has failed to comply with it. Where the international body in question is empowered to indicate or order interim measures of protection, the injured State must refrain from unilaterally adopting any such measures until that body has given its decision on the request for interim measures;

(c) It is doubtful however whether the injured State is also required to refrain from unilateral measures by the fact that it is legally entitled to resort unilaterally to a binding or non-binding third-party settlement procedure.

42. The time has come to turn to the views expressed and proposals made so far on this matter by the former Special Rapporteur and the Commission.

43. According to draft article 10 of part 2, as proposed by the former Special Rapporteur,[110] it would be unlawful for the injured State to resort to reprisals (as distinguished from reciprocity) "until it has exhausted the international procedures for peaceful settlement of the dispute available to it". This prohibition excluded "interim

[105] Ibid., para. 94.
[106] Ibid, para. 95.
[107] Ibid., p. 446, para. 96.
[108] Ibid.
[109] Including inquiry, good offices, mediation, conciliation, resort to international institutions, arbitration or judicial settlement.
[110] See footnote 46 above.

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" (para. 2 (*a*)) as well as the "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" (para. 2 (*b*)). He thus accepted the view of the arbitral tribunal in the *Air Service Agreement* case regarding the admissibility of measures favouring the effective submission of the dispute to third-party settlement.[111]

44. The Commission's reactions to the proposed draft article 10 varied. Some members were in favour of excluding the settlement procedure requirement for reprisals performing a preventive function,[112] some agreed with the Special Rapporteur's position,[113] while others considered this position too favourable to the "author" State (in view of the fact that the outcome of the procedure was not necessarily binding).[114] Some members felt that the provisions of Article 33 of the Charter of the United Nations and of other contemporary instruments were such that an obligation of prior resort to means of settlement existed in all cases. Furthermore, they believed that an express reference to the competence of the Security Council should also be added.[115] Finally, a number of members took the view that greater precision was indispensable in order to specify that procedure and the kind of settlement obligations to be considered relevant under the article.[116]

45. In the light of the foregoing analysis of international practice, the Commission may, in particular, wish to articulate the relevant provision more clearly, a solution which the present writer would be inclined to favour. It is proposed that the following elements should be taken into account in such an endeavour:

(a) the strength of the relevant settlement obligation and the extent of the availability of the procedure contemplated;
(b) the degree of effectiveness; and
(c) the nature and objective function of the measure envisaged.

46. As regards the first element, the strongest settlement obligation is, of course, achieved when the procedure is conceived in such a way as to be set in motion, when

[111] See fourth report (*Yearbook ... 1983*, vol. II (Part One) (footnote 51 above), paras. 104 *et seq.* Riphagen also mentioned the resolution of the Institute of International Law (see footnote 5 above) in support of draft art. 5. See also his comment to draft article 10, in sixth report (*Yearbook ... 1985*, vol. II (Part One) (footnote 11 above), p. 12).

[112] Barboza (*Yearbook... 1983*, vol. I, 1778th meeting, para. 2).

[113] McCaffrey (ibid., 1779th meeting, para. 36); Lacleta Muñoz (*Yearbook ... 1985*, vol. I, 1899th meeting, para. 27), linking parts 2 and 3 of the draft and envisaging genuine means of settlement; Jagota (ibid., 1901st meeting, para. 10), recommending explicit reference to the effectiveness of settlement procedures in the article.

[114] Flitan (ibid., 1893rd meeting, para. 8), commenting on the Special Rapporteur's view "that the fact that a compulsory third-party dispute settlement procedure did not provide for a final and binding decision by the third party did not take away the compulsory character of the procedure itself", said that "that was something that did not by any means follow from article 10. The question was, in that instance, why the compulsory character of the procedure itself should be maintained". Mahiou (ibid., 1897th meeting, para. 13) suggested allowing measures which expedited the settlement of disputes.

[115] Díaz González (ibid., para. 47).

[116] Arangio-Ruiz (ibid., 1900th meeting, para. 19).

necessary, by a mere unilateral application by the allegedly injured party. This is the case of institutional procedures available by virtue of instruments of a general character or by the combined effect of such instruments and further bilateral or multilateral instruments. The first hypothesis is represented by the Security Council or General Assembly mediation/conciliation procedure governed by Articles 35 to 38 of the Charter of the United Nations. The second is represented by that of a judicial settlement before ICJ under the general rules set forth in the Court's Statute, in combination with agreements (arbitration clauses or general treaties) allowing for the possibility of a unilateral application, or with the declarations made under the so-called Optional Clause. With reference to judicial settlement, the possibilities for unilateral initiative which exist by virtue of provisions of the ICJ Statute contemplating accessory functions for the Court, such as those endowing the Court with *compétence de la compétence* (Art. 36, para. 6), with the power to indicate interim measures of protection (Art. 41), and others, should not be overlooked. A third possibility for unilateral initiative is represented by the infrequent cases where the obligation to resort to arbitration is accompanied by devices intended to ensure that—failing the *compromis* which is otherwise normally indispensable—the arbitral procedure is set in motion by a demand addressed by one of the parties to some permanent body to set up the tribunal. In such a situation the arbitral tribunal, once constituted, could also be unilaterally requested to indicate or to order interim measures. Finally, the statutes of a number of international bodies do envisage settlement or quasi-settlement procedures that may be initiated unilaterally.[117]

47. The second element—the effectiveness of the procedure—is present in a high degree in all "third-party" settlement procedures leading to a binding result. This is the case, of course, of arbitration and judicial settlement, the latter never, and the former only very rarely, including the possibility of indicating interim measures with binding force. A lesser degree of effectiveness is obviously to be found in those numerous and varied mediation/conciliation procedures, the most illustrious (although not the most frequently used) of which are the procedures before the two main political bodies of the United Nations. The traditional good offices and mediation procedures, ad hoc inquiries, and the various regional dispute settlement systems show varying degrees of effectiveness. Dispute settlement or quasi-settlement procedures operating within the framework of specialized, worldwide or regional international institutions are common, albeit not always highly effective.[118]

48. The third element—the nature and the objective function of the measure envisaged—should be taken into account in at least two respects:

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[117] See, for example, the case of the *Aerial Incident of 3 July 1988* (*Islamic Republic of Iran* v. *United States of America*), which at the time of writing is still before ICJ. The case was brought by the Islamic Republic of Iran, *inter alia*, on the basis of the violation by the United States of article 84 of the Convention on International Civil Aviation establishing ICAO. This article states that:

"... if any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within 60 days of receipt of notification of the decision of the Council."

[118] An example is given in footnote 117 above.

(a) First, countermeasures the nature and impact of which would be likely to jeopardize a just solution should be inadmissible as long as amicable settlement or quasi-settlement procedures are available, however ineffective. In any event, those measures which are in contradiction with the general obligation not to endanger international peace and security, and justice, as provided for by Article *2*, paragraph 3, of the Charter of the United Nations, would also be inadmissible.

(b) In the second place, special attention should be paid to those measures which, owing to their *nature* and *function,* are referred to as "interim measures of protection", that is to say, measures designed to protect the injured State against the risk of not obtaining reparation (*lato sensu*) or, when a wrongful act of a continuing character has not yet ceased, to prevent the continuation of the unlawful conduct.[119] The adoption of such measures would not be in contradiction with the requirement of "previous exhaustion of available settlement procedures", at least not until an international body had ruled on the admissibility and content of interim measures of protection under an applicable settlement procedure.[120]

49. The incidence of compliance with settlement obligations upon the lawfulness of reprisals is obviously not unrelated to the dispute settlement provisions to be adopted—as arbitration clauses—within the framework of part 3 of the draft articles. With respect to the contents of those provisions, a considerable difficulty will admittedly have to be faced in view of the "naturally" very extensive area that would be covered by the arbitration clauses eventually to be embodied in the codification of a convention on State responsibility. Everybody is aware of the fact that such a convention would cover *any subject matter* which may suffer an alleged breach of an international obligation. It is therefore likely that States will, in principle, be more reluctant to undertake far-reaching third-party settlement obligations than they would be with reference to any *specific* area of the law of nations codified so far. The fact that any settlement obligations provided for in part 3 would obviously limit the area in which the freedom of an allegedly injured State to resort to reprisals would be affected by the requirement of prior resort to available settlement procedures is bound to make States more reluctant to broaden their third-party and other settlement commitments. Every effort will be made to take due account of these easily foreseeable difficulties under the relevant articles of part 2 and in part 3.

50. On the other hand, the very factor considered in paragraph 49 above makes it all the more important to attempt to develop adequately the law of dispute settlement

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[119] See, on this point, para. 5 above.

[120] "Objective" qualifications such as the ones just mentioned (measures likely to be detrimental to a just settlement or likely to endanger peace, security and justice; and interim measures of protection) could offer more reliable criteria than those distinctions based on the subjective aim pursued by the injured State, such as the distinction between coercive, protective and executive measures. Indeed, the available data does not offer any defensible criteria as to the relevance of any distinctions between the aims or purposes—protective, coercive or executive—in pursuance of which measures may be taken by the injured State, in the light of the impact of settlement obligations upon the lawfulness of unilateral measures. As a matter of fact, any given measure may simultaneously pursue two or more such aims. No specific cases have been identified in which the evaluation of the lawful ness of a measure (in its relationship with a dispute settlement obligation) was clearly made dependent upon the aim pursued by the injured State. To be sure, the phrase "interim measures of protection" does appear in the *Air Service Agreement* award (see footnotes 34 and 103 above). That phrase is, however, used with reference to the action of the adjudicating body and not with reference to the injured party's action. It indicates a distinct act, phase or purpose of the arbitral procedure. The "objective" meaning of interim measures of protection as understood in this report has already been discussed in para. 5 above.

within the framework of parts 2 and 3 of the draft articles. States must be made to realize that the law of State responsibility will not achieve the greater fairness, balance and effectiveness, which are indispensable, unless they accept substantial improvements in the field of amicable settlement procedures. Unilateral measures are long bound to remain the core of the legal regime of State responsibility, in the absence of institutional remedies. The effective implementation of such consequences of internationally wrongful acts as cessation and reparation will, in the final analysis, rest on reprisals. Implementation, however, must not only be effective, it must also be just: and for justice to be secured at the stage of implementation the system of reprisals must be mitigated by adequate settlement procedures. This is in the interest of both parties. The alleged wrongdoing State must find in settlement procedures a guarantee against unfounded or unreasonable claims on the part of the allegedly injured State. The latter must find in settlement procedures a guarantee of early cessation of the wrongful conduct and of adequate reparation of the effects thereof. Both have a clear interest in making settlement procedures as effective as possible, whatever the instinctive general reluctance of all States to commit themselves.

51. The considerations set forth in paragraph 50 above should be taken into account, most particularly by the Governments of those States—the great majority—whose economic, political or military weakness puts them at a disadvantage, whether they are in the position of allegedly injured State or of alleged wrongdoing State. The Commission should therefore do its best, in dealing with the problem of dispute settlement in parts 2 and 3, not only to draw as much as possible on the commitments embodied in the Charter of the United Nations and other instruments, but also to proceed more imaginatively to the highest possible degree of progressive development. Contemporary trends at the worldwide and regional levels do seem to show a few encouraging, albeit modest, signs.[121]

[121] In addition to the developments described in para. 33, it is perhaps useful to recall the prospects which seem to emerge from the Conference on Security and Cooperation in Europe. See, for example, the Principles for dispute settlement and provisions for a CSCE procedure for peaceful settlement of disputes adopted at the Meeting of Experts on Peaceful Settlement of Disputes of the Conference on Security and Cooperation in Europe held at Valletta from 15 January to 8 February 1991 (*Official Records of the General Assembly, Forty-sixth Session*, agenda items 127 and 131, document A/46/335, annex). Of particular interest here are paragraphs 4 (Dispute prevention), 5 (Dispute management) and 6 (Dispute solution):

"4. The participating States will seek to prevent disputes and to develop, utilize, and improve mechanisms designed to prevent disputes from occurring, including, as appropriate, arrangements and procedures for prior notification and consultation, regarding actions by one State likely to affect significantly the interests of another State. "5. Should disputes nevertheless occur, the participating States will take particular care not to let any dispute among them develop in such a way that it will endanger international peace and security, and justice. They will take appropriate steps to manage their disputes pending their settlement. To that end, the participating States will:

"(*a*) address disputes at an early stage;

"(*b*) refrain throughout the course of a dispute from any action which may aggravate the settlement of the dispute;

"(*c*) seek by all appropriate means to make arrangements enabling the maintenance of good relations between them, including, where appropriate, the adoption of interim measures which are without prejudice to their legal positions in the dispute."

"6. As laid down in the Helsinki Final Act and subsequent relevant documents, the participating States will endeavour in good faith and in a spirit of cooperation to reach a rapid and equitable solution of their disputes on the basis of international law, and will for this purpose use such means as negotiation, inquiry, good offices, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice, including any settlement procedure agreed to in advance of disputes to which they are parties. To that end, the participating States concerned will in particular:

CHAPTER III

III. PROPOSED DRAFT ARTICLES

52. The following draft articles are proposed:

Article 11. Countermeasures by an injured State

An injured State whose demands under articles 6 to 10 have not met with adequate response from the State which has committed the internationally wrongful act is entitled, subject to the conditions and restrictions set forth in the following articles, not to comply with one or more of its obligations towards the said State.

Article 12. Conditions of resort to countermeasures

1. Subject to the provisions set forth in paragraphs 2 and 3, no measure of the kind indicated in the preceding article shall be taken by an injured State prior to:

***(a)* the exhaustion of all the amicable settlement procedures available under general international law, the Charter of the United Nations or any other dispute settlement instrument to which it is a party; and**

***(b)* appropriate and timely communication of its intention.**

2. The condition set forth in subparagraph (*a*) of the preceding paragraph does not apply:

***(a)* where the State which has committed the internationally wrongful act does not cooperate in good faith in the choice and the implementation of available settlement procedures;**

***(b)* to interim measures of protection taken by the injured State, until the admissibility of such measures has been decided upon by an international body within the framework of a third-party settlement procedure;**

"(*a*) consult with each other at as early a stage as possible; "(*b*) in case they cannot settle the dispute among themselves, endeavour to agree upon a settlement procedure suited to the nature and characteristics of the particular dispute;

"(*c*) where a dispute is subject to a dispute settlement procedure agreed upon between the parties, settle the dispute through such procedure, unless they agree otherwise;

"(*d*) accept, in the context of the CSCE Procedure for Peaceful Settlement of Disputes and its scope of applicability, the mandatory involvement of a third party when a dispute cannot be settled by other peaceful means."

(More generally, for interesting analyses of the issue of peaceful settlement of international disputes in Europe, see *The Peaceful Settlement of International Disputes in Europe: Future Prospects, Workshop, The Hague, 6-8 September 1990* (Dordrecht, Martinus Nijhoff Publishers, 1991).)

A further source of inspiration is the statement made by the President of ICJ, Sir Robert Jennings, to the General Assembly (*Official Records of the General Assembly, Forty-sixth Session, Plenary Meetings*, 44th meeting). After having drawn attention to the full docket of the Court (11 cases at that time), he pointed out how the Court could perform an even more active role in the settlement of disputes if its advisory jurisdiction were more widely utilized by States and by organs of the United Nations. He stressed that even disputes that were predominantly political in nature, such as the Iraq-Kuwait dispute before the invasion, often had a legal component, and a non-binding pronouncement in such cases might facilitate their solution by such means as negotiation and mediation. His suggestion was gladly accepted by the Secretary-General (ibid.).

(c) **to any measures taken by the injured State if the State which has committed the internationally wrongful act fails to comply with an interim measure of protection indicated by the said body.**

3. The exceptions set forth in the preceding paragraph do not apply wherever the measure envisaged is not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, are not endangered.

CHAPTER IV

IV. PROPORTIONALITY OF COUNTERMEASURES

53. As indicated in the third report,[122] the relevance of proportionality in the regime of countermeasures is widely accepted both by scholars and in jurisprudence.[123] It is necessary however to clarify the precise content of the principle, namely how rigid or how flexible it is, and the criterion by which proportionality should be assessed.

54. In so far as the *first* point (content) is concerned, it is rather unusual in the context of inter-State practice for reference to be made, either by the reacting State or by the State against which measures are being taken, to equivalence or proportionality in a narrow sense.[124] Considering that the function of the principle is to avoid the possible inequitable result of the use of countermeasures, it is understandable that a rigid notion of proportionality should have been found unsuitable. The "negative" formulations adopted in the Naulilaa and *Air Service Agreement* awards, for instance,

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[122] *Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above).

[123] Ibid., paras. 63-68.

[124] An example could perhaps be the tariff measure adopted by the United States of America in 1987 with regard to Japanese electronic goods following an alleged failure by Japan

"...to honour a five-year bilateral accord on the pricing of semiconductors (microchips).... The action followed the adoption of unanimous resolutions by both House and Senate calling for retaliation for violation of the accord. ... In announcing the tariffs ... the United States Secretary of Commerce remarked that Japan was an 'ally and a friend' and that 'nobody in the administration is very happy about having to do this'. Japan stated that it would challenge the imposition of the tariffs under the rules of the [General Agreement on Tariffs and Trade]...." (*Keesing's ... 1987*, vol. 33, p. 35331.)

President Reagan on 8 June 1987 announced a reduction of US$ 51 million in the value of merchandise affected by the measure, "this reduction being described as '*strictly proportional*'* to the degree to which Japanese manufacturers had adjusted their prices in accordance with the United States concept of 'fair value'". More generally, a rigid assessment of proportionality of measures and countermeasures seems to be the one provided for by the GATT system. On this point, see Boisson de Chazournes, *Les contre-mesures dans les relations internationales économiques*, chap. III. Cases in which States appear to apply the principle of proportionality in a narrow sense are considered to be those in which they adopt "reciprocal measures" (see *Yearbook ... 1991*, vol. II (Part One) (footnote 1 above), paras. 28-32). However, the admissibility in these cases not only of "reciprocal measures" but also of measures "not strictly proportional" (equivalent) to the wrongful act and—as indicated in chaps. I and II above—the absence of any difference, from the point of view of the impact of dispute settlement obligations, in the requirement of a previous demand for reparation or of a previous intimation, between "reciprocal measures" on the one hand, and measures "not strictly proportional" on the other hand, lead the present writer to agree with those who consider "reciprocal measures" to be no different from other forms of countermeasures and subject to the same conditions and limitations (ibid., para. 31).

are therefore preferable.[125] The former Special Rapporteur seems to have relied on the same understanding of the principle, according to paragraph 2 of his proposed draft article 9 of part 2, a countermeasure "shall *not**, in its effects, be manifestly *disproportional** to the seriousness of the ... act".[126] On the other hand, the doubts expressed by a number of representatives in the Sixth Committee of the General Assembly concerning the use of the term "manifestly" are valid.[127] While the assessment of the proportionality of a countermeasure must certainly involve consideration of all elements deemed to be relevant in the specific circumstances, the influence of the term "manifestly" could have the effect of introducing an element of uncertainty and subjectivity into the construction and application of the principle.[128] Expressions such as "out of proportion" or simply "disproportionate" would seem to be preferable.[129]

55. The *second* issue to be considered concerns the criteria of proportionality. For the same reasons given above, namely the need to ensure that the adoption of countermeasures does not lead to any inequitable results, proportionality should be assessed by taking into account not only the purely "quantitative" element of damage caused, but also what might be called "qualitative" factors, such as the importance of the interest protected by the rule infringed and the seriousness of the breach.[130] This appears to be in line with the position emerging from the 1934 resolution of the Institute of International Law on reprisals[131] and, more recently, from the award in the

[125] According to the award in the Naulilaa case,

"*... on devrait certainement considérer comme excessives et partant illicites, des représailles* hors de toute proportion (emphasis added) *avec l'acte qui les a motivées*" (*Portuguese Colonies* (see footnote 24 above, p. 1028)).

In the *Air Service Agreement* award (see footnote 34 above) the arbitrators held the United States measures to be in conformity with the principle of proportionality because they "*do not appear to be clearly disproportionate when compared to those taken by France**" (p. 444, para. 883). In the Commission, Calero Rodrigues came out clearly in favour of the inclusion of a "negatively" formulated requirement of proportionality in the draft articles concerning countermeasures (*Yearbook ... 1982*, vol. I, 1733rd meeting, para. 36).

[126] Sixth report (*Yearbook ... 1985*, vol. II (Part One) (see footnote 11 above)), p. 11, draft article 9, para. 2, and commentary thereto.

[127] See, in particular, the statements made by the representatives of France (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 38th meeting, para. 14), Greece (ibid., 40th meeting, para. 45), Finland (ibid., 45th meeting, para. 5), Algeria (ibid., 48th meeting, para. 32), and Morocco (ibid., 50th meeting, para. 34).

[128] The same holds true for the expressions *hors de toute proportion* used in the Naulilaa award and "*clearly** disproportionate" in the *Air Service Agreement* award (see footnote 125 above).

[129] The same line is taken in section 905, para. 1 (*b*), of the *Restatement of the Law Third* (see footnote 39 above), p. 904, according to which an injured State

"may resort to countermeasures that might otherwise be unlawful, if such measures .... (*b*) are not out of proportion to the violation and the injury suffered".

[130] On this, the present writer shares Riphagen's opinion, according to which "quantitative" and "qualitative" proportionality would not be separable (see preliminary report (*Yearbook ... 1980*, vol. II (Part One), pp. 127-128, document A/CN.4/330, paras. 94-95)).

[131] According to art. 6, para. 2, of the resolution (see footnote 5 above), the acting State must *proportionner la contrainte employée à la gravité de l'acte dénoncé comme illicite et à l'importance du dommage subi* (p. 710).

Air Service Agreement case[132] and the proposals made by the former Special Rapporteur.[133]

56. A different matter is the possible relevance of the aims pursued by the allegedly injured State in resorting to countermeasures. Although, as explained in chapter I of this report (paras. 3-5 above), the aims—or rather the functions—of an act of reprisal could be of relevance in deciding whether and to what extent the measure is lawful, this issue is different from that of proportionality. Proportionality, even if not understood in a strictly "quantitative" sense, is in any event a relationship between the two evils represented by the breach and the reaction thereto. It is not to be measured, therefore, on the basis of the likelihood of the reaction achieving a particular aim.

CHAPTER V

V. PROHIBITED COUNTERMEASURES

57. The third report summed up the main issues arising with regard to countermeasures, namely (*a*) the prohibition of the use of force; (*b*) respect for human rights; (*c*) diplomatic law; and (*d*) *jus cogens* and *erga omnes* rules.[134] Although some of the issues under (*a*), (*b*) or (*c*) are covered by *jus cogens* or *erga omnes* rules, it is preferable to continue to deal with them separately in view of the importance that the prohibition of the use of force and the protection of human rights in particular have acquired in recent times.

A. Countermeasures and the prohibition of the use of force

58. Although the present writer is not fully convinced that the prohibition of the use of force under Article 2, paragraph 4, of the Charter of the United Nations has really acquired the status of a rule of general international law, in line with the pronouncements of ICJ and the virtually unanimous view of scholars,[135] it is essential to work from the assumption that such is the case. If it were not the case, such a general rule would, in any event, have to be affirmed as a matter of progressive development of the law of State responsibility.

59. The move towards the restriction of resort to armed reprisals, which had already emerged before the Covenant of the League of Nations and the Briand-Kellogg Pact, may be considered to have achieved its aim at the treaty-law level with the entry into force of those two "anti-war" treaties. Notwithstanding some ambiguities in the relevant rules—particularly in the Covenant—those two treaties may reasonably be interpreted as restricting, in the former case, and forbidding, in the latter case, resort to "forcible measures short of war" prior to exhaustion of peaceful

[132] See footnote 34 above. In that award the arbitrators held that "it is essential, in a dispute between States, to take into account *not only the injuries suffered** by the companies concerned but also the *importance of the questions of principle** arising from the alleged breach" (p. 443).

[133] According to his draft article 9, para. 2 (see footnote 126 above): "2. The exercise of [the right to resort to reprisals] by the injured State shall not, *in its effects**, be manifestly disproportional *to the seriousness of the internationally wrongful act** committed."

[134] *Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above), paras. 96-102.

[135] Ibid. (especially footnotes 190-212).

means of redress.[136] This appears to be a correct interpretation of the combined effect of the provisions of the two treaties concerning the prohibition of force, on the one hand, and the obligation to attempt a peaceful settlement, on the other. This interpretation of the treaty-law situation is confirmed by the practice of the period between the wars. Unlike previously, States resorting to armed measures declared that they were acting in self-defence.[137] It must be further recalled that resort to force was also being condemned in the Americas, albeit under the different term "forcible intervention",[138] for instance by the so-called Saavedra Lamas Treaty of 1933.[139]

60. It is well known that while the Covenant of the League of Nations restricted resort to force, the Charter of the United Nations firmly prohibits it altogether, except in self-defence under Article 51. The drafters of the Charter certainly intended to condemn—and in fact did condemn—the use of force even if resort to force was in pursuit of rights.[140] It is therefore impossible to espouse the view that armed reprisals would not be condemned in so far as they were used not against the territorial integrity and political independence of any State (or in any manner incompatible with the purposes of the United Nations) but for the restoration of an injured State's right.[141]

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[136] Of course, the Covenant did not explicitly refer to measures "short of war". More specifically, it condemned resort to war: (*a*) prior to the experiment of one of the peaceful means envisaged in the Covenant (arbitration or judicial settlement (Art. 12)); (*b*) during the three months following an arbitral award or a judgment of PCIJ or a report of the Council of the League (ibid.); (*c*) against a member which complies with the arbitral award or Court decision (Art. 13); and (*d*) against any party to the dispute which complies with a unanimous report of the Council or a qualified majority report of the Assembly (Art. 15). Except in those cases, and subject to the controversial impact of the duty to respect and preserve the territorial integrity of all the members (Art. 10), war was not unlawful (see Forlati Picchio, op. cit., pp. 108-109 and footnote 17). It was, however, held by a number of authorities that the prohibition of war in the cases mentioned included the prohibition of military measures "short of war". See, for example, Brierly, "Règles générales du droit de la paix", *Recueil des cours..., 1936-IV*, p. 124, and, for a survey of opinions, Brownlie, op. cit., pp. 220 *et seq*). This position apparently found some support in the opinion of the Committee of Jurists consulted by the League following the Tellini (Janina) case (see footnote 23 above), where the admissibility of forcible measures short of war was made conditional upon a decision of the Council (in the light of Arts. 13-15 of the Covenant).

As for the Briand-Kellogg Pact (see para. 25 and footnote 65 above), it condemned war in articles I and II and prescribed the settlement of disputes by peaceful means.

[137] Brownlie, op. cit., pp. 19 *et seq*.; Lamberti Zanardi, *La legittima difesa nel diritto internazionale*, pp. 39 *et seq*., and particularly p. 87.

[138] On the parallelism of this development *mutatis mutandis* with the European anti-war trend, see, *inter alia*, 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*, pp. 547 *et seq.*

[139] See para. 25 and footnote 67 above. Article I of that treaty provided:

"... that the settlement of disputes or controversies of any kind that may arise among them shall be effected only through the pacific means established by International Law.", while article III specified that

"in no case shall [the Contracting Parties] resort to intervention either diplomatic or armed".

The Declaration of American Principles approved by the Eighth International Conference of American States, held in Lima in 1938, is also very clear in reiterating the unlawfulness of all use of force, including armed reprisals. It states "once again" that "All differences of an international character should be settled by peaceful means" and that "The use of force as an instrument of national or international policy is proscribed" (AJIL, vol. 34, *Supplement*, No. 4 (October 1940), p. 201).

[140] On the proceedings of the San Francisco Conference, see Lamberti Zanardi, op. cit., pp. 143 *et seq*., and Taoka, *The Right of Self-defence in International Law*, pp. 105 *et seq.*

[141] On the doctrine in question, originally formulated by Colbert and especially by Stone, see *Yearbook ... 1991*, vol. II (Part One) (footnote 1 above), para. 98 and footnote 193.

61. States have made explicit pronouncements on the subject of the prohibition of armed countermeasures under Article 2, paragraph 4, of the Charter of the United Nations, principally in the well-known Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[142] by which the General Assembly unanimously proclaimed that "States have a duty to refrain from acts of reprisal involving the use of force".[143] This position is implicitly confirmed by the General Assembly's Definition of Aggression,[144] where it is specified in article 5, paragraph 1, that "[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression". This is believed to mean that not even a legal consideration such as the pursuit or protection of a right would justify resort to one of the actions referred to in article 3 of the Definition.[145] During the drafting of the resolution on the Definition of Aggression, an attempt was made—without success—to broaden the concept of armed attack, and consequently of self-defence, in order to include as exceptions the protection of nationals abroad, on the one hand, and intervention in favour of the self-determination of dependent peoples, on the other. Neither of these cases, however, involves the protection of a State's rights by means of reprisals.[146] The condemnation of armed reprisals is also present, albeit indirectly, in the assertion by ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) of the customary nature of the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations condemning the use of force.[147]

62. There is of course the question whether the failure to implement the core of the United Nations collective security system which is represented by Articles 42 to 47 of the Charter might not justify an "evolutive" interpretation not only of the

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[142] See footnote 82 above.

[143] For a discussion of the Declaration, see Rosenstock, "The Declaration of Principles of International Law concerning Friendly Relations: a survey", AJIL (1971), p. 713 *et seq*., especially p. 726.

The prohibition is reiterated in the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, which refers to:

"The duty of a State to refrain from armed intervention, subversion, military occupation or any other form of intervention and interference, overt or covert, directed at another State or group of States, or any act of military, political or economic interference in the internal affairs of another State, including acts of reprisal involving the use of force" (General Assembly resolution 36/103, annex, sect. II, para. (*c*)).

[144] General Assembly resolution 3314 (XXIX), annex.

[145] That article lists the forms of aggression. These may be summarized as follows: invasion or attack by the armed forces of a State of the territory of another State; bombardment; blockade of ports or coasts; attack on military forces of another State; the use of armed forces of one State which are in the territory of another State, without the consent of the latter; the action of a State allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force (amounting to any of the acts of aggression listed).

[146] They concern rescue or other operations to assist nationals or peoples in danger or under duress. The same trend has emerged more recently within the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations. In 1987 the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations was finally adopted, according to which: "No consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter." (General Assembly resolution 42/22, annex, sect. I, para. 3.)

[147] *I.C.J. Reports 1986*, p. 99, para. 188.

Charter, but also of the corresponding general rule of international law with regard to condemnation of the use of force. This refers to the doctrine according to which the persistence of that failure would justify an interpretation under which the prohibition laid down in Article 2, paragraph 4, of the Charter would be subject not only to the exception envisaged in Article 51, but also to other exceptions not expressly provided for therein.[148] It will be seen, however, that such a doctrine (whether it is accepted or not) would only cover those cases in which resort to force might be justified by those grave emergency situations for which Articles 42 to 51 of the Charter were devised, situations which may call for a broadening of the concept of self-defence, but not for an exception to the prohibition of armed countermeasures against an internationally wrongful act. This seems to be demonstrated by practice, which will be considered in the following paragraphs. While this practice does seem to have a bearing on the concept of self-defence—in the sense of broadening it in order to fill the gap left by the failure to complete the implementation of the collective security system—it appears less likely to justify the notion that armed force may be lawfully resorted to by way of reprisal.[149]

63. The prohibition of armed reprisals is further evidenced by the fact that States resorting to force do not attempt to demonstrate the lawfulness of their conduct by qualifying it as a reprisal: they refer instead to self-defence. This was the position France and the United Kingdom appeared to take during the Suez crisis of 1956, for example.[150] A similar position was taken by the United Kingdom in 1964 in order to justify the bombardment of a locality in Yemen following a violation by that country of the airspace of the South Arabian Federation. Before the Security Council, which explicitly condemned the action as an armed reprisal, the British Government used a plea of self-defence; this was rejected for lack of immediacy of the reaction.[151] It is

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[148] *Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above), para. 98.

[149] This position has recently been supported by Sicilianos, *Les réactions décentralisées à l'illicite : Des contre-mesures à la légitime défense*, pp. 398 *et seq.*

According to the *Restatement of the Law Third* (see footnote 39 above):

"The threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter ..." (sect. 905 (2), p. 380).

It also specifies that:

"... a State victim of a violation of an international obligation by another State may resort to countermeasures that might otherwise be unlawful, if such measures (*a*) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (*b*) are not out of proportion to the violation and the injury suffered" (ibid.).

[150] Both Governments took the position that as the main users of the canal, their vital interests would be endangered if free passage was interrupted. (See the relevant statements in *Official Records of the Security Council, Eleventh Year*, 751st meeting, paras. 46 and 61.) On this occasion the United States declared that the circumstances prevented speaking of self-defence and that it was a case of armed attack (*Official Records of the General Assembly, First Emergency Special Session, Plenary Meetings*, 561st meeting, paras. 140 and 150).

[151] Security Council resolution 188 (1964) of 9 April 1964, in which the Council:

"1. *Condemns* reprisals as incompatible with the purposes and

the principles of the United Nations;

"2. *Deplores* the British military action at Harib on 28 March 1964". The discussion which took place is reported in *Official Records of the Security Council, Nineteenth Year*, 1106th-1111th meetings.

Numerous cases may be cited of violation of national airspace by military aircraft of States belonging to the opposing blocs which occurred during the early years of the cold war. In a number of these cases, the aircraft was shot down. In the well-known U2 case, for instance, a United States military aircraft was shot down by Soviet forces in 1960. The case was brought before the Security Council by the Soviet Union (ibid., 860th meeting). It is doubtful how such cases should be

interesting to note that the United Kingdom refrained from vetoing the Council's resolution and declared that it did not object to paragraph 1, which condemns reprisals as incompatible with the purposes and principles of the United Nations, since "the action [in question] was not a reprisal or retaliation".[152] The representative of the United Kingdom went on to say that:

The purpose of our action at Harib fort which ... we regard as falling under Article 51 of the Charter, was wholly defensive in order to prevent further attacks against the territorial integrity of the South Arabian Federation and its inhabitants.[153]

64. In many cases armed force appears to have been resorted to by way of reaction to terrorist acts. Despite the absence of the immediacy requirement—action having been taken in some instances months after the attack or even to prevent future attacks—the States taking the forcible action almost invariably invoke self-defence in order to justify it. Israeli incursions into neighbouring States in the late 1960s and early 1970s have inspired discordant doctrinal positions.[154] Whatever the merits of these episodes from other points of view, it must be stressed that here again, as in the cases considered earlier in this chapter, the justification given by the acting State before the Security Council—a highly questionable justification from the legal point of view—was the right of "self-defence": where self-defence was understood as the right to protect the life and security of nationals within the country against attacks launched from bases situated in foreign territory.[155] The same line of reasoning has been adopted with respect to more recent episodes, such as the raid against the headquarters of the Palestine Liberation Organization in Tunis in 1985.[156] While

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categorized. On the one hand, the existence of a territorial violation is clear but, on the other, it is more doubtful whether such a violation constitutes real aggression and justifies an immediate armed reaction. It is important to stress here that the States concerned did not invoke the notion of reprisal in support of their armed reaction to the violation of their airspace, but referred instead to self-defence. Unfortunately, some incidents have concerned civil aircraft as well (the Israeli commercial airliner shot down by Bulgaria in 1955; the forced landing—and consequent dismantling—of a Libyan civilian aircraft by Israel in 1973; and the South Korean airliner shot down in 1983 by the Soviet Union). In these cases, reference to self-defence is much more debatable. On this practice, see Gianelli, op. cit., chap. IV, No. 10,1 (*a*) and (*c*).

[152] See *Official Records of the Security Council, Nineteenth Year*, 1111th meeting, para. 29.

[153] Ibid., para. 30. On this occasion the representative of the United States of America expressed his Government's disapproval of "provocative acts and retaliatory raids in situations such as that before us" (ibid., para. 4).

[154] *Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above), para. 98.

[155] See the statement by the Israeli representative (*Official Records of the Security Council, Twenty-third Year*, 1407th meeting para. 215), relating to some incidents which had occurred in Jordan; the statements by the Israeli representative (ibid., 1460th meeting, para. 59, and 1462nd meeting, para. 121), concerning the attack against the civilian airport in Beirut; and the letter from the Permanent Representative of Israel to the United Nations of 11 April 1973 (ibid., *Twenty-eighth Year, Supplement for April, May and June 1973*, document S/10912), concerning the incursion into Lebanon. See also *Repertory of Practice of United Nations Organs, Supplement No. 2*, vol. I (United Nations publication, Sales No. 64.V.5), p. 112, para. 156. Episodes concerning Israeli actions brought before the Security Council are numerous and have led to a number of resolutions of condemnation, at times formulated in a contradictory manner, such as Security Council resolutions 101 (1953); 111 (1956); 228 (1966); 265 (1969); 270 (1969); 279 (1970); 280 (1970); 285 (1970); 294 (1971); 313 (1972); 316 (1972); 332 (1973); 347 (1974); 425 (1978); and 509 (1982).

On this practice, see Sicilianos, op. cit., pp. 413 *et seq.*

[156] See the statement of the Israeli representative in the Security Council (*Official Records of the Security Council, Fortieth Year*, 2615th meeting) justifying the violation of Tunisian sovereignty:

"The PLO got in Tunisia an extraterritorial base from which they conducted their terrorist operations. We have struck only at this base ... Tunisia knew very well what was going on in this extraterritorial base, the planning that took place there, the missions that were launched from it, and the

rejecting the "self-defence" justification, the Security Council condemned the actions, characterizing them explicitly either as armed reprisals or, more generally, as military actions.[157] Following the bombardment of Libyan localities by the United States in 1986, the United States Government stated that it had acted under Article 51 of the Charter in response to terrorist acts.[158] South Africa, for its part, justified incursions into the territories of its African neighbours in the 1980s as reactions to acts of terrorism.'[159] It is quite clear that the States engaging in such acts of violence did not attempt to justify them as reprisals or countermeasures. They preferred a plea of self-defence, this concept being in their view applicable in the case of use of force to protect vital interests.

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purposes of those missions; repeated armed attacks against my country and against innocent civilians around the world".

The Israeli representative went on to say that his Government was concerned "with the prevention of future crimes" and further indicating its "aim to weaken and to destroy the nerve-centre of world terror" (ibid.).

[157] On other occasions the Council was unable to adopt any decision. For an analysis of the Council's resolutions, see Sicilianos, op. cit., pp. 413 *et seq.*, who considers that it is not possible to conclude from the Council's practice that armed reprisals are found to be admissible or at least are tolerated, in the presence of certain prerequisites. He notes that, on the contrary, several States have expressly ruled out the lawfulness of armed reprisals. See, for instance, the statement by the representative of Pakistan during the debate concerning an Israeli raid in Jordan:

"The Security Council cannot tolerate military reprisals, much less a massive armed attack by a Member State on another Member State on the pretext of retaliation against alleged acts of terrorism or sabotage." (*Official Records of the Security Council, Twenty-third Year*, 1407th meeting, para. 61.)

Paraguay used similar terms with reference to the situation in the Middle East:

"We do not accept the doctrine of the right of reprisal whereby a State can presumably arrogate to itself the right to carry out military operations of the kind now being considered by the Council in the territory of the other State." (Ibid., *Twenty-fourth Year*, 1470th meeting, para. 37.)

[158] The bombing, which took place on 15 April, followed the explosion of a bomb, on 5 April, in a discothèque in West Berlin largely patronized by United States military personnel, which caused deaths and injuries. The Embassy of the Libyan Arab Jamahiriya in Berlin is alleged to have announced the act in advance. On 27 December 1985, other attacks had taken place at airports in Rome and Vienna. The United States stated that it had proof of Libyan responsibility and described the action—directed against terrorist bases—as a case of self-defence which was perfectly consistent with Article 51 of the Charter of the United Nations (letter from the Acting Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (ibid., *Forty-first Year, Supplement for April, May and June 1986*, document S/17990)). The United Kingdom took the same position, remaining isolated however, even within the Western group (other Western countries simply adopted measures of retortion against the Libyan Arab Jamahiriya). While during the Security Council debate several States strongly criticized the United States action (see, for instance, the statements by the representative of Yugoslavia, who "condemns most strongly this armed attack" (*Official Records of the Security Council, Forty-first Year*, 2676th meeting), and of Hungary, according to whom "the isolated suggestion that the armed attack carried out by the United States was an act of self-defence is nothing but an ill-conceived attempt to justify the illegitimate and to misinterpret another clear rule of law" (ibid., 2677th meeting), the General Assembly condemned the attack in resolution 41/38 on the Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the aerial and naval military attack against the Socialist People's Libyan Arab Jamahiriya by the present United States Administration in April 1986 (adopted by 79 votes in favour, 28 against, with 33 abstentions).

[159] Reference is made to a number of episodes. Actions were usually directed against bases of the African National Congress of South Africa. With reference to the Maseru incursion of 19 December 1985, when nine people with links to that organization were killed, South Africa stated before the Security Council that its action was justified by "terrorist violence emanating from Lesotho's territory" (*Official Records of the Security Council, Fortieth Year*, 2639th meeting). Mention may be made also of the incursions into Botswana, Zimbabwe and Zambia (19 May 1986); Swaziland (14 December 1986); Zambia (25 April 1987); Mozambique (28 May 1987); and Botswana (28 March and 21 June 1988).

65. The tendency to broaden the scope of self-defence to include a reaction to an armed attack against a State merits further analysis, especially with respect to armed intervention for reasons of humanity in a state of necessity. Actions of this nature are usually undertaken by a State for the protection of its nationals in situations where there is a serious risk to life, regardless of the nature of the act or fact giving rise to the danger, whether it be an internationally wrongful act of a State or the behaviour of private parties over which the territorial State has no control. The relevant practice includes the actions which the United Kingdom proposed to carry out in Iran in 1946 and 1951, the Belgian intervention in the Congo in 1960, the United States action in the Dominican Republic in 1965, the "*Mayaguez*" affair in 1975, the Entebbe raid by Israel in 1976, the Egyptian intervention in Larnaca in 1978, the United States attempted rescue of hostages in Iran in 1980 and its interventions in Grenada and Panama in 1983 and 1989 respectively.[160] On such occasions the States concerned frequently resorted to the plea of self-defence as a justification for their action.[161] In a few instances they referred to state of necessity.[162]

66. There are also instances of armed intervention to protect nationals of the territorial State itself. This seems to have been the case of the Arab States' intervention in Palestine in 1948, India's intervention in Bangladesh in 1971, Viet Nam's intervention in Cambodia in 1978, and the United Republic of Tanzania's intervention in Uganda in 1979.[163]

67. The lawfulness of armed intervention to protect nationals in danger abroad generally appears to be accepted not so much under Article 51, as a reaction to an armed attack against a State in the person of its nationals or against the nationals of an ally of the intervening State,[164] but rather on the basis of a plea of self-defence as

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[160] On this practice, see Ronzitti, op. cit., pp. 21 *et seq*., Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internationale generale*, pp. 163 *et seq*., and, more recently, Sicilianos, op. cit., pp. 449 *et seq.* In particular, on the Belgian intervention in the Congo, see *Official Records of the Security Council, Fifteenth Year*, 879th meeting; on the United States action in the Dominican Republic (ibid., *Twentieth Year*, 1200th meeting, para. 19); for the other cases cited, see the footnotes which follow. The protection of nationals in danger was also invoked as a justification, together with vital interests, for the British and French intervention in Egypt in 1956 (see para. 63 above). In the Grenada case the protection of nationals was only one of the various reasons invoked as justification (*Official Records of the Security Council, Thirty-eighth Year*, 2491st meeting, paras. 51-77). No mention is made here of cases where the State taking the action had also tried, by some means or another, to secure the consent of the territorial State (the validity of such consent being questionable however).

[161] See statements before the Security Council by the United States of America in the Panama case (ibid., *Forty-fourth Year*, 2902nd meeting) and in the "*Mayaguez*" case (ibid., *Thirtieth Year, Supplement for April, May and June 1975*, document S/l1689, pp. 24-25); by Israel on the Entebbe raid (ibid., *Thirty-first Year*, 1939th meeting, para. 111); by the United States on the Tabas raid (ibid., *Thirty-fifth Year, Supplement for April, May and June 1980*, document S/13908, pp. 28-29).

[162] Statement by Belgium on the Congo intervention (ibid., *Fifteenth Year*, 879th meeting, para. 151).

[163] Ronzitti, op. cit., pp. 89 *et seq*.; and Sicilianos, op. cit., pp. 166 *et seq*. In addition to humanitarian reasons, the acting States also invoked self-defence. See, for instance, the Indian Government's position in the Bangladesh case (ibid., *Twenty-sixth Year*, 1606th meeting, paras. 160 *et seq*.); Viet Nam's position on its intervention in Cambodia (ibid., *Thirty-fourth Year*, 2109th meeting, para. 126).

[164] In this vein, see Bowett, op. cit., pp. 91 *et seq.* (but see also footnote 155 above); "The use of force for the protection of nationals abroad", *The Current Legal Regulation of the Use of Force*, pp. 40 *et seq*.; Thomas and Thomas, *The Dominican Republic Crisis 1965*, pp. 13 *et seq*.; Rostow, "The politics of force: analysis and prognosis", *The Year Book of World Affairs*, p. 50.

understood in the practice of common-law countries,[165] that is to say, self-defence in a broad sense, encompassing self-defence *stricto sensu* and necessity.[166] Some evidence of this interpretation may be inferred from the ICJ *dictum* in the case of *United States Diplomatic and Consular Staff in Tehran*[167] with reference to the United States rescue operation. By condemning that action for the reason that it appeared to be incompatible with the respect due to the judicial process,[168] the Court seems to have accepted by implication that the United States action might have been lawful if a judicial procedure had not been under way.

68. The justification of armed intervention for humanitarian purposes in favour of the nationals of the territorial State is more problematic. If some (perhaps the majority) of writers do not find any justification for intervention of this kind[169] on the basis of positions taken by Governments,[170] others consider this practice to be lawful,[171] arguing, *inter alia*, on the basis of the work carried out by the Commission on article 33 of part 1 of the draft.[172] For the time being, there is no need to take a stand on this issue, though the problem may have to be tackled in relation to the consequences of so-called international crimes of States. It is essential, however, for the present purposes, to note that such instances of armed humanitarian intervention—whether in favour of the intervening State's nationals or those of the territorial State—consist of reactions to situations which, albeit different from an armed attack, present a degree of urgency calling for immediate, direct armed action. They do not undermine, therefore, the prohibition of the use of force by way of countermeasure.

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[165] In this vein, see Ross, *A Textbook of International Law*, pp. 247 *et seq.*; Waldock, "The regulation of the use of force by individual States in international law", *Recueil des cours .... 1952-11*, p. 503 (who seems to speak of "self-protection"); Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law", *Recueil des cours ..., 1957-11*, pp. 172-173; Panzera, "*Raids* e protezione dei cittadini all'estero", *Rivista di diritto internationale*, pp. 759 *et seq.*; Pillitu, *Lo stato di necessità nel diritto internazionale*, especially pp. 263 *et seq.*; and Ronzitti, op. cit., pp. 52 *et seq.*, who believes that a customary rule is emerging according to which such intervention would be lawful.

A contrary opinion (against the lawfulness of armed intervention in favour of nationals in danger abroad, except to protect human rights) is expressed by Sicilianos, op. cit., pp. 453 *et seq.*; and Schweisfurth, "Operations to rescue nationals in third States involving the use of force in relation to the protection of human rights", *German Yearbook of International Law*, pp. 159 *et seq.*

[166] See, among others, Westlake, *International Law*, vol. I, p. 299; Wright, "The meaning of the Pact of Paris", AJIL (1933), pp. 53 *et seq.*; and Jennings, "The *Caroline* and *McLeod* cases", ibid., pp. 83 *et seq.* See also the doctrine cited by Žourek, "La notion de légitime défense en droit international", *Annuaire de l'Institut de droit international, 1975*, p. 20; Brownlie, op. cit., p. 43; Lamberti Zanardi, op. cit., pp. 9 *et seq.* Along somewhat different lines, see Bowett, op. cit., p. 89, who distinguishes "necessity" from "self-defence", including the defence of nationals abroad under the latter; and Ross, op. cit., pp. 247 *et seq.*

[167] See footnote 37 above.

[168] *I.C.J. Reports 1980*, p. 43, para. 93:

"The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations; and to recall that in paragraph 47, IB, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries."

[169] Ronzitti, op. cit., pp. 89 *et seq.* and pp. 108 *et seq.*, who also refers to the less recent literature. Brownlie, op. cit., pp. 341-342 and Lauterpacht, "The international protection of human rights", *Recueil des cours ..., 1947-1*, pp. 5 *et seq.*, appear to be undecided.

[170] Ample study of this practice is to be found in Ronzitti, op. cit., pp. 93 *et seq.*

[171] On this point, see Lattanzi, op. cit., pp. 464 *et seq.*

[172] See footnote 8 above; and Ago, Addendum to eighth report, *Yearbook ... 1980*, vol. II (Part One), p. 13, document A/CN.4/318/Add.5-7.

69. The conclusions reached so far find support in the Commission's comments on article 30 of part 1[173] of the draft. In dealing with countermeasures as part of the circumstances precluding wrongfulness, the Commission stated that "forms of reaction which were permissible under 'classical' international law, such as armed reprisals, are no longer tolerated in peacetime".[174] This position was explicitly supported by various States during the discussion which took place in the Sixth Committee of the General Assembly.[175]

B. The problem of economic and political measures as forms of coercion

70. The third report contains a brief outline of various scholarly opinions regarding the unlawfulness of certain economic and political countermeasures.[176] In order to reach a conclusion on possible limitations to the admissibility of economic and political measures, it is now necessary to examine the practice of States.

71. It is well known that during the San Francisco Conference the Latin American States put forward a proposal that would have extended the scope of Article 2, paragraph 4, of the Charter of the United Nations to the condemnation of economic and political force. The proposal was defeated.[177] This fact alone is not sufficient, however, to conclude that most of the States present at the Conference were categorically opposed to the prohibition of actions of such nature. Opposition to the proposal may have been motivated by its excessively broad definition of economic and political force. Moreover, the attitude of States may have changed since then (as

[173] See footnote 8 above.

[174] *Yearbook ... 1979*, vol. II (Part Two), p. 116, para. 5.

[175] See the statements by Australia (*Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 47th meeting, para. 34); Egypt (ibid., 51st meeting, para. 24); Kenya (ibid., 43rd meeting, para. 4); and Mexico (ibid., 41st meeting, para. 46), according to which the Commission should consider the possibility of stipulating in an additional paragraph that article 30 should not be interpreted as authorizing exceptions to the prohibition on the use of force other than those specified in the Charter of the United Nations. Riphagen had not proposed a specific provision prohibiting armed reprisals. His view was that the clauses of the Definition of Aggression and of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations safeguarding the powers of the Security Council under the Charter "seem[ed] to exclude any automatic assumption that all international obligations 'essential for the protection of fundamental interests of the international community' [among which he included the prohibition of armed force], or even all th[o]se obligations the breach of which, in isolation, is 'recognized as a crime', are immune under international law from being justifiably breached" (*Yearbook ... 1980*, vol. II (Part One) (see footnote 130 above), pp. 126-127, para. 90). Notwithstanding these reflections, on other occasions States have called in the Sixth Committee of the General Assembly for a provision explicitly prohibiting armed reprisals. See, for example, the statements by Czechoslovakia (*Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 43rd meeting, para. 29), Sweden (ibid., *Fortieth Session, Sixth Committee*, 28th meeting, para. 66) and Algeria (ibid., 31st meeting, para. 48).

[176] See *Yearbook ... 1991*, vol. II (Part One) (footnote 1 above), paras. 101 *et seq.*

[177] See *Documents of the United Nations Conference on International Organization*, San Francisco, 1945, vol. VI, pp. 558-559 for the text of the amendment proposed by Brazil, and pp. 334-335 for the discussion in Commission J of 4 June 1945. The attempt by the Latin American countries to prohibit the use of non-armed force has its origin at the end of the last century, within the context of the principle of non-intervention, but has not succeeded in establishing itself in the same way as the prohibition of the use of military force. For a bibliography on the principle of non-intervention in the Americas, see Rousseau, *Droit international public*, vol. IV, pp. 53 *et seq.*

has the membership of the United Nations). Certain General Assembly resolutions and regional instruments are relevant to the issue.

72. General Assembly resolution 2131 (XX) on the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty clearly condemns the use of economic and political force. Paragraph 1 of that resolution not only prohibits armed intervention, but also "all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements". It goes on to state in paragraph 2 that:

2. No State may use or encourage the use of economic, political or any type of measures to coerce another State in order *to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind* ...*

Similarly, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations'[178] proclaims that:

No State may use or encourage the use of economic, political or any other type of measures to coerce another 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* ...*

It must be stressed that owing to the opposition of Western countries, the prohibition of intervention was not dealt with under the principle of the prohibition of the threat or use of force in international relations. A further effort to link a condemnation of economic coercion to the prohibition of force in Article 2, paragraph 4, of the Charter was made by Latin American and socialist countries during the long *travaux préparatoires* of the resolution on the Definition of Aggression.[179] The resolution did not, however, consider economic coercion. The Special Committee on the Question of Defining Aggression declared that a provision in that sense would have been an obstacle to the adoption of the resolution by *consensus.*[180] It is nevertheless interesting to note that the opposition was mainly a result of the extremely broad definition proposed.[181] Prohibitions rather similar to the ones just recalled are to be found in General Assembly resolutions concerning permanent sovereignty over natural resources,[182] the new international economic order,[183] and other topics, such as strict observance of the prohibition of the threat or use of force in

[178] See footnote 82 above.

[179] See the proposal put forward by Bolivia in 1952, according to which

"... unilateral action to deprive a State of the economic resources derived from the fair practice of international trade, or to endanger its basic economy, thus jeopardizing the security of that State or rendering it incapable of acting in its own defence and cooperating in the collective defence of peace"

should have been considered a form of aggression. (Draft resolution submitted to the Sixth Committee of the General Assembly at its sixth session (A/C.6/L.211).)

[180] *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19* (A/9619 and Corr.l). Here again the Western States opposed an express provision on economic coercion.

[181] Statement by the representative of the United Kingdom of Great Britain and Northern Ireland (*Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 54, document A/2211, para. 447).

[182] General Assembly resolutions 1803 (XVII) and 3016 (XXVII).

[183] General Assembly resolutions 3281 (XXIX) and 3201 (S-VI). See also Arangio-Ruiz, "Human rights and non-intervention in the Helsinki Final Act", *Collected Courses ..., I977-IV*, pp. 272 *et seq.*

international relations and of the right of peoples to self-determination;[184] and economic measures as a means of political and economic coercion against developing countries.[185]

73. At the regional level mention must be made of the OAS Charter,[186] which formulates the principle of non-intervention in the very broad terms which were later to appear in General Assembly resolutions 2131 (XX) and 2625 (XXV), including the prohibition of the "use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind" (article 16). A formally non-binding, but none the less very significant, instrument containing a similar prohibition is the Final Act of the Conference on Security and Cooperation in Europe.[187] Here too the prohibition is expressed in the same terms as in the General Assembly resolutions and under the specific title of non-intervention.[188]

74. All the instruments mentioned condemn resort to economic or political coercion when it infringes the principle of non-intervention.[189] Armed and non-armed forcible measures are thus subject to different regimes. As there is a general prohibition of armed coercion, armed countermeasures are unlawful in any case. The prohibition of economic or political coercion only covers non-armed measures with specifically reprehensible aims, such as the "subordination of the exercise of [the target State's] sovereign rights", or the effort to secure "advantages of any kind".[190] Clearly, the condemnation of non-armed coercion only covers those measures of an economic/political nature the consequences of which are likely to cause very serious or even catastrophic disruption to the State against which they are taken.

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[184] General Assembly resolution 2160 (XXI).

[185] General Assembly resolution 40/185. In paragraph 2 thereof, the General Assembly:

"2. *Reaffirms* that developed countries should refrain from threatening or applying trade restrictions, blockades, embargoes and other economic sanctions, incompatible with the provisions of the Charter of the United Nations and in violation of undertakings contracted, multilaterally and bilaterally, against developing countries as a form of political and economic coercion which affects their economic, political and social development."

[186] Signed at Bogotá 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). Article 15 forbids intervention

"... directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." and therefore prohibits

"... not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements".

[187] See footnote 82 above.

[188] Ibid. Principle VI provides, in its third paragraph, that the participating States

"... will ... in all circumstances refrain from any other act of military, or political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind".

See Arangio-Ruiz, "Human rights and non-intervention ...", loc. cit., pp. 274 *et seq.*

[189] Likewise, ICJ, in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) (see footnote 147 above), pp. 108 *et seq*., particularly para. 209 acknowledged the unlawfulness of economic measures only in the context of the principle of non-intervention.

[190] It is true that this perspective does not imply consequences which differ in any way from the economic/political measures considered unlawful to the extent that they include the use of armed force: this has led to the conclusion that the effort to distinguish the two hypotheses in any practical, meaningful way has failed. In this vein, with regard to General Assembly resolution 2625 (XXV), see Arangio-Ruiz, "The normative role of the General Assembly ...". loc. cit., pp. 528-530.

75. This conclusion is supported by other elements of State practice. While economic measures are very frequently resorted to, the complaints of States which have frequently been the target of economic measures have concerned not so much the nature of the action *per se*, but rather the fact that the action amounted to "economic strangulation" or produced otherwise catastrophic effects. A few examples will be provided, but without going into the merits of the cases with regard to the lawfulness of the measures adopted.

76. Although the actions involved did not qualify as countermeasures proper,[191] the positions taken by Bolivia with regard to the sea-dumping of tin by the Soviet Union in 1958[192] and by Cuba with regard to the drastic cutback in United States sugar imports in 1960 are significant.[193] Also of interest are the complaints of some Latin American States, including Argentina,[194] which alleged (before the Security Council) the unlawfulness of the trade sanctions resorted to by Western countries following the outbreak of the Falkland Islands (Malvinas) crisis. The Latin American States in question described the measures as acts of "economic aggression carried out in blatant violation of all international law".[195] The Soviet Union accused the United States of America of "using trade as a weapon against our country" with regard to the measures adopted following the Polish crisis in 1981-1982.[196] In this case the United States maintained that it was not seeking "to bring the Soviet Union to its knees economically".[197] The United States, which is traditionally opposed to a broad interpretation of Article 2, paragraph 4, of the Charter of the United Nations, declared during the debates in the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations that the pressure exerted by the Soviet Union on Poland, which led to the declaration of martial law in the latter

[191] It is not clear whether the State adopting the measure was reacting against a prior unlawful act. However, even in the absence of a prior unlawful act, the statements referred to appear to be relevant, because they highlight the conditions under which the use of economic force is considered unlawful. It must also be borne in mind that in economic matters the borderline between retortion and reprisal is not always easily discernable, as the rights and duties are usually treaty-based and their interpretation is often debatable.

[192] Quoted in McDougal and Feliciano, *Law and Minimum World Public Order—The Legal Regulation of International Coercion*, p. 194, footnote 165.

[193] AJIL, vol. 55, No. 3 (July 1961), pp. 822 *et seq.* Cuba described this action as "constant aggression for political purposes against the fundamental interests of the Cuban economy".

[194] The official position of Argentina was made clear to the Italian Government in a document submitted by the Argentine Embassy in Rome on 14 April 1982 entitled "Reazioni del Governo argentino sulle misure restrittive adottate dalla CEE sull'importazione di suoi prodotti", quoted in De Guttry, "Le contromisure adottate nei confronti dell'Argentina da parte delle Comunità Europee e dei terzi Statied il problema della loro liceità internazionale", *La questione delle Falkland-Malvinas nel diritto internazionale*, p. 357, footnote 38. According to Argentina, the measures adopted by the European Community would amount to an act of economic aggression openly violating the principles of international law and of the United Nations.

[195] Statement by Venezuela (*Official Records of the Security Council, Thirty-seventh Year*, 2362nd meeting, paras. 48-108). See also the statements by Ecuador (ibid., 2360th meeting, paras. 194 *et seq*.), El Salvador (ibid., 2363rd meeting, paras. 104-119); and Nicaragua (ibid., paras. 26-48).

[196] Statement by the Minister of Foreign Trade of the Union of Soviet Socialist Republics, as reported in *Financial Times*, 17 November 1982, p. 1.

[197] Statement by Thomas N.T. Niles, Deputy Assistant Secretary, in hearing before the Subcommittee on Europe and the Middle East of the Committee on Foreign Affairs, *United States House of Representatives, 97th Congress, Second session, 10 August 1982* (Washington, D.C., U.S. Government Printing Office, 1982), p. 8.

country, was precisely a case of unlawful resort to force.[198] The concept of economic coercion used in order to influence another country's conduct has also been resorted to by some States. This concept has been used to describe the measures adopted by South Africa towards neighbouring countries which gave shelter to members of the African National Congress of South Africa, action which South Africa alleged to be in violation of international law.[199] It is also useful to recall some of the official comments by States on the Commission's draft Code of Crimes against the Peace and Security of Mankind. A number of States, while not always clearly distinguishing between crimes of States and crimes of individuals, have stated that the Commission should bear in mind that economic measures could in some instances amount to aggression.[200]

77. To conclude, it is quite obvious that a great variety of forms of economic or political reaction are frequently resorted to and are considered perfectly admissible as countermeasures against internationally wrongful acts.[201] Their admissibility, however, is not totally unlimited. Although the State practice considered does not appear to warrant the conclusion that certain forms of economic and/or political coercion are equivalent to forms of armed aggression, such practice none the less reveals a trend towards the prohibition of economic or political measures which jeopardize the territorial integrity or the political independence of the State against which they are taken.[202]

C. Countermeasures and respect for human rights

78. Although originally confined to belligerent reprisals, limitations of the right of unilateral reaction to internationally wrongful acts on humanitarian grounds have, in recent times, thanks to the unprecedented development of human rights law, acquired a restrictive impact which is second only to the prohibition of the use of force.[203] It is nevertheless much more difficult to determine the precise extent of limitations motivated by humanitarian concerns.

79. The practice considered in the third report may be usefully supplemented by a few recent cases which support the unanimous attitude of writers. During the Falkland Islands (Malvinas) crisis, the United Kingdom froze Argentine assets in the country, but with the specific exception of the funds which would normally be necessary for

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[198] These pressures did not build up to the point of open military action (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 41*(A/37/41), para. 50).

[199] See the statements by Yugoslavia, Madagascar and Thailand (*Official Records of the Security Council, Forty-first Year*, 2660th meeting).

[200] See the statements by Sierra Leone (*Official Records of the General Assembly, Fortieth Session, Sixth Committee*, 23rd meeting, para. 73) and Suriname (ibid., 34th meeting, para. 108).

[201] The admissibility of economic countermeasures has already been maintained by the Commission. In the commentary to article 30 of part 1 of the draft, the Commission stated that:

"... modern international law does not normally place any obstacles of principle in the way of the application of certain forms of reaction to an internationally wrongful act (*economic reprisals**, for example)" (see footnote 174 above).

[202] See, for example, the statement of the Ethiopian representative in the Sixth Committee on article 30 of part 1 of the draft, according to which article 30 deserved more study with regard to economic measures "in view of the possibility that economically strong States could use the rule to the detriment of weaker States under the pretext of legitimate countermeasures" (*Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 43rd meeting, para. 19).

[203] The development of limitations to the right to take reprisals based on humanitarian concerns is amply illustrated by Lattanzi, op. cit., pp. 295-302.

"living, medical, educational and similar expenses of residents of the Argentine Republic in the United Kingdom" and for "[p]ayments to meet travel expenditure by residents of the Argentine Republic leaving the United Kingdom".[204] In declaring, in 1986, a total blockade of trade relations with the Libyan Arab Jamahiriya by way of countermeasures, the United States of America prohibited the export to Libya "of any goods, technology (including technical data or other information) or services from the United States except publications and donations of articles intended to relieve human suffering, such as food, clothing, medicine, and medical supplies intended strictly for medical purposes".[205] Following the murder of an Italian researcher in Somalia, the Foreign Affairs Committee of the Italian Parliament approved, on 1 August 1990, the suspension of any activities in Somalia "not directly aimed at humanitarian assistance".[206] It is, on the other hand, well known that in cases such as those just described, the State taking the action frequently combines reprisals proper with merely retaliatory measures (retortion), the distinction between the two not always being apparent. A rigorous distinction does not, however, appear to be essential. The fact that limitations motivated by humanitarian concerns are taken into account by States even in applying measures of mere retortion (in view of the fact that they consider the interest infringed not to be legally protected) makes the limitation even more significant than it would be if it were confined to reprisals proper.

80. As regards the scope of humanitarian interests within which the limitation is to operate, indications may be drawn from the relevant international instruments. Both the International Covenant on Civil and Political Rights (art. 4, para. 1) and the European Convention on the Protection of Human Rights and Fundamental Freedoms

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[204] Notice issued by the Bank of England on 13 April 1982 (*British Year Book of International Law*, vol. 53 (1982), p. 511).

[205] Executive Order No. 12543 dated 7 January 1986, sect. 1, reproduced in AJIL, vol. 80, No. 3 (July 1986), p. 630. A very similar provision is contained in Executive Order No. 12722, under which the United States took measures against Iraq following the invasion of Kuwait (sect. 2 (*b*) (AJIL, vol. 84, No. 4 (October 1990), p. 903). It is appropriate to recall the much earlier example of the "Martens Clause" in the preamble to the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907, which reads:

"... the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience".

This provision testifies to the existence of a core of *lois de l'humanité* which places a restriction on the conduct of war by the parties. It is noteworthy, as a further example, that in a speech to the National Assembly on 13 December 1949, the then French Minister for Foreign Affairs, Robert Schuman, maintained with regard to a dispute that had arisen with Poland that the French Government

"*... ne pouvait pas penser que, dans un pays démocratique, les autorités eussent le droit d'arrêter des ressortissants étrangers sans aucun motif et sans qu'aucun chef d'inculpation soit retenu contre eux, simplement pour faire pression sur un autre gouvernement*" [... could not believe that in a democratic country the authorities had the right to arrest foreign nationals without cause and without bringing any charges against them, simply in order to exert pressure on another Government] (Kiss, op. cit., vol. VI, p. 16). With regard to the Convention on the Prevention and Punishment of the Crime of Genocide, Sir Hartley Shawcross, representing the United Kingdom before ICJ in 1951, declared that "[t]he Convention ... contain[s] absolute obligations, not subject to any consideration of reciprocity at all" (*I.C.J., Pleadings, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, p. 388). Furthermore, following the killing of 85 young people in Bangui on 18 April 1979 by Emperor Bokassa's personal guard, France suspended a financial cooperation agreement with the Central African Empire in retaliation, with the exception of food, educational and medical assistance programmes ("Chronique ...", RGDIP (1980), p. 364).

[206] As reported in *La Repubblica*, 2 August 1990, p. 14.

(art. 15, para. 1) envisage the possibility of the application of most of their rules being suspended in case of a public emergency which threatens the life of the nation. The possibility of suspension is, however, excluded, according to the Covenant, for the right to life (art. 6), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), the right not to be held in slavery or in servitude (art. 8), the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (art. 11), the right expressed by the principle *nulla poena sine lege* (art. 15), the right to recognition as a person before the law (art. 16), and the right to freedom of thought, conscience and religion (art. 18).[207] The literature on the subject is also useful for the purpose of identifying those human rights which are usually considered to be the "most essential". According to Buergenthal:

> ... an international consensus on core rights is to be found in the concept of "gross violations of human rights" and in the roster of rights subsumed under it. That is to say, agreement today exists that genocide, apartheid, torture, mass killings and massive arbitrary deprivations of liberty are gross violations.[208]

In El Kouhene's opinion there is a *minimum irréductible des droits de la personne humaine* which comprises at least the right to life, the right not to be subjected to torture or degrading treatment and the right not to be reduced to slavery or servitude.[209] Medina Quiroga also believes that some human rights qualify as "core rights" or "basic rights";[210] and Meron does not exclude the possibility of distinguishing various categories of human rights, although he warns that "... except in a few cases (e.g., the right to life or to freedom from torture), to choose which rights are more important than other rights is exceedingly difficult".[211] It would actually seem that the most basic of the human rights ("core rights" or *minimum irréductible*) are those the promotion of and respect for which have become part of customary international law.[212]

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[207] On treaty-based rights from which no derogation is permissible, see Lattanzi, op. cit., pp. 15 *et seq*.

[208] "Codification and implementation of international human rights", *Human Dignity: The Internationalization of Human Rights*, p. 17.

[209] *Les garanties fondamentales de la personne en droit humanitaire et droits de l'homme*, p. 109.

[210] *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System*, p. 13.

[211] "On a hierarchy of international human rights", AJIL (1986), p. 4.

[212] For instance, the customary nature of the prohibition of torture is maintained, *inter alia*, by Doehring, the rapporteur on new problems of extradition at the Cambridge session of the Institute of International Law (*Yearbook of the Institute of International Law*, vol. 60, part II (1983), p. 253) as well as by Lillich ("Civil rights", *Human Rights in International Law*, p. 127), Sieghart (*The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights*, p. 60); Meron (*Human Rights and Humanitarian Norms as Customary Law*, pp. 95-96); Burgers and Danelius (*The United Nations Convention against Torture*, p. 1); and the *Restatement of the Law Third* (see footnote 39 above), sect. 702, pp. 161-175). The view that the prohibition of torture is a matter of *jus cogens* is put forward by Dinstein ("The right to life, physical integrity and liberty", *The International Bill of Rights*, p. 122); O'Boyle ("Torture and emergency powers under the European Convention on Human Rights: Ireland v. the United Kingdom", AJIL (1977), p. 687); and Migliazza ("L'évolution de la réglementation de la guerre à la lumière de la sauvegarde des droits de l'homme", *Collected Courses..., 1972-III*, p. 190). On the characterization of the right not to be subjected to torture as an "essential" human right and on the prohibition of torture by a norm of general international law, see Marchese, *La tortura e i trattamenti crudeli, inumani e degradanti nel diritto internazionale*, chap. IV.

81. It is not considered appropriate, however, for the draft articles to include any enumeration of the "core" human rights which would be immune from countermeasures or the effects thereof. Any enumeration would "crystallize" a rule that must be left open to the evolution of human rights law.

82. The question now is to consider whether any of the human rights not usually included among the so-called core rights, and which may therefore be described in a sense as "less essential", should also remain immune from countermeasures.[213] Some scholars are of the opinion that such a limitation would apply not only to the treaties and rules on human rights or to the rules of the humanitarian law of armed conflict, but also to any rules intended in any way to protect human beings. It would follow that an injured State could not suspend, by way of countermeasure, forms of assistance aimed at improving the condition of the population of the wrongdoing State.[214] According to this opinion, any obligation concerning, *inter alia*, development cooperation should not be infringed by way of countermeasure. Such a broad notion of a limitation based on humanitarian grounds is not, however, shared by a significant number of writers nor is it sufficiently supported by practice. Furthermore, to accept it within the framework of the draft articles on State responsibility would appear to be in contradiction with the need for an overall balance between the introduction of essential limitations to countermeasures, on the one hand, and the need not to deprive States of the possibility to react to breaches of international obligations, on the other.

83. Among suggestions to extend the scope of the limitation of resort to countermeasures which infringe human rights is a proposal that the property rights of foreign nationals should be immune from lawful measures.[215] However, the human rights which should be considered inviolable by countermeasures—the "more essential" human rights—are not understood to include property rights. Recent State practice presents not only cases of expropriation of foreign property by way of countermeasure, but also rather frequent cases where the assets of foreign nationals have been "frozen" by way of reaction to a prior allegedly wrongful act by their State.[216] It is not considered, therefore, that the provision concerning humanitarian limitations should either explicitly include or be read as referring to property rights. This obviously does not imply, however, that the limitations to countermeasures in the area of property rights (and especially to countermeasures of a definitive nature) could not come about through the operation of different rules (such as the general rule of proportionality).

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[213] The possible limitations to countermeasures presently deriving from *multilateral treaty norms* concerning specific human rights which are not included in what has been referred to as *le minimum irréductible* are an entirely different matter. The violation, by way of countermeasure, of those norms which establish obligations qualifying as *erga omnes* obligations within the framework of the treaty would constitute a violation of the right not only of the State alleged to have committed the wrongful act against which the measure is adopted, but also of the other States parties to the treaty. This feature is not unique to human rights norms, but concerns all norms establishing indivisible obligations. It will therefore be dealt with separately, in paras. 92-95 below. In the light of this clarification, draft article 11, paragraph 1 (*c*), of part 2, as proposed by the former Special Rapporteur (see footnote 46 above) is not entirely satisfactory, in so far as it appears to consider the humanitarian restriction to the right to adopt countermeasures only within the context of multilateral treaty norms.

[214] See, for example, Cassese, *Il diritto internationale nel mondo contemporaneo*, p. 271.

[215] *Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above), paras. 111-112.

[216] This practice is referred to, *passim*, throughout the present report. See, for example, footnote 7 above.

D. The question of the inviolability of diplomats and other specially protected persons

84. The main doctrinal positions on this issue and that of the former Special Rapporteur, as reflected in his draft article 12 (*a*),[217] are summarized in the third report.[218] During the thirty-seventh session the members of the Commission expressed a variety of views on this point. Some favoured the proposed draft article 12 (*a*),[219] while others suggested a broadening of its scope.[220] A third group of members found the limitation to be totally unjustified,[221] while a fourth expressed the view that the limitation in question should only apply to a small number of diplomatic immunities.[222]

85. It was hoped to draw more significant, if not decisive indications from recent practice, but in fact it appears to be short on cases of non-compliance by way of countermeasures with obligations affecting the treatment of diplomatic envoys.[223] For example, in 1966 Ghana arrested the members of the Guinean delegation to the OAU Conference, including the Foreign Minister. The arrest, which took place on board a United States commercial aircraft in transit at Accra, was justified by the Government of Ghana as a means to secure reparation for a number of wrongful acts committed by Guinea, including a raid on the premises of the Ghanaian Embassy at Conakry and the arrest of the Ambassador and his wife.[224] Another example is the arrest by Ivorian authorities, in 1967, of the Foreign Minister of Guinea and the Guinean Permanent Representative to the United Nations during a forced interruption of their flight to Guinea. The Ivorian Foreign Minister stated that:

> This arrest ... is a consequence of the arbitrary detention of several Ivory Coast nationals in the Republic of Guinea, and the Ivory Coast keenly regrets being obliged ... to detain the group of Guineans on Ivory Coast soil until the release of Ivory Coast nationals.[225]

86. The basis for the limitation would seem to be found in the very *raison d'être* of the rules on diplomatic relations. The *ratio* for the immunity of diplomatic envoys from countermeasures may, in other words, be identified with the "great importance

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[217] See footnote 46 above.

[218] *Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above), paras. 114 *et seq.*

[219] Calero Rodrigues (*Yearbook ... 1985*, vol. I, 1892nd meeting, para. 39), Barboza (ibid., 1897th meeting, para. 30), Razafindralambo (ibid., 1898th meeting, para. 21) and Lacleta Muñoz (ibid., 1899th meeting, para. 28).

[220] Flitan (ibid., 1893rd meeting, para. 10), Balanda (ibid., 1894th meeting, para. 44) and Yankov (ibid., 1899th meeting, para. 41).

[221] Sucharitkul (ibid., 1891st meeting, para. 41), Sinclair (ibid., 1895th meeting, para. 7) and Njenga (ibid., 1896th meeting, para. 28).

[222] Tomuschat (ibid., 1896th meeting, para. 41), Al-Qaysi (ibid., 1899th meeting, para. 18), Arangio-Ruiz (ibid., 1900th meeting, para. 21) and Jagota (ibid., 1901st meeting, para. 13).

[223] As for less recent practice, it should be recalled that the necessity of preserving diplomatic relations at all costs was repeatedly emphasized in the course of the debates on the amendment of Article 16 of the Covenant of the League of Nations with regard to the regulation of economic measures as sanctions against aggression (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).

[224] *Keesing's ... 1965-1966*, vol. XV, pp. 21738-21740.

[225] *Official Records of the Security Council, Twenty-second Year, Supplement for July, August and September 1967*, document S/8120 and Add.1-2, annex IV, pp. 176-177.

attached to unhindered international communication". Riphagen, for his part, referred to the concept of a "self-contained regime", implying that the only lawful forms of counter-measure would be those envisaged by the regime itself.[226] He thus seemed to share the position expressed by ICJ in the case of *United States Diplomatic and Consular Staff in Tehran*, according to which

> The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.[227]

This *dictum* was rightly found to be lacking in precision.[228]

87. It is submitted that the only rationale for any restriction of the *faculté* to take countermeasures affecting diplomatic envoys can be that of securing the normal channels of communication among States (*ne impediatur legatio*). Certainly, the possibility of effective, uninterrupted communication is an essential requirement of international relations both in times of crisis and under normal conditions. It is precisely from the identification of this element that the Commission should try to determine the impact of the restriction in question. It is evident that the obligations that should not be infringed by way of countermeasures could not include *all* the international obligations deriving from the rules of diplomatic law without distinction, but only those with which it is essential to comply in order to preserve the normal operation of diplomatic channels.

88. It is legitimate to ask, of course, whether any limitation of the *faculté* to take countermeasures in the area of diplomatic relations may perhaps have been subsumed by limitations of a different nature, such as those relating to the protection of human rights, on the one hand, and, where they do not overlap with the latter, those deriving from peremptory rules, on the other hand. Some of the basic rules affecting specially protected persons overlap with rules protecting human rights in general, particularly with any such rules of a peremptory character. It seems reasonable to assume, however, that the rules on the inviolability of diplomatic envoys (and other protected persons) have a specific *raison d'être* of their own. They actually came into existence long before the rules on the protection of human rights and the rules of *jus cogens.* It would therefore seem correct to maintain the specific corresponding limitation of the *faculté* to adopt countermeasures, at least as a residual limit.

E. The relevance of *jus cogens* and *erga omnes* obligations

89. This report has thus identified the limitations to the lawfulness of countermeasures which derive from (*a*) the prohibition of the use of armed force and of any economic or political coercion which endangers the territorial integrity or the political independence of the State against which it is directed; (*b*) the inviolability of fundamental human rights; and (*c*) norms aimed at ensuring the "normal processes of

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[226] The opinion of the former Special Rapporteur is recalled in para. 115 and footnote 237 of the third report (*Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above)).

[227] *I.C.J. Reports 1980* (see footnote 37 above), p. 40, para. 86.

[228] Röling (*Netherlands Yearbook of International Law* (1980), p. 147) quoted in the third report (*Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above)), para. 115, footnote 235. The same view seems to be shared by Dominicé (ibid.).

bilateral or multilateral diplomacy". It seems unnecessary at this point to elaborate at any length on the existence of that other general limitation which derives from the legal necessity to comply with any peremptory rule of general international law.[229]

90. It is essential to recall, however, that the Commission has implicitly recognized the existence of the restriction in question, in part 1 of the draft articles, first, by including among the circumstances precluding wrongfulness the fact that "the act constitutes a *measure legitimate under international law** ... in consequence of an internationally wrongful act..." (art. 30);[230] secondly, by stressing the inviolability of peremptory norms even when there is the *consent* of the State in favour of which the infringed obligation exists (art. 29, para. 2);[231] and thirdly, in case of a *state of necessity* (art. 33, para. 2).[232] The special attention paid by the Commission to the norms in question confirms the conclusion clearly emerging from the adoption, by a large majority, of articles 53 and 64 of the Vienna Convention on the Law of Treaties,[233] namely that "the very existence of such a category of norms implies that there is a general interest in international society that they should be respected as much as possible".[234] It is therefore deemed appropriate to include in the draft a provision analogous to the one proposed by the former Special Rapporteur in draft article 12 (*b*)[235] prohibiting resort to any countermeasure which is "inconsistent with a peremptory rule of general international law". It is difficult not to agree with those who believe that "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".[236]

91. Considering the object of some of the limitations described in the previous sections of this chapter (such as, for example, the prohibition of resort to armed force and the obligation to respect fundamental human rights), a provision concerning the *jus cogens* limitation would presumably end up applying to cases covered by those limitations. However, not all the limits referred to in the preceding sections may be considered as deriving from rules of *jus cogens*; nor, conversely, is the *jus cogens* limit exhausted by the specific limitations envisaged so far. On the one hand, the *jus cogens* limitation already covers subject-matters not included in the specific limitations mentioned (for example, the prohibition of countermeasures deriving from

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[229] Ibid., paras. 118-120.

[230] See footnote 8 above.

[231] Ibid.

[232] Ibid.

[233] Article 53 (adopted with 87 votes in favour, 8 against and 12 abstentions) reads:

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Article 64 (adopted with 84 votes in favour, 8 against and 16 abstentions) reads:

"If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

[234] Gaja, "*Jus cogens* beyond the Vienna Convention", *Collected Courses ..., 1981-III*, p. 297.

[235] Riphagen, sixth report (*Yearbook ... 1985*, vol. II (Part One) (see footnote 11 above), draft article 12 and commentary thereto, p. 13).

[236] Gaja, loc. cit., p. 297. On this point see also third report (*Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above)), para. 119.

the peremptory rule on self-determination of peoples). On the other hand, in view of its historically relative nature, the *jus cogens* limitation could extend, reduce, or modify its scope in the course of time. In order to complete the picture of the limitations, it is therefore necessary to adopt ad hoc provisions relating to each of the "substantive limitations" considered in the preceding sections, as well as one on the general limit deriving from *jus cogens.*

92. For a number of reasons the draft articles should include, in addition to the limitation to countermeasures deriving from *jus cogens*, a further limitation based on the *erga omnes* structure of certain international legal obligations.[237] It is well known—and will be further explained later[238]—that the concept of *erga omnes* obligation is not characterized by the importance of the interest protected by the norm (as is typical of *jus cogens*) but rather by the "legal indivisibility" of the content of the obligation, namely by the fact that the rule in question provides for obligations which bind simultaneously each and every State concerned with respect to all the others. This legal structure is typical not only of peremptory norms, but also of other norms of general international law and of a number of multilateral treaty rules (*erga omnes partes* obligations).[239]

93. The consequence of the legal structure of *erga omnes* rules with regard to the regime of unilateral reactions to internationally wrongful acts is that any measure adopted by a State *vis-à-vis* a wrongdoing State infringes not only the right of the latter but also the rights of all the other parties to which the *erga omnes* rule that has been infringed applies. This inequitable consequence was expressly envisaged, for example, in the course of the debates on what was to become article 60 of the Vienna Convention on the Law of Treaties. Paragraph 5 of that article does not allow the termination or suspension of treaty provisions relating to the protection of the human person contained in treaties of a humanitarian character. During the *travaux préparatoires*, while some States declared that this eventuality was already covered by articles 43 (Obligations imposed by international law independently of a treaty) and 53 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)), the prevailing opinion was that the exception to the normal rules on termination and suspension of treaties (art. 57) on humanitarian grounds was connected with the *erga omnes* structure of the rules in question.[240]

94. The problem of restricting countermeasures infringing *erga omnes* obligations was considered by Riphagen in draft article 11, paragraphs 1 (*a*) and (*b*) and 2, of part 2. According to these provisions:

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[237] Ibid., para. 121.

[238] See chap. VIII below.

[239] See *Yearbook ... 1991*, vol. II (Part One) (footnote 1 above), para. 121, and chap. VIII below.

[240] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968* (United Nations publication, Sales No. E.68.V.7), pp. 352 *et seq*., and ibid., *Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6), pp. 111 *et seq*. The provision goes back to a Swiss proposal and was based on the concern of the International Committee of the Red Cross that non-compliance with the Conventions on humanitarian law of armed conflicts should be excluded. This explains the reference in the article to treaties on humanitarian law. However, the reasons given for the inclusion of such a provision in article 60 indicate that it was not the subject-matter (humanitarian law), but the structure of the rules in question that was found to be most relevant.

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 of 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;

...

2. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act if the multilateral treaty imposing the obligations provides for a procedure of collective decisions for the purpose of enforcement of the obligations imposed by it, unless and until such collective decision, including the suspension of obligations towards the State which has committed the internationally wrongful act, has been taken; in such case, paragraph 1 (*a*) and (*b*) do not apply to the extent that such decision so determines.[241]

95. While agreeing with the previous Special Rapporteur on the need to include a provision forbidding countermeasures in violation of *erga omnes* obligations, at least by way of progressive development and for the protection of "innocent" States,[242] it is felt, however, that paragraphs 1 (*a*) and (*b*) and 2 of draft article 11 do not provide a satisfactory solution. Apart from the lack of a clear distinction between the three hypotheses covered by the paragraphs quoted, which overlap in many respects, the provisions in question only consider *erga omnes* obligations provided for in multilateral treaties. They ignore those *erga omnes* obligations presently in existence and likely to undergo further development in the future which have not attained the status of peremptory norms but derive from norms of general, customary or unwritten law.[243] It is therefore believed that the provision on the inadmissibility of measures in violation of *erga omnes* obligations—or, at any event, of the rights of States other than the wrongdoing State—should be drafted in such terms as to cover all *erga omnes* obligations, whether treaty-based or customary.

CHAPTER VI

VI. PROPOSED DRAFT ARTICLES

96. The following draft articles are proposed:

Article 13. Proportionality

Any measure taken by an injured State under articles 11 and 12 shall not be out of proportion to the gravity of the internationally wrongful act and of the effects thereof.

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[241] *Yearbook ... 1985*, vol. II (Part One) (see footnote 11 above), article 11 and commentary thereto, p. 12.

[242] It is useful to recall that the Institute of International Law, as early as 1934, had proposed, in article 6, paragraph 3. of its well-known resolution entitled "Régime des représailles en temps de paix" (see footnote 5 above) 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" (emphasis added).

[243] See chap. VIII below.

Article 14. Prohibited countermeasures[244]

1. An injured State shall not resort, by way of countermeasure, to:

(a) **the threat or use of force [in contravention of Article 2, paragraph 4, of the Charter of the United Nations];**

(b) **any conduct which:**

(i) is not in conformity with the rules of international law on the protection of fundamental human rights;

(ii) is of serious prejudice to the normal operation of bilateral or multilateral diplomacy;

(iii) is contrary to a peremptory norm of general international law;

(iv) consists of a breach of an obligation towards any State other than the State which has committed the internationally wrongful act.

2. The prohibition set forth in paragraph 1 (*a*) includes not only armed force but also any extreme measures of political or economic coercion jeopardizing the territorial integrity or political independence of the State against which they are taken.

CHAPTER VII

VII. THE SO-CALLED SELF-CONTAINED REGIMES

97. As indicated in the third report, the so-called self-contained regimes are characterized by the fact that the substantive obligations they set forth are accompanied by special rules concerning the consequences of their violation.[245] The analysis of international practice reveals that such rules, which are mostly, if not exclusively, treaty rules, are not infrequent in multilateral treaties, particularly in the instruments establishing international organizations or isolated organs. As regards the forms of reaction against violations envisaged, they do not differ in substance from the forms of unilateral reaction usually resorted to by States under general international law. Their main feature is that their implementation frequently involves an international body which has the role either of monitoring compliance or of intervening to some degree in the determination, direct application or authorization of

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[244] This is the reformulation of the draft article submitted by the Special Rapporteur. The original version read:

"*Article 14. Prohibited countermeasures*

"An injured State shall not resort, by way of countermeasure to:

"(*a*) the threat or use of armed force in breach of the Charter of the United Nations;

"(*b*) any other conduct susceptible of endangering the territorial integrity or political independence of the State against which it is taken;

"(*c*) any conduct which:

"(i) is not in conformity with the rules of international law on the protection of fundamental human rights;

"(ii) is of serious prejudice to the normal operation of bilateral or multilateral diplomacy;

"(iii) is contrary to a peremptory norm of general international law;

"(iv) consists of a breach of an obligation towards any State other than the State which has committed the internationally wrongful act."

[245] *Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above), paras. 84-88.

measures.[246] Whatever the variations, the main question is whether the rules constituting the so-called self-contained regime affect, and if so in what way, the rights of the participating States to resort to the countermeasures provided for under general international law.[247] As it is difficult to deal with the issue *in abstracto*, the best course of action is to look at some of the allegedly self-contained regimes.

98. The most important instance of an allegedly "self-contained" regime appears to be the system represented by the "legal order" of EEC.[248] With regard to this system, the notion that the member States have forfeited their liberty to resort to unilateral measures under the general international law of countermeasures has been repeatedly asserted by the Court of Justice of the European Communities, the most interesting pronouncements being consolidated cases 90-91/63 against Belgium and Luxembourg[249] and case 232/78 against France.[250] Some writers share the Court's

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[246] The various possibilities are illustrated by Lattanzi, "Sanzioni internazionali", *Enciclopedia del diritto*, pp. 559 *et seq.*, and by the literature referred to therein.

[247] As noted in the third report, the problem might also arise with regard to the substantive consequences of a violation of the rules of the so-called self-contained regime (*Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above), paras. 86-88).

[248] References to the EEC system as a "self-contained regime" are made, *inter alia*, by Riphagen, in his third report (*Yearbook ... 1982*, vol. II (Part One), document A/CN.4/354 and Add.1-2, paras. 72-73 and footnote 53) and fourth report (*Yearbook ... 1983*, vol. II (Part One) (see footnote 51 above), para. 120); Reuter and Combacau, *Institutions et relations internationales*, p. 386; Sørensen, "Eigene Rechtsordnungen—Skizze zu einigen systemanalytischen Betrachtungen über ein Problem der internationalen Organisation", *Europäische Gerichtsbarkeit und nationale Verfassungsgerichtbarkeit, Festschrift zum 70. Geburtstag von Hans Kutscher*, p. 431; and Simma, "Self-contained regimes", *Netherlands Yearbook of International Law* (1985), pp. 125 *et seq.*

[249] In this case the Court rejected the argument of Belgium and Luxembourg according to which the inactivity of the Commission in regulating certain aspects of dairy products trade would constitute a violation of the obligations established by the Treaty; a violation which would, in turn, justify the violation by the latter of obligations set forth in the same Treaty. According to the Court, the EEC Treaty

"establishes a new legal order which regulates the powers, rights and duties of such persons [the persons to whom the Treaty applies], as well as the necessary procedure for determining and adjudicating upon any possible violation thereof".

In consequence ... *en dehors des cas expressément prévus, l'économie du traité comporte interdiction pour les États membres de se faire justice eux-mêmes* [... save in the cases expressly provided for, the terms of the Treaty prohibit the Member States from taking the law into their own hands] (*Commission of the European Economic Community* v. *the Grand Duchy of Luxembourg and the Kingdom of Belgium*, judgement of 13 November 1964 (Cour de justice des Communautés européennes, *Recueil de la jurisprudence de la Cour, 1964*, Luxembourg, pp. 1217 *et seq*.) Judgement published in French only. For account of the cases in English, see *Common Market Law Reports [1965]*, vol. 4 (London), Consolidated cases 90-91/63 (Import of milk products), *EEC Commission* v. *Luxembourg and Belgium*, pp. 58 *et seq*.).

[250] In this case, which concerns the institution by France, in violation of the Treaty, of a national regime for the production of lamb meat, the Court sums up its opinion as follows:

"The French Republic cannot justify the existence of such a system with the argument that the United Kingdom, for its part, has maintained a national organization of the market in the same sector. If the French Republic is of the opinion that that system contains features which are incompatible with Community law it has the opportunity to take action, either within the Council, or through the Commission, or finally by recourse to judicial remedies with a view to achieving the elimination of such incompatible features. A Member State cannot under any circumstances unilaterally adopt, on its own authority, corrective measures or measures to protect trade designed to prevent any failure on the part of another Member State to comply with the rules laid down by the Treaty" (*Commission of the European Communities* v. *French Republic*, "Mutton and lamb", judgement of 25 September 1979 (Court of Justice of the European Communities, *Reports of Cases before the Court 1979-8* (Luxembourg), p. 2739)).

view.[251] Others, however, maintain that the *faculté* to resort to the remedies afforded by general international law cannot be excluded whenever the EEC machinery has been used to no avail.[252]

99. It must be stressed that the only case-law available is that of the Court of Justice of the European Communities itself, that is to say, of a judicial body which is an integral part of the allegedly self-contained system. No occasion has arisen, so far, for any pronouncement by an external judicial body. It is significant, furthermore, that a full espousal of the Court's view has so far come mainly from scholars specially concerned with European Community law. By contrast, scholars whose principal interest lies with public international law hold the opposite view. It is legitimate to wonder whether the hypothesis in question is only conceivable within the framework of the Community "legal system", or, more precisely, within the framework of the international legal relationships set up among the participating States by the European Community treaties.[253] Looked at from outside, from the viewpoint of general international law, these treaties do not differ in essence from any other treaties. They remain subject to all the rules of the law of treaties. The element of reciprocity is not set aside, and even the choice of the contracting States to be the members of a "community" cannot, as a matter of international law, be considered to be irreversible (at least as long as those States remain sovereign entities and legal integration is not achieved).

100. It would seem to follow that the EEC system does not really constitute a self-contained regime, at least not for the purposes of the regime of countermeasures against violations under general international law. The claim that it would actually be legally impossible for the States belonging to the Community to "fall back" upon the

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[251] Compare, *inter alia*, Schwarze, "Das allgemeine Völkerrecht in den innergemeinschaftlichen Rechtsbeziehungen", *Europarecht* (1983), pp. 1-39; Ipsen, "Über Supranationalität", in *Festschrift für Ulrich Scheuner zum 70. Geburtstag*, 1973, pp. 211 *et seq.*; Pescatore, *L'ordre juridique des Communautés européennes : Étude des sources du droit communautaire*, p. 165, and "Aspects judiciaires de 'l'acquis communautaire'", *Revue trimestrielle de droit européen*, 1981, pp. 617-651, particularly pp. 626-628.

[252] As explained by Simma:

"According to what is probably the leading view in [the] literature, however, measures of reprisal or an *exceptio non adimpleti contractus* (article 60 of the Vienna Convention on the Law of Treaties) would not become admissible even at this point [namely, after the Court of Justice of the European Communities had found a Member State in violation of an obligation arising from a previous judgement of the Court]. Other authors are more cautious and consider, though with marked hesitation, a fall-back on the countermeasures provided in general international law as an *ultima ratio* after all the legal and political means within the EEC system have been exhausted to no avail." (Loc. cit., p. 126.) The more cautious authors include Simma himself, according to whom

"... the general regime of State responsibility can only be again called to the foreground after all remedies provided in the 'subsystem' have been exhausted without any positive results and when further tolerance of the imbalance of costs and benefits caused by non-performance can no longer bona fide be expected from an injured party. Thus, not even in the case of EEC law do we find the total and final 'decoupling' of a 'self-contained regime' for the general rules" (ibid., pp. 128-129).

A similar position is taken by Conforti in his commentary on article 1 of the Treaty instituting the European Coal and Steel Community, *Trattato istitutivo della Comunità Europea del Carbone e dell'Acciaio: Commentario*, vol. I, pp. 37-39. In the sense that resort to "self-help" measures would be justified when the Member State does not comply with its obligations following a judgement by the Court, see also Kapteyn and Verloren van Themaat, *Introduction to the Law of the European Communities after Accession of New Member States*, p. 27.

[253] *Treaties establishing the European Communities* (Luxembourg, Office for Official Publications of the European Communities, 1987).

measures afforded by general international law even in case of failure of the institutional EEC remedies does not really seem to be justified, *at least* from the viewpoint of general international law. White's belief that the claim rests upon a prevalence of "policy considerations" over "legal reasoning" would appear to be correct.[254]

101. The other two examples of allegedly self-contained regimes, namely the rules on the protection of human rights and those governing diplomatic relations and the status of diplomatic envoys, are even less convincing.[255]

102. The "self-contained" regime of human rights would consist of treaty-based rules, more precisely of one or other of the treaty-based systems in force at the worldwide or regional level.[256] The literature is divided but, with the exception of writers from the socialist countries, the negative view decidedly predominates.[257]

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[254] Legal consequences of wrongful acts in international economic law", *Netherlands Yearbook of International Law* (1985), pp. 137 *et seq*., particularly p. 162.

[255] Riphagen considered the three cases in question as instances of "objective regimes". (See *Yearbook ... 1983*, vol. II (Part One) (footnote 51 above), paras. 89-91.)

[256] Actually, the discussion centres not so much upon the hypothesis of a single self-contained regime resulting from a combination of the various human rights conventions, as upon that of a number of self-contained regimes, one for each of the various human rights "systems" in existence (e.g. the International Covenants, the European Convention, etc.).

[257] According to Henkin:

"The effort to create an international law of human rights has been largely a struggle to develop effective machinery to implement agreed norms. Arduous effort had not brought forth machinery of notable effectiveness. It would be ironic if the meager successes in establishing such machinery should become the basis for interpreting the agreements as excluding other traditional means of enforcement, where they are most needed, and for denying them to States willing to use them ...

"No human rights agreements, even those that establish elaborate enforcement machinery, expressly or by clear implication exclude the ordinary inter-State remedies. In fact, the principal human rights agreements clearly imply the contrary: that every party to the agreements has a legal interest in having it observed by other parties and can invoke ordinary legal remedies to enforce it." ("Human rights and 'domestic jurisdiction'", *Human Rights, International Law and the Helsinki Accord*, p. 31.)

According to Simma:

"It has yet to be proved that such a 'decoupling' of human rights treaties from the enforcement processes of general international law was actually intended by the negotiating States. As long as such proof is not furnished one has to stick to the premise that multilateral treaties for the protection of human rights, like all other treaties, embody correlative rights and duties between the contracting parties *uti singuli*, resulting in a duty on each party to fulfil its obligations *vis-à-vis* all the others, and conversely, in a right for each party to demand compliance from every other party and, if necessary, to enforce it through countermeasures." (Loc. cit., p. 133.)

According to Lattanzi,

"...whenever the procedures provided for in the treaty do not manage to secure respect for human rights ... States have no alternative but to resort to the coercive measures available to induce [the author State] to fulfil [its] obligations" (op. cit., p. 261, footnote 41).

The *Restatement of the Law Third* (see footnote 39 above), states that:

"(1) A State party to an international human rights agreement has, as against any other State party violating the agreement, the remedies generally available for violation of an international agreement, *as well as** any special remedies provided by the agreement." (Sect. 703 (Remedies for Violation of Human Rights Obligations), p. 175. See also reporters' notes, 2, at pp. 178-179.) The contrary view is taken by Maddrey, together with a number of writers from the socialist countries:

"There are two barriers to the application of the law of reprisals to human rights enforcement. First, because there is a lack of consensus concerning the substantive norms of human rights law ... This uncertainty about the substantive content of human rights law and the binding nature of accepted norms makes it difficult to determine when a breach gives rise to a permissible reprisal.

Some writers address themselves to the two somewhat more plausible cases of a self-contained human rights regime: the International Covenant on Civil and Political Rights "system" of 1966 and the European Convention on the Protection of Human Rights and Fundamental Freedoms "system" of 1950.[258]

103. The International Covenant on Civil and Political Rights has been considered in this context by Tomuschat,[259] Meron,[260] Simma,[261] and others. The present writer is inclined to share their view that the provision of article 44 of the Covenant[262] is sufficient to exclude the Covenant "system" from being properly categorized as a self-contained regime.

104. On the European Convention "system", which is the most advanced among the existing human rights instruments, scholars take a more cautious approach. The prevailing view is that in this case too the normal rights and remedies, namely the general international legal rights and remedies, essentially remain intact.[263] An

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"Second, some jurists contend that under the customary law of reprisals only those States directly affected by an act of the offending State are allowed to take retaliatory action. Because human rights complaints involve a State's treatment of its own nationals, there is no direct injury to another State under traditional terms. Other jurists have argued that the breach of international law creates a public right of reprisal, one allowing all nations to take retaliatory action. But the lack of consensus on this point makes it difficult to determine when a right to intervene has arisen. With these two difficulties, therefore, the law of reprisals affords little legitimacy to unauthorized actions taken to promote human rights." ("Economic sanctions against South Africa: problems and prospects for enforcement of human rights norms", *Virginia Journal of International Law* (1982), pp. 362-363.)

Along the same lines, Frowein is cited by Meron, op. cit., p. 229, footnote 305, as the principal representative of the view that the remedies envisaged by human rights instruments exclude resort to other means.

[258] According to Meron, in fact: "Whether a particular human rights treaty excludes remedies dehors the treaty depends ... not on abstract legal theory but on good faith interpretation of the terms of the treaty… "(ibid., p. 231).

[259] In Tomuschat's view, the hypothesis that article 41 represents an exclusive arrangement excluding every other method for the implementation of the treaty should be expressly denied, because this would have the result that those States which have not chosen to recognize the competence of the Committee to receive and consider communications from a State Party claiming that another State Party is not fulfilling its obligations under the Covenant, cannot be called to account for their conduct, except within the framework of the provision on the submission of reports. The burden of proof rests on those who maintain such a derogation (deviation) from general international legal rules ("Die Bundesrepublik Deutschland und die Menschenrechtspakte der Vereinten Nationen", *Vereinte Nationen*, 1978, p. 8).

[260] According to this writer,

' 'In view of the rather limited nature of the settlement of disputes contained in the ... Covenant, it is not surprising that article 44 of the Covenant liberally allows States parties that have recognized the competence of the Human Rights Committee with regard to inter-State complaints under article 41 to resort to other means of settling disputes concerning the Covenant's interpretation and application, including the ICJ." (Op. cit., p. 232.)

[261] Loc. cit.

[262] Article 44 of the International Covenant on Civil and Political Rights reads:

"The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them".

[263] Henkin, loc. cit., pp. 32-33. Simma believes, more generally, that the presence of human rights instruments has not determined a "decoupling" (of remedies) with general international law; he adds, however, that

indication of this is the provision of article 62 of the Convention, which (albeit under a special agreement) expressly envisages the right to resort to dispute settlement procedures other than those set up by the Convention.[264] From this point of view the European system is open to general international remedies.

105. With reference to both human rights "systems"—and implicitly any similar instruments—the present writer has had occasion to affirm that the obligations set forth therein "... are subject to the general rules of international law with regard to implementation, regardless of any ad hoc procedures made available to single individuals or groups, or to States themselves...".[265] Henkin, with further reference to the procedures envisaged either by the Covenant or by the European Convention, states that "they were clearly intended to supplement not to supplant general remedies available to one party against violation by another...".[266]

106. The study of some recent cases seems to lend support to the view that there is no such thing as a worldwide or regional self-contained regime for human rights.[267]

"In the case of a treaty like the European Convention, which provides an effective system of individual and State complaints, the necessity of resorting to enforcement according to general international law will hardly ever arise." (Loc. cit., p. 133.)

Meron, for his part, warns that

"... the European Convention on Human Rights, which establishes a very effective settlement of disputes system, explicitly excludes resort to means of settlement dehors the Convention, such as the International Court of Justice or United Nations human rights organs. Article 62 of the Convention provides that States parties, 'except by special agreement', may submit disputes concerning the interpretation or application of the Convention only to a means of settlement provided in the Convention." (Op. cit., pp. 232-233.)

The same writer, however, states that

"The inclusion of article 62 in the Convention indicates the drafters' understanding that, in absence of this provision, States parties would be permitted to use settlement of disputes procedures dehors the Convention." (Ibid., p. 233.)

[264] This article reads:

"The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of a petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention."

[265] Arangio-Ruiz, "Human rights and non-intervention . . ., loc. cit., p. 247.

[266] Henkin, loc. cit., p. 31. It is not without interest, in particular as regards the allegedly self-contained regime represented by the system of the European Convention on the Protection of Human Rights and Fundamental Freedoms, that the European Court of Human Rights applies the provisions of the Convention concerning the substantive consequences of violations (notably article 50) as embodying the general rules of international law governing such consequences (Lattanzi, op. cit., pp. 207 *et seq.* and pp. 236 *et seq*.). See, *inter alia*, the following cases: *Engel and others* (Publications of the European Court of Human Rights, *Series A: Judgments and Decisions, Judgment of 23 November 1976*, vol. 22, p. 70); *Deweer* (ibid., *Judgment of 27 February 1980*, vol. 35, p. 31); *König* (ibid., *Judgment of 10 March 1980*, vol. 36, p. 20); and *Artico* (ibid., *Judgment of 13 May 1980*, vol. 37, p. 22).

[267] Following the murder in Washington, D.C. of the former Chilean Foreign Minister by Chilean agents, the United States of America in 1976 suspended the military assistance agreement with Chile (case quoted in Lattanzi, op. cit., pp. 322-324). In 1975, Mexico suspended consular relations with Spain following the passing of death sentences on eleven Basque separatists ("Chronique ...", RGDIP (1976), pp. 590 *et seq*., in particular p. 595). Countermeasures *stricto sensu* seem also to have been involved in the French decision of 23 May 1979 to suspend any form of military assistance to the Central African Empire—a State party to the International Covenant on Civil and Political Rights—following the execution on 18 April of that year of 85 young people by Emperor Bokassa's personal guard. On 17 August 1979, following confirmation of the facts by a Commission of five African magistrates, France extended the measures to all financial assistance to the Empire (with the exception of food, medical and educational assistance programmes) (ibid. (1980), pp. 363-364, and Lattanzi, op. cit., p. 322). A

The only difficulty with such cases is that it is not always easy to distinguish cases of countermeasures *stricto sensu* from cases of mere retortion.[268]

107. From the point of view of the existence of a (regional) self-contained regime, paragraph 267 of the ICJ judgment in the *Military and Paramilitary Activities in and against Nicaragua* case is also inconclusive. With regard to charges of human rights violations by Nicaragua, the Court stated, *inter alia*, that

> ... where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves.
>
> ...
>
> The political pledge by Nicaragua [to respect human rights] was made in the context of the Organization of American States, the organs of which were consequently entitled to monitor its observance. The Court has noted above (paragraph 168) that the Nicaraguan Government has since 1979 ratified a number of international instruments on human rights, and one of these was the American Convention on Human Rights (the Pact of San José, Costa Rica). The mechanisms provided for therein have functioned. The Inter-American Commission on Human Rights in fact took action and compiled two reports ... following visits by the Commission to Nicaragua at the Government's invitation. Consequently, the Organization was in a position, if it so wished, to take a decision on the basis of these reports.[269]

Nothing is said here about a "self-contained" inter-American human rights regime, in any case, not in the sense of a "closed legal circuit". There is simply the acknowledgement of the existence of regional human rights arrangements and

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countermeasure proper was also taken by the Netherlands Government when it suspended all agreements in force with Suriname—a State party to the Covenant—following the unexplained death of 15 prominent figures in that country. The Dutch Minister for Development Cooperation declared in Parliament in August 1983 that

"Before terminating this suspension [of agreements with Suriname], the Netherlands Government expects Suriname to take positive steps towards the restoration of democracy and law and order, respecting at the same time fundamental human rights and providing structures capable of preventing a recurrence of what happened in December 1982." ("Netherlands State practice", *Netherlands Yearbook of International Law*, vol. XV (1984), p. 321, sect. 6.4341.)

Also of interest is the statement by a spokesman of the Federal Republic of Germany (1982), according to which:

"*Der Internationale Pakt über bürgerliche und politische Rechte ist ein völkerrechtlicher Vertrag, auf den die Regeln über völkerrechtliche Verträge Anwendung finden. Nach diesen Regeln richten sich die Rechte und Pflichten der Vertragsparteien in erster Linie nach den in dem Vertrag selbst getroffenen Bestimmungen. Dies gilt auch für den Fall der Nichterfüllung von Verpflichtungen. Ergänzend kommt das allgemeine Völkerrecht zur Anwendung.*" (Bundestags-Drucksache, 9/1981, p. 2—cited in Simma, loc. cit., p. 134.)

[268] As recalled by Lattanzi, Anzilotti saw the issue in the clearest terms long before the proliferation of human rights instruments. In 1906 he wrote:

"*... rien ne s'oppose, et les exemples ne manquent pas, à ce qu'un Etat s'oblige envers d'autres États à traiter ses propres sujets d'une manière déterminée, en leur octroyant notamment certains droits. L'État, alors, est internationalement tenu de se comporter envers ses nationaux de la façon promise; le refus de leur accorder les droits annoncés constituerait un défaut d'exécution de l'obligation, qui autoriserait les États envers lesquels l'engagement a été pris à en réclamer l'accomplissement par tous les moyens du droit international*" [There is nothing to prevent a State—and there are all too many examples of this—from entering into an undertaking with other States to treat its own subjects in a given way, in particular by granting them certain rights. The State is then internationally bound to conduct itself towards its nationals as promised; refusal to grant them the rights stated would amount to failure to perform the obligation, and this would entitle the States with which the undertaking was entered into to call for it to be performed by all means available under international law] ("La responsabilité internationale des États à raison des dommages soufferts par des étrangers", RGDIP (1906), p. 10).

[269] *I.C.J. Reports 1986* (see footnote 147 above), p. 134.

machinery. The very fact of stressing that such arrangements and machinery had functioned seems to imply that a "fall-back" on general remedies would have followed had it been otherwise.

108. According to a possible interpretation of a *dictum* of ICJ, another case of an allegedly self-contained regime would be the law of diplomatic relations and, in particular, of the privileges and immunities of diplomatic envoys and premises.

109. According to the *dictum* of ICJ in the *United States Diplomatic and Consular Staff in Tehran* case,

> The rules of diplomatic law ... constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious.[270]

It seemed to follow, according to the Court, that a State injured by a violation of another State's duty in the field of diplomatic relations could only "employ the remedies placed at its disposal by diplomatic law specifically".[271]

110. Nevertheless, doubts have been expressed in many quarters about the self-contained nature of diplomatic law.[272] The most convincing is the theory according to which any real limitations on "diplomatic" countermeasures, so to speak, derive not from any "specificity" of diplomatic law, but simply from the normal application, in the area of diplomatic law, of the general rules and principles constituting the regime of countermeasures (namely the various kinds of general limitations; the absolute limitation of *jus cogens*; the limitations imposed by the need to respect human rights; and possibly specific limitations deriving from *given rules* of the law of diplomatic relations). This is the position taken by Simma[273] and, to a certain extent, Dominicé.[274]

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[270] *I.C.J. Reports 1980* (see footnote 37 above), p. 40, para. 86.

[271] Ibid, para. 87.

[272] According to Simma:

"There is no question that serious breaches of diplomatic law such as, for instance, acts of State terrorism committed by means of diplomatic agents, may justify countermeasures (reprisals) in the form of suspension of obligations towards the violator in other fields. Therefore, even if one agrees with the opinion of the Court that countermeasures to abuses of diplomatic immunity may not affect the immunity of the diplomats concerned, this legal construction can be labelled 'self-contained' only in a very narrow sense." (Loc. cit., pp. 120-121.)

Tomuschat has stated that:

"... only a hard core of the immunities of diplomatic and consular missions and staff should be protected ... other immunities might be legitimately restricted by way of reciprocity or reprisal." (*Yearbook ... 1985*, vol. I, 1896th meeting, para. 41.)

[273] "[I]t is indeed to the *general* limits of countermeasures to internationally wrongful acts that the Commission, in this writer's opinion, should also subject the secondary rules of diplomatic law: i.e. proportionality, *jus cogens* and the higher law of the UN Charter" (loc. cit., p. 122).

[274] "[*P*]*our affirmer qu'une violation initiale du droit diplomatique ne peut en aucune manière autoriser l'État qui en est la victime à le transgresser, à son tour, l'argument du régime se suffisant à lui-même n'est pas nécessaire*" [The assertion that an initial violation of diplomatic law can on no account authorize the victim State, in turn, to break that law, does not require the self-contained regime argument] ("Représailles et droit diplomatique", *Recht als Prozess und Gefüge—Festschrift für Hans Huber zum 80. Geburtstag*).

111. In his comment to draft article 2 of part 2,[275] Riphagen suggests that an example of a possible derogation from the general regime could be a customs tariff treaty establishing the consequences of the violation of its own rules, in derogation from the general rules on the consequences of internationally wrongful acts. This would presumably be the case—if we understand his position correctly—of the General Agreement on Tariffs and Trade,[276] certain articles of which affect countermeasures, with regard to settlement of disputes (art. XXIII), quantitative restrictions to imports in violation of the Agreement (art. XII), safeguards (art. XIX) and the modification of tariff concessions (art. XXVIII). While Riphagen seems to envisage here not so much a self-contained regime, but just a number of treaty-based "derogations" from general rules, the concept of self-contained regimes may appear to be evoked, in connection with the General Agreement on Tariffs and Trade, in a recent work on countermeasures in international economic relations, according to which:

Le respect des dispositions de l'Accord général ne permet pas à un État de manquer au respect de ses engagements au titre d'un exercice de contre-mesure à l'encontre d'un autre État partie au GATT, en dehors des hypothèses prévues par l'Accord général. En effet, les possibilités d'exercice de contre-mesures à l'encontre d'États auxquels est attribuable un fait qui relève du domaine d'application de l'Accord général et qui puisse être générateur d'un exercice de contre-mesures sont strictement délimitées et réglementées, ce qui rend illicite tout exercice de mesures prétendument contre-mesures et qui ne serait pas conforme aux prescriptions de l'Accord général ... [Observance of the provisions of the General Agreement does not entitle a State to fail to observe its commitments because of the application of a counter-measure against another State party to GATT, save in the cases specified in the General Agreement. The possibilities for the application of countermeasures against States to which is attributed an act that falls within the scope of the General Agreement and that may give rise to the application of countermeasures are strictly circumscribed and regulated, and this renders unlawful any application of measures alleged to be countermeasures which is not in accordance with the terms of the General Agreement...][277]

In relations between the contracting States, the prohibition of countermeasures other than those contemplated in the Agreement would apply also to the suspension of compliance with one or more obligations of the Agreement by way of reaction to the violation of international obligations other than those deriving from the Agreement itself. Subject, however, to further study, this "system" does not seem to constitute a really self-contained regime. The writer herself seems to acknowledge this when she notes that the participating States do resort, in some cases, to

... mesures adoptées en dehors de tout cadre réglementaire, telles que les mesures dites de la zone grise et les accords d'auto-limitation [... measures adopted outside any regulatory framework, such as the so-called grey area measures and voluntary restraint agreements].[278]

This would indicate that the GATT "system" is not really a self-contained regime in the sense in which the former Special Rapporteur seems to have used that expression.

112. In conclusion, none of the supposedly self-contained regimes seems to materialize *in concreto.* Furthermore, the analysis of these cases gives rise to the most serious doubts as to the very admissibility *in abstracto* of the concept of self-contained regimes as "subsystems" of the law of State responsibility or, in the words

[275] *Yearbook ... 1985*, vol. II (Part One) (see footnote 11 above), p. 5, para. 2.
[276] GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969-1).
[277] Boisson de Chazournes, op. cit., p. 148.
[278] Ibid., p. 63.

of the former Special Rapporteur, "closed legal circuit[s] for particular field[s] of factual relationships",[279] such as those created by human rights law, the law of diplomatic relations, the law of tariffs and trade, or the law of the European Communities. To be sure, any substantive rules or any more or less articulated and organized set of such rules may well introduce provisions which aim to improve the regulation of the consequences of possible violations, this with the purpose of ... rendering the response on the part of the injured party more certain and violations therefore more prohibitive, or of limiting the response and thus avoiding excessive reaction, counter-reaction, and the eventual breakdown of the rules or set of rules in question.[280] In some of the cases considered, the aim may be either to achieve, by means of ad hoc machinery, a more effective, organized monitoring of violations and responses thereto (as in some human rights instruments and some international institutions) or to prevent a reaction to a violation from defeating the more general purpose of the breached rule (as in the rules on the protection of diplomatic envoys). In so doing, the rules or sets of rules in question do not exclude the validity and operation of the rules of general international law governing the consequences (substantive or instrumental) of internationally wrongful acts. The special, ad hoc, rules merely represent contractual (or perhaps customary) law derogations from the general rules in question, such derogations being admissible to the extent that they are not incompatible with the latter. Indeed, no derogation from those essential rules and principles on the consequences of internationally wrongful acts that are inherent to international relations and international law could be conceivable, unless the implementation of those rules brought about a degree of union that would lead to the surrender of the international legal personality of the participating States and their integration within a "national" (constitutional) system. In particular, no treaty-based provisions would be admissible that would involve derogation from (*a*) the prohibition of the use of force; (*b*) the rule of respect for fundamental rights; (*c*) the basic exigencies of diplomatic relations; (*d*) other peremptory rules of general international law; (*e*) the duty to respect the rights of "third" States; (*f*) the principle of proportionality; or (*g*) the rule under which the lawfulness of any unilateral measure must be assessed in the light of its ultimate legal function. Within the framework of such principles and rules there is no obstacle to States establishing, bilaterally or multilaterally, special machinery which envisages particular measures or sanctions, *either* in response to wrongful acts involving the infringement of the rules set forth in the same instrument *or* in response to any internationally wrongful act if the particular measures or sanctions contemplated affect the instrument in question in any way.

113. It follows that whenever an injured State finds itself in a position to avail itself of the measures envisaged in a given instrument, precisely to deal with an infringement thereof, it will be entitled to do so simply on the strength of that instrument. The question whether the measure taken is proportional under the general principle or has been preceded by a demand for reparation or *sommation*, in conformity with the general rules, will not arise. It will suffice to verify whether the measure is admissible under the relevant instrument in the circumstances, assuming,

[279] *Yearbook ... 1982*, vol. I, 1731st meeting, para. 16.

[280] Simma here refers to the special regime of suspension and termination of treaties in the Vienna Convention on the Law of Treaties, "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), p. 82).

of course, that the target State is a party thereto. This may also happen—as long as *jus cogens* is respected—in derogation from the general rules of the law of treaties on suspension and termination of multilateral treaties.

114. However, it seems reasonable to assume, in particular, that a State joining a so-called self-contained regime does not thereby restrict, by some kind of self-limitation, its rights or *facultés* of unilateral reaction under general international law to such an extent that there is no possibility of any derogation from or integration of that "regime". Of course, any State accepting the "regime" shall be bound, when confronted with a breach by another State party of an obligation deriving from that "regime", first of all to react—if it so wishes—in conformity with the provisions of the relevant "regime". This does not exclude, however, a certain latitude for general law measures, the extent of such latitude depending on the degree of availability and effectiveness of the remedies envisaged by the treaty-based "regime".[281]

115. Two main hypotheses are conceivable in which the possibility of "fall-back" is and should remain open:

(a) In the first hypothesis, the State injured by a violation of the "system" resorts to that system's institutions, secures a decision in its favour, but fails to obtain, through the system's procedures, the reparation to which it is entitled under that decision. Clearly, as long as the wrongdoing State does not comply in full with its obligations, the injured State may lawfully resort to measures which, although not covered by the "system", are available to it (with the relevant limitations) under general international law.

(b) In the second hypothesis, the internationally wrongful act consists of an ongoing violation of the "regime". In this case too, except of course where the injured State would be entitled to act in self-defence, there is an obligation to seek recourse in the first place through the procedures agreed in the instrument concerned. However, if the unlawful conduct persists while these procedures are in progress—and in spite of any interim measures for which provision is made therein—the injured State may lawfully resort simultaneously to any "external" unilateral measures which may be appropriate to protect its primary or secondary rights, without endangering the "just" solution of the conflict which could be afforded by the "system".

116. It should be added, nevertheless, with regard to both these hypotheses, that each of the States parties to a "regime" has presumably considered the legal rights and obligations covered thereby, and the very integrity of that regime, as a *bien juridique* of major importance. Consequently, any derogation from the "regime" not contemplated therein should be considered as highly exceptional. "External" unilateral measures should thus be resorted to only in extreme cases, namely, only in response to wrongful acts of such gravity as to justify a reaction susceptible of jeopardizing a *bien juridique* very highly prized by both the injured and the lawbreaking State. In other words, the principle of proportionality will have to be applied in a very special way—and very strictly—whenever the measures resorted to consist in the suspension or termination of obligations deriving from an allegedly "self-contained" regime.

[281] The situation is not dissimilar from that of a State which is bound, *vis-à-vis* the wrongdoing State, by specific, bilateral obligations to submit to given dispute settlement procedures as a first resort when its demand or *sommation* has proved unsuccessful.

117. Finally, it should be re-emphasized that normally a "self-contained" regime would be established by a multilateral treaty. As in the case of any multilateral treaty, this implies that suspension or termination by way of countermeasure may be lawfully resorted to only under the general proviso that it does not cause prejudice to the rights of States parties other than the wrongdoing State or States. In this respect too, as with respect to proportionality, it seems reasonable to assume that the very fact that States participate in a special regime emphasizes the restriction in question, in the sense that each party to the regime would have acquired something more than a merely factual interest in proper compliance with the regime by all parties in all circumstances.

118. The considerations set forth in the preceding paragraphs lead to the conclusion that it would be inappropriate, in codifying the law on State responsibility, to contemplate provisions placing "special" restrictions upon measures consisting in the suspension or termination of obligations arising from treaties creating special regimes or international organizations. A correct interpretation and application of the general rules governing any unilateral measure—including measures affecting compliance with written or unwritten *erga omnes* obligations—should be sufficient to cover the problems which may arise from treaties establishing international organizations or any allegedly "self-contained" regimes.

119. For reasons analogous to those that cast strong doubt on the concept of "self-contained" regimes (or "closed legal circuits"), draft article 2 of part 2 as adopted on first reading[282] is a source of serious perplexity. The link between the subject-matter of that draft article and the problem of allegedly self-contained or otherwise special regimes suggests that that draft article should not be left aside until the second reading stage.

120. Draft article 2 asserts the residual nature of the whole of part 2, namely the fact that the rules set forth in that part are to apply only on the condition and to the extent to which the consequences of an internationally wrongful act are not "determined by other rules of international law relating specifically to the internationally wrongful act in question". This provision derives from Riphagen's belief in the existence, within the framework of international law, of the "self-contained" regimes discussed in paragraphs 97 to 119 above, and from his related belief that the rules of such regimes or systems governing the consequences of the breaches of obligations deriving therefrom would exclude the operation of the general rules on the consequences of internationally wrongful acts within the area covered by the regime or system in question.[283]

121. Although a few members did express some doubts during the debate on the proposal,[284] the adoption of the draft article by the Commission at its thirty-fifth session[285] indicates that the idea was generally accepted.

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[282] For text of articles 1-5 of part 2 as adopted on first reading, see *Yearbook ... 1991*, vol. II (Part Two), pp. 126-127, footnote 359.

[283] See third report (*Yearbook ... 1982*, vol. II (Part One) (footnote 248 above), paras. 52-77); sixth report (*Yearbook ... 1985*, vol. II (Part One) (footnote 11 above), commentary to article 2); see also his comments in *Yearbook ... 1982*, vol. I, 1731st meeting, paras. 16-23, and *Yearbook... 1984*, vol. I, 1858th meeting, paras. 3-9.

[284] Views were expressed against the article by Ushakov (*Yearbook ... 1982*, vol. I, 1734th meeting, para. 47) and Yankov (ibid., 1737th meeting, para. 15). Doubts on the notion of "sub-systems" and

122. According to the general terms in which draft article 2 refers to "any other rules of international law", it would seem that the special regimes that would enjoy a certain exclusiveness, so to speak, in the regulation of the consequences of internationally wrongful acts, could encompass not only treaty rules but also unwritten customary rules. With regard to unwritten law, however, it is difficult to identify the rules concerned and to see how the special regime they create would relate to the rules to be codified by the Commission. In addition to the rules condemning international crimes of States, the examples of special customary law regimes indicated by Riphagen would seem to be those applying to respect for human rights, the protection of the environment as a "shared resource", and diplomatic immunities.[286] As already explained in paragraphs 101 to 109 above, and as recognized by Riphagen himself,[287] respect for human rights and diplomatic immunities do not give rise to any special forms of international responsibility under unwritten law. On the contrary, the consequences of the violation of human rights or diplomatic law rules—whether substantive or instrumental—are subject to the same restrictions deriving either from the absolute limitations to countermeasures or from the general requirement of compatibility with *jus cogens.* As for the protection of the environment, it is impossible to see in what sense the present state of international practice can justify the assumption that either it is already covered by a special regime of customary, unwritten law or that a special regime of that nature is just around the corner. As a recent contribution to the topic has well demonstrated,[288] and as pointed out in paragraphs 139 to 151 below, there are no peculiarities in the regulation of the legal consequences of internationally wrongful acts affecting the environment that are not in some way covered by the application of the general norms and principles of international responsibility. As regards the regime governing the consequences of international crimes, to the extent that it may have to be singled out as *special* compared with that applying to other internationally wrongful acts of States, it has so far been assumed to have been covered within the framework of the draft articles on which the Commission is currently working, notably as an integral component of parts 2 and 3. In conclusion, it would appear that there is not a single area of international legal relations falling under a special regime of unwritten rules on State responsibility to justify a provision which, like the one presently embodied in article 2, would label as merely residual the general rules on State responsibility devised by the Commission.

123. Draft article 2 is questionable too, at least in its present formulation, with respect to treaty-based rules. It would certainly be perfectly correct to say in that article—although it should go without saying—that derogation from the general rules to be set forth in part 2 is not excluded. Of course, States may well derogate from

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on the excessive scope of draft article 2 were also expressed by Calero Rodrigues (ibid., 1736th meeting, paras. 22-24).

[285] See *Yearbook ... 1983*, vol. II (Part Two), pp. 42-43. The formulation gave rise to more perplexity in the Sixth Committee. It was stressed by a number of speakers, especially the representatives of Brazil (*Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 43rd meeting, para. 56), France (ibid., 38th meeting, para. 14), Greece (ibid., 40th meeting, para. 45), and Iraq (ibid., 50th meeting, para. 50), that too many derogations would deprive the draft of its interest.

[286] Fourth report (*Yearbook ... 1983*, vol. II (Part One) (see footnote 51 above), paras. 89-91).

[287] Ibid.; sixth report (*Yearbook ... 1985*, vol. II (Part One) (see footnote 11 above), pp. 12-13), article 11, para. 1 (*c*) and article 12, para, (*b*), and commentaries thereto.

[288] Spinedi, "Les conséquences juridiques d'un fait internationalement illicite causant un dommage à l'environnement", *International Responsibility for Environmental Harm.* pp. 75-124.

them by treaty. This is a normal feature of any rule of international law which is not a peremptory rule. The tenor of article 2, however, seems to go beyond that obvious statement. As presently drafted, article 2 states that the general rules set forth in part 2 would be inapplicable whenever and to the extent that the legal consequences of a given internationally wrongful act were determined by "other rules of international law". Even within the confines of treaty law, article 2, as drafted, would mean that whenever a treaty determines the legal consequences of one or more given internationally wrongful acts—for example, the violation of the obligations set forth in that treaty—the rules of part 2 would no longer come into play. Each of the States parties to such a treaty would automatically exclude the application of the general rules as codified—by virtue of an article (draft article 2) forming part of the very codification convention in which those general rules are to be embodied. Such a sweeping consequence calls for further reflection by the Commission.

124. As already mentioned, when States introduce into a treaty special rules governing the consequences of its violation, their aim is not to exclude, in their mutual relations, the rights, obligations, and *facultés*—in short, the guarantees—which each derives, *vis-à-vis* each of the other parties, from the normal operation of the general rules on State responsibility. On the contrary, the aim pursued is to strengthen the normal, unstructured, and sometimes unsatisfactory guarantees of general law, by making them more dependable and effective, either by means of institutional devices or, failing that, by means of more precise stipulations. In no case does that mean renouncing the possibility of "falling back" on less developed, "natural" guarantees in cases such as those considered in paragraph 115 above. A presumption of total abandonment of the guarantees, such as the one presently expressed in draft article 2, seems thus to be doubly objectionable. On the one hand, it defeats the purpose of States establishing special regimes by attributing unintended derogatory effects to their agreement. On the other hand, it appears to defeat the very purpose of the codification and progressive development of the law of State responsibility undertaken by the General Assembly through the Commission, by making the general rules "residual".

125. Were a provision such as that of draft article 2 really to remain in the draft articles—a matter on which there is strong doubt—it should be qualified by the addition of at least three limitations:

(a) The first, to be embodied in the text of the article, should specify that the derogation from the general rules set forth in the draft articles is a derogation deriving from contractual instruments (and not from unwritten, customary rules);

(b) The second—also to be included in the text—should specify that for a *true* derogation from the general rules to take effect, the parties to the instrument must expressly indicate that by entering the treaty-based system they exclude the application of certain or of all the general rules of international law on the consequences of internationally wrongful acts, rather than confining themselves to dealing globally with the consequences of the violation of the regime;

(c) The third could be confined to a clarification in the commentary to the draft article to the effect that, notwithstanding point (*b*), the effects of the treaty-based derogation would not survive a violation of the system which was of such gravity and magnitude as to justify, as a proportional measure against the wrongdoing State, the suspension or termination of the treaty-based system as a whole. By disengaging itself

(temporarily or permanently) from the system,[289] the injured State would be at liberty to pursue its so-called secondary rights by the means of redress set forth in the general rules.

126. For reasons which partly coincide with and partly transcend those indicated in paragraphs 119 to 125 above, it is felt that draft article 4 of part 2 as adopted on first reading[290] may call for some further reflection.

CHAPTER VIII

VIII. THE PROBLEM OF A PLURALITY OF EQUALLY OR UNEQUALLY INJURED STATES

A. The origin of the concept of non-directly injured States

127. Chapter IX of the third report[291] already called into question the accuracy of the concept of "non-directly" injured or "non-directly" affected States. On further reflection, that concept is now found to be unacceptable.

128. In the Commission and the Sixth Committee the concept of "non-directly" injured States emerged in 1984 in relation to the definition of injured State. It had been prompted by some thoughts put forward by the former Special Rapporteur in his presentation of the draft article that was to become article 5 of part 2 of the draft as adopted on first reading.[292] Thereafter, the concept seems to have gained some credence in the literature[293] where it was preferred to the term "third" States, which

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[289] A possibility contemplated by paragraphs 1 and 2 (*b*) and (*c*) of article 60 of the Vienna Convention on the Law of Treaties.

[290] See footnote 282 above.

[291] *Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above), paras. 89-95, especially paras. 90 and 95.

[292] Riphagen, fourth report (*Yearbook ... 1983*, vol. II (Part One) (see footnote 51 above), paras. 31 *et seq*.), and sixth report (*Yearbook ... 1985*, vol. II (Part One) (see footnote 11 above), pp. 6-8, commentary to article 5).

The following members of the Commission were in favour of the distinction between "directly" injured or affected States and "indirectly" injured or affected States as reflected in paras, (*e*) and (*f*) of article 5 as subsequently adopted by the Commission on first reading: Sinclair (*Yearbook ... 1984*, vol. I, 1865th meeting, paras. 1-10); Lacleta Muñoz (ibid., 1867th meeting, paras. 15-19); Flitan (*Yearbook ... 1985*, vol. I, 1892nd meeting, paras. 47-56); Ogiso (ibid., 1896th meeting, paras. 1-18); Tomuschat (ibid., paras. 33-46 and 49); and Jagota (ibid., 1901st meeting, paras. 2-19). In the Sixth Committee of the General Assembly, the need to distinguish between "directly" or "indirectly" injured States for the purposes of the legal consequences of an internationally wrongful act had been stressed by the representatives of Afghanistan (*Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 42nd meeting, para. 39); the German Democratic Republic (ibid., 45th meeting, para. 13); Romania (ibid., 43rd meeting, para. 57); the Federal Republic of Germany (ibid., 36th meeting, para. 16, and ibid., *Fortieth Session, Sixth Committee*, 24th meeting, para. 10); Bulgaria (ibid., 27th meeting, para. 25); Czechoslovakia (ibid., 29th meeting, para. 15); France (ibid., 34th meeting, para. 41); New Zealand (ibid., 31st meeting, para. 7); and Viet Nam (ibid., 27th meeting, para. 74).

[293] Some authors have recently dealt with the consequences of unlawful acts, and especially of violations of *erga omnes* or *erga omnes partes* obligations, distinguishing between the rights and *facultés* of the injured party on the basis of whether it was a "directly" or "indirectly" injured State. See, Ramcharan, "State responsibility in respect of violation of treaty rules in general, and of those creating an 'objective regime' in particular: specific features with regard to the 'first, second and third parameters'", *Indian Journal of International Law* (1986), pp. 1 *et seq*.; Hutchinson, "Solidarity and breaches of multilateral treaties", *British Year Book of International Law* (1988), pp. 151 *et seq*.; Sachariew, "State responsibility for multilateral treaty violations: identifying the 'injured State' and its legal status, *Netherlands International Law Review* (1988), pp. 273 *et seq*.; Simma, "Bilateralism and

had also been used in the same regard,[294] "third" States being States extraneous to a legal relationship. This term has already been discarded *ictu oculi* as inappropriate.[295] The terminology "non-directly" injured or affected State, however, is no better. It appears to be very ambiguous, particularly in the light of a logical understanding of the definition of injured State presumably espoused by the Commission.

129. An essential element of the definition of injured State—more or less satisfactorily reflected in the formulation of article 5[296]—is that an internationally wrongful act consists not only or not necessarily in inflicting unjust physical damage. More broadly, it constitutes or results in the infringement of a right, that infringement—whether or not damage has been caused—constituting the injury.[297] This is in conformity with the meaning of "a breach of an obligation" in article 3 (*b*) of part 1 of the draft and with the significant absence from that article of any reference to damage as an element or effect of a wrongful act. A State can thus be injured by the breach of an international obligation even if it did not suffer any damage other than the infringement of its right.[298] In order to identify the "injured State or States" in each particular case for the purposes of the legal consequences of an internationally wrongful act, it is essential, therefore, to determine which State or States have suffered an in fringement of their right.

130. According to the traditional view, all international obligations are structurally such that, even when they are established by a multilateral treaty or a customary rule, their violation in any concrete case infringes the right of only one or of a few given States. Recent developments, however, seem to indicate that this may not necessarily be true. A distinction appears to have emerged. Certainly, the majority of international rules—like the majority of private law rules of national societies—still set forth obligations of the traditional kind, that is to say, obligations the violation of which only affects the right of one or more given States. This applies both to the rules of bilateral treaties as well as to most rules of multilateral treaties or customary law. With regard to multilateral rules, it has been suggested that while they apply to a plurality of States they create legal (obligation/right) relationships *dont chacun des*

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community interest in the law of State responsibility, *International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne*, pp. 821-844; Spinedi, loc. cit.; Cardona Llorens, "Deberes jurídicos y responsabilidad internacional", *Hacia un nuevo orden internacional y europeo, Estudios en Homenaje al Profesor Don Manuel Díez de Velasco.* The latter author, however, believes that it would be correct to consider the States in question not as "indirectly" injured by the breach of an obligation (and the corresponding right) but as entitled to react to the breach of an international "duty".

[294] Charney, "Third State remedies in international law", *Michigan Journal of International Law* (1989), pp. 57-101, and "Third State remedies for environmental damage to the world's common spaces", *International Responsibility for Environmental Harm*, op. cit., pp. 149-177.

[295] Third report (*Yearbook ... 1991*, vol. II (Part One) (see footnote 1 above)), para. 90.

[296] See footnote 282 above.

[297] As the writer, speaking as the representative of Italy, had stated in the Sixth Committee in 1985:

"Article 5, as provisionally adopted, was not intended to be more than a general definition of the States which, by the fact of possessing the right corresponding to the obligation, non-compliance with which constituted the wrongful act, were legally affected by the act." (See *Official Records of the General Assembly, Fortieth Session, Sixth Committee*, 27th meeting, para. 67.)

[298] As was rightly observed by Reuter:

"In draft article 5, the Special Rapporteur had endeavoured to follow the guidelines laid down in part 1 of the draft. Injury was not a constituent element of responsibility and account had been taken only of legal, abstract injury resulting from any breach of an international obligation." (See *Yearbook ... 1984*, vol. 1, 1861st meeting, para. 10.)

destinataires de la norme est titulaire envers un seulement des autres destinataires.[299] In other words, despite the multilateral sphere of action of the rule, it only creates bilateral relationships. It is precisely this kind of obligation—and the corresponding rights—to which reference is made in article 5, paragraphs 2 (*a*) to (*e*) of part 2, as adopted on first reading,[300] in defining injured States.

131. On the other hand, there are a number of indications in the practice and literature of international law of the existence of rules that apparently do not fit the pattern of bilateralism described above. These are the rules which, in the pursuit of "general" or "collective" interests, create obligations, compliance with which is in the legally protected interest and, in that sense, a legal right of all the States to which the rule applies. According to Spinedi:

On a parlé, à cet égard, de normes qui ont pour objet la tutelle d'intérêts qui sont simultanément propres à tous les États, ou à tous les États composant une collectivité donnée, et non pas à chacun d'eux pris séparément [Mention has been made in this connection of rules designed to safeguard interests that belong to all States simultaneously or to all the States of which a given body is composed, and not to each one severally].[301]

Disarmament and arms control, promotion of and respect for human rights, protection of the environment in general and of areas not falling within the jurisdiction of any State, are examples of the spheres covered by such rules. Spinedi goes on to state that:

Ces normes imposent à chaque État des obligations envers tous les autres États, chacun desquels est titulaire du droit subjectif correspondant. La violation de ces obligations lèse simultanément les droits subjectifs de tous les États liés par la norme, qu'ils aient ou non été spécialement atteints, à l'exception, naturellement, du droit subjectif de l'État auteur de la violation. Pour désigner les obligations dont il s'agit on emploie généralement l'expression "*obligation* erga omnes" [These rules impose on every State obligations towards all the other States in each of which the corresponding subjective right is vested. A breach of these obligations simultaneously injures the subjective rights of all the States bound by the rule, whether or not they have been especially affected—apart, of course, from the subjective right of the State that committed the breach. The term "*erga omnes* obligation" is generally used to denote the obligations in question.][302]

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[299] Spinedi, loc. cit., p. 88, citing Morelli, "A proposito di norme internazionali cogenti", *Rivista di diritto internazionale* (1968), pp. 114-115.

[300] See footnote 282 above.

[301] Loc. cit., pp. 88-89.

[302] Ibid., p. 89. On the structure and contents of such norms, see the ICJ statements in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* (*I.C.J. Reports 1951*, p. 23) and in *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment* (*I.C.J. Reports 1970*, p. 32). As regards the literature, see, Morelli, loc. cit.; Juste Ruiz, "Las obligaciones *erga omnes* en derecho internacional público", *Estudios de derecho internacional, Homenaje al Profesor Miaja de la Muela*, vol. I, pp. 219-234; Picone, "Obblighi reciproci e obblighi *erga omnes* degli Stati nel campo della protezione dell'ambiente marino dall'inquinamento", *Diritto internazionale e protezione dell'ambiente marino, Studi e documenti sul diritto internazionale del mare*, vol. 12, pp. 15 *et seq*.; Lattanzi, op. cit., pp. 97-149: Sperduti, "Les obligations solidaires en droit international", *Essays in International Law in Honour of Judge Manfred Lachs*, 1984, pp. 271-276; Hutchinson, loc. cit.; Gaja, "Obligations *erga omnes*, international crimes and *jus cogens*: a tentative analysis of three related concepts", *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, pp. 151-160; *Restatement of the Law Third* (see footnote 39 above), pp. 339 and 342-343; Cardona Llorens, "Interés, interés jurídico y derecho subjetivo en derecho internacional público", *Estudios en recuerdo de la Profesora Sylvia Romeu Alfaro*, pp. 231 *et seq*.; and Sicilianos, op. cit., pp. 103 *et seq.*

The provisions of article 5, paragraphs 2 (*e*) (ii), (iii), (*f*), and 3 as adopted on first reading refer precisely to the legal relationships or situations determined by the violation of rules of this kind.

132. Nowadays, the debate no longer so much concerns the existence of *erga omnes* obligations. Apart from the problem of identifying *in concreto* the treaty or customary rules establishing *erga omnes* obligations—which need not be discussed here—the main issue in the area of State responsibility is to determine the consequences of the fact that *erga omnes* obligations carry corresponding *omnium* rights. It is therefore necessary to determine, in view of the possible violation of those obligations, the precise position of the various States for the benefit of which they exist:

(a) Is that position the same as, or does it differ from, that of States qualifying as injured States under rules other than *erga omnes* rules?

(b) Are the positions of the injured States under an *erga omnes* rule all the same? If not, in what sense do they differ and with what effects?

It is in connection with questions such as these that such concepts as "directly" and "non-directly" injured States, "specially" affected and "non-specially" affected States, or "third" States arise.

133. Having rejected the concept of "third" States, the time has come to deal with the other two. It should not be too difficult to show why and in what sense they are unacceptable.

B. Impropriety of the concept of non-directly injured States

134. It may be useful to take the example of a violation of *erga omnes* rules on the protection of human rights. As generally acknowledged, rules of this kind create among the States to which they apply a legal relationship characterized by each State's obligation to ensure the enjoyment of human rights for everyone under its jurisdiction, irrespective of nationality. Any violation of its obligation by State A will constitute a simultaneous infringement of the corresponding right of States B, C, D and E respectively.[303] The rights of all the latter States being the same—namely the right to have State A respect the human rights of those under its jurisdiction—no one of them is more or less directly affected by the violation than any other.[304] There may,

[303] A remarkable analysis of the matter may be found in Lattanzi, op. cit., pp. 79-155.

[304] Within the system of the European Convention on the Protection of Human Rights and Fundamental Freedoms this situation occurs in the case of inter-State disputes in which a group of States acts against another with regard to the same violation. Examples are the cases brought against Greece (*Yearbook of the European Convention on Human Rights*, vol. 12, 1969) and Turkey (*European Human Rights Reports*, vol. 6, August 1984, pp. 241-257), in which several States complained about the violation of article 3 of the Convention (prohibition of torture and inhuman or degrading treatment or punishment).

Cases in which more than one State has reacted under general international law against human rights violations are rare and usually refer to violations amounting to so-called international crimes of States. Examples of cases in which several States felt entitled to react without specifically referring to the "criminal" nature of the wrongful act include measures taken against the practices of a repressive military regime in Chile; against the proclamation of a stale of siege in Poland; and those taken by States

of course, be a difference where one or more of the injured States feel particularly affected because State A has violated the human rights of individuals with whom they have ethnic or other ties. This, however, does not make the injury sustained by those States *legally* more direct than that suffered by the other States.

135. Another example would be the breach of an *erga omnes* obligation related to environmental protection in outer space or in any area where contamination or pollution would affect the whole planet. An internationally wrongful act causing depletion of the ozone layer, for example, would physically affect all States and would constitute a simultaneous *legal* injury for all the States parties to a multilateral treaty setting forth the obligation that has been breached. Here again, there would either be equal infringement of "equally equal" rights or, at most, qualitatively or quantitatively different injuries. Although differences could emerge from the point of view of the degree of exposure of States to the negative impact of the ozone depletion, in no case would it be correct to define this difference in terms of a "direct", "less direct" or "indirect" juridical injury. Again, the concept of non-directly injured States appears to be logically untenable and to reduce the injured States' entitlement to claim cessation or reparation.

136. A further example could be the unlawful closing by coastal State A of a canal situated within its territorial waters and linking two areas of the high seas. Such an act would affect many interests: (*a*) those of any State or States whose ships were on the point of entering the canal when the restriction was put into effect; (*b*) those of the State or States whose ships were sailing towards the canal intending to traverse it on their usual sea route or planned itinerary; and (*c*) those of all other States, because, according to the law of the sea, all States have the right of innocent passage through the canal.[305] In this case too it seems fairly clear that there is no such thing as an indirectly injured or affected State. Since all States have a right of innocent passage through the canal, all the States are *legally* injured by State A's breach. The situations of the various States or groups of States do not differ in the sense that some are indirectly injured and others directly injured. States in the category described under (*c*) would appear to be as directly injured by the breach as those in categories (*a*) and (*b*). All that can be said is that the three groups of States are *all* injured, albeit in three different ways. Further differences may well appear *in concreto* among the States belonging to each of the three categories, but only as regards the extent of the damage sustained or feared. Another example, from the area of crimes, which for the time being has been left aside, would be the various legal positions of States confronted with an act of aggression.[306]

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other than the United States of America against Iran following the taking of the hostages. On this practice, see Lattanzi, op. cit., pp. 492-501.

[305] The *S.S.* "*Wimbledon*" case, decided by PCD, may in many respects be considered to be similar. Germany had prohibited the ship's transit through the Kiel Canal. The violation of articles 380 to 386 of the Treaty of Versailles was the object of complaints not only by the United Kingdom and France, which, as recalled by Hutchinson, had "a particular connection with that vessel—the former as the State of nationality of its charterers, the latter as the State of registry" (loc. cit., pp. 179-180), but also by Italy and Japan which were also parties to the Treaty but were connected with the case only by the fact that they possessed merchant ships and were therefore interested in the proper enforcement of the regime of navigation provided for under article 380 (Judgment of 17 August 1923, *P.C.I.J., Series A, No. 1*, pp. 6 *et seq*., see particularly p. 20).

[306] Here again, the injured States would fall into a number of categories. One category would of course consist of the State(s) which are the target of the aggression; others could respectively include the States whose territories are bordering those of the aggressor or the victim State(s); the States of the

137. The conclusion seems to be that the distinction between directly and non-directly injured States does not hold water. The examples considered would seem to indicate that to draw such a distinction would, in cases such as human rights, and possibly the global environment, lead to the characterization of *all the States* whose rights are infringed by a violation, as *non-directly injured* States, and, in other cases, such as freedom of navigation, or aggression, to an *improper portrayal*, in terms of "directness" or "indirectness", of *differences relating only to the nature or the degree of the injury*.[307]

138. The only reasonable starting-point for the substantive as well as the instrumental consequences of a violation of *erga omnes* obligations—and the consequences of any other kind of international bilateral or multilateral obligation—thus appears to be the characterization of each injured State's position according to the nature and the degree of the injury sustained.[308]

C. Conceivable and possible solutions in case of a plurality of injured States

139. The fact that the breach of *erga omnes* obligations results in a plurality of injured States, combined with the fact that such States may not be injured in the same

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region; the allies of the victim State(s) and the States which depend upon the victim State's vital exports; all the States participating in a collective security system together with the aggressor and the victim State; all the other States bound by the rule of general international law which condemns aggression. In view of the special nature of aggression, this case will be left to some future date when the problem of the consequences of international crimes is tackled. For the moment it may be useful to note that the specific nature of the wrongful act in question may *prima facie* lead to the victim State(s) being referred to as "directly" injured and to all the others as "indirectly" injured. However, the *erga omnes* scope of the infringed rule suggests that such a distinction would unduly restrict the circle of legally injured States, particularly those States parties to a relevant collective security system. A distinction in terms of "specially" or "non-specially" affected States would, in view of its ambiguity, not be any better. The only real distinguishing feature—and the one which would be more consistent with solidarity among the members of a collective security system—would seem to be the nature and the gravity of the actual injury sustained by each State.

[307] It must further be stressed that the possibility of a State qualifying as an injured State on the ground of the mere violation of its subjective right (*nudum ius*), in the absence of any physical or other damage to any of its elements or assets, is not confined to the realm of *erga omnes* obligations as considered, for example, by Lattanzi (op. cit., pp. 120 *et seq*.). It can also occur in a strictly bilateral context. If State A undertakes by a bilateral treaty to grant aid or other forms of assistance in return for State B's undertaking to respect its own nationals' civil and political rights, any violation by the latter of its obligation constitutes a legal injury to State A, notwithstanding the fact that none of its elements or assets is affected. In contrast to (*erga omnes*) human rights obligations the obligations in the present (bilateral) case are synallagmatically related, something which is not normally a feature of human rights undertakings. Be that as it may, to say that in such a bilateral situation State A would be "indirectly" injured would be as meaningless as would be the same proposition within the context of an *erga omnes* human rights system. Thus, it becomes all the clearer that the whole concept of "indirectly" injured States is the fruit of a gross misunderstanding which derives from an inadequate absorption of the definition of an internationally wrongful act, as laid down in article 3 of part 1 of the draft.

[308] It is for this reason that, in the Sixth Committee in 1985, the writer, speaking as the representative of Italy, stated that "...the monistic concept of 'injured State' ... did not imply 'a parallel monistic treatment' of 'injured States'". (See *Official Records of the General Assembly, Fortieth Session, Sixth Committee*, 27th meeting, para. 67.)

That same year in the Commission, he had stressed the need to refer to the concept of "material or moral injury (*préjudice*) ... as a factor which must certainly affect the kind of reparation or the severity of the countermeasures to which each injured State would be entitled to have recourse." (See *Yearbook ... 1985*, vol. I, 1900th meeting, para. 13.)

way or to the same degree, complicates the responsibility relationship. Both the substantive and the instrumental consequences of the breach are affected. With regard to the substantive consequences, the question is whether, to what extent, and under what conditions the States thus injured (equally or unequally) are all entitled to claim cessation, restitution in kind, pecuniary compensation, satisfaction and/or guarantees of non-repetition. With regard to the instrumental consequences, the question is whether, to what extent, and under what conditions the various (equally or unequally) injured States may lawfully resort to sanctions or countermeasures. Up until now these problems have been considered, both within and outside United Nations bodies (under the ambiguous concepts of "non-directly" and "directly" injured or affected States), in connection with wrongful acts frequently labelled as "crimes" under article 19 of part l.[309] The same problems may well arise, however, with regard to the consequences of those more ordinary wrongful acts which are commonly referred to as "delicts".

140. As noted by some of those who have dealt with the matter so far,[310] the problems may present themselves in two possible ways. The first possibility is that the relevant rules, either *erga omnes* or more general rules, envisage procedures for the monitoring and sanctioning of violations which are more or less effective and exhaustive. The other possibility is that such procedures are either totally non-existent or not exhaustive.

141. To the extent that the substantive and/or instrumental consequences of violations were covered by procedures giving a decisive role to an international body, their operation would in principle exclude any necessity of unilateral claims and/or measures on the part of the injured States. Although severally affected, the various injured States would in principle be in such a position that the problem of any unilateral claim, sanction or measure would not arise. It would be up to the competent international body to take due account, in putting forward claims or devising or implementing sanctions, of the plurality of equally injured States and of any differences among the unequally affected States which may have a bearing on their respective, individual positions.[311] Any issues of unilateral claims or measures would only arise if and to the extent to which the collective or institutional system were to fail.

142. Where no organized collective system is present—which is usually the case—some writers doubt that all the injured States are severally entitled to put forward

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[309] See footnote 8 above. See also *Yearbook ... 1991*, vol. II (Part One) (footnote 1 above), para. 91, especially footnote 174, together with the reports and discussions on this matter collected in *International Crimes of State*..., op. cit.

[310] See, in so far as delicts are concerned, the authors referred to in footnotes 293 and 294 above.

[311] The institutionalized or otherwise "integrated" or organized systems, though not numerous, may vary according to the degree of "centralization" and according to whether they organize only the monitoring, the reaction, or both. To the extent that one or other function is effectively centralized, the legal interests of the various equally or differently injured States may be more or less adequately and effectively protected and harmonized. For the same reasons indicated in paras. 112-115 above with respect to the so-called self-contained regimes, any limitations placed by the systems in question on the rights of States parties only affect such States *inter sese* at the level of treaty law. Those limitations do not extend to the level of general international law, which is where the articles the Commission is in the process of drafting are intended to find their place by way of codification or progressive development of the general rules on State responsibility.

unilateral claims and to resort to countermeasures unilaterally. They fear, in particular, that the broadening of the *faculté* of unilateral countermeasures may lead to reactions that are not justified by the aim of securing compliance with the obligation infringed[312] or may create confusion and uncertainty in the enforcement of the law and in the safeguarding of the interests involved.[313] Indeed, some of the writers cited contend that to entrust the pursuit of collective interests to the unilateral reaction of single States would not be in conformity with the very structure of the so-called primary relationship.[314]

143. While such preoccupations may be justified and may have some merit, they are not sufficient either to prove *de lege lata* or to justify *de lege ferenda* a derogation from the substantive or instrumental legal consequences of an internationally wrongful act. To exclude the lawfulness of individual State claims or measures would be to accept that the *erga omnes* violations in question would not give rise to liability (*responsabilité*); and this would be tantamount to accepting that the rules infringed are not binding.[315] In particular, it would be incorrect to assume that, in the absence of an agreed treaty-based collective monitoring and sanctioning system, no reaction would be provided for under general international law. In the corpus of general international law there is really no "gap" to be filled with respect to individual claims or countermeasures. Each one of the States participating in an *inter omnes* legal relationship is indeed entitled to the same kind of rights and *facultés* as those to which it would be entitled within the framework of any bilateral or international responsibility relationship. The only real peculiarities of the situations determined by the presence of a plurality of injured States, that is to say, by the fact that the infringed rule is an *erga plurimos* or *erga omnes* rule—is that the rights and *facultés* of the various injured States must be determined *in concreto* and implemented with a view to the pursuit of the totally or partially *common* legal interest infringed by the breach. First substantive rights and then *facultés* will each be considered briefly.

144. To begin with substantive rights, the proposition frequently encountered is that to the extent that the States involved are "only indirectly" injured by the *erga omnes* breach they would be entitled to claim cessation and guarantees of non-repetition,[316] but not pecuniary compensation,[317] or, according to some, restitution in kind.[318] Although it may be true in certain instances, such as when a State is injured by an

[312] See, for example, Hutchinson, loc. cit., p. 214; and Sachariew, loc. cit., pp. 282-285.

[313] Charney, "Third State remedies in international law", loc. cit., pp. 88-90.

[314] Sachariew, loc. cit., pp. 282-285.

[315] The absurdity of such a consequence is stressed by Hutchinson, loc. cit., pp. 214-215; Charney, "Third State remedies in international law", loc. cit., p. 92; and Spinedi, loc. cit., pp. 121-124.

[316] All the writers who distinguish between "directly" and "indirectly" injured States agree on this point. See footnotes 293 and 294 above.

[317] The possibility that "indirectly" injured States may, at least in some cases, be entitled to demand reparation by equivalent is not ruled out by Lattanzi (op. cit., pp. 169 *et seq*.) or Spinedi (loc. cit., p. 106 *et seq*.). In the Commission the inadmissibility of "damages" in favour of the States in question was affirmed by Riphagen in his preliminary report (*Yearbook ... 1980*, vol. II (Part One) (see footnote 130 above), para. 40) and by Sinclair (*Yearbook ... 1984*, vol. I, 1865th meeting, para. 3). That position was shared by the representative of the Federal Republic of Germany in the Sixth Committee (*Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 36th meeting, paras. 13-17).

[318] "Indirectly" injured States do not have a right to *restitutio* according to Picone, loc. cit., pp. 84-86; and Sachariew, loc. cit., p. 282. The opposite view is taken by Ramcharan, loc. cit., p. 28; and Spinedi, loc. cit., pp. 100-101.

erga omnes violation, this is not a consequence of any alleged "indirectness" of the injury. It is merely a consequence of the kind of injury involved. If, for example, within the framework of a human rights arrangement, a State violates the rights of its own nationals by making arbitrary arrests and every other State is only entitled to claim cessation of such conduct and adequate guarantees of non-repetition, this would surely not be a consequence of any "indirectness" of the injury but merely of the fact that the claims are sufficient to restore the *droit subjectif* of the claimant State and of the others. The aim of the *droit subjectif* is to ensure that no State bound by the rule violates the rights of any human being, irrespective of nationality. If there is no right to compensation, again, this is not due to any "indirectness" of the injury but to the fact that the breach has not given rise to damage. This situation is no different from that of a State injured by a breach of an obligation deriving from a bilateral treaty and not involving any damage.[319]

145. A similar reasoning, in the same situation, would apply to restitution in kind. Each one of the States involved will be entitled to claim *naturalis restitutio* if and to the extent that the restoration of its right so demands. In the hypothesis considered in paragraph 144 above, there would presumably be no room for a claim of restitution in kind, the release of those arrested, that is to say, the cessation of the unlawful act, together with appropriate guarantees for the future, will suffice to restore the infringed legal interest. This would, however, not necessarily be the case if, for example, some of those detained had suffered any physical or moral damage. Each one of the States entitled to claim compliance with the infringed rule—although, "non-directly" injured (to use the current, albeit incorrect terminology), would be entitled to claim restitution in kind.[320] Similar considerations would apply, *mutatis mutandis*, in the case of unlawful oil pollution of the high seas. Assuming the existence of an *erga omnes* breach, would the injured States be entitled severally to claim restitution in kind to restore the damaged ecosystem? The answer should be in the affirmative because each

[319] This is what Riphagen himself admitted when he said that the injured States in question could "not claim damages *ex tunc*, since by definition there is no injury to [their] *material interest**" (*Yearbook ... 1980*, vol. II (Part One) (see footnote 130 above), para. 40). Lattanzi, instead, is of the opinion that any compensation the State in fringing human rights may pay to the individual victim(s) of the violation is in compliance with the obligation of reparation by equivalent as a form of responsibility towards all the States to which the norm protecting the infringed right applies. (In this respect, consideration should be given, for example, to the practice under article 50 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, or article 63 of the American Convention on Human Rights.) The States in question would therefore be entitled to this form of reparation as well (Lattanzi, op. cit., pp. 234-239). For an example of the right of any injured State to demand pecuniary reparation for the violation of *erga omnes* obligations for the protection of the environment as such, see Spinedi, loc. cit., pp. 106-111. Finally, it should not be forgotten that an *erga omnes* violation may in addition to causing a "legal injury" to all the States to which the norm applies also "materially affect" one or more of those States to varying degrees. Such could be the case in the example already cited of the violation of the right of innocent passage through straits linking international waters (see para. 136 above). In cases such as these, each injured State will obviously have a right to reparation by equivalent to the extent that it has suffered (economically assessable) damage.

[320] This is what could take place in case of a violation of article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. A State bringing a complaint before the competent body against the violation of that article would also enjoy the right, under article 50 of the Convention, to request rehabilitation or, at least, the sum of money necessary to obtain medical assistance, for the victims of the violation. To the extent that the prohibition of torture is considered to be covered by an unwritten *erga omnes* obligation (see, on this point, Marchese, op. cit., chap. IV), such claims could also be made under the general rules of State responsibility.

one of the parties in the legal relationship established by the *erga omnes* rule has suffered a violation of its right and is consequently entitled to claim the "restoration" (in kind) of the protected "global commons".

146. Moving now to the instrumental consequences,[321] it is easy to see that any special restrictions of the individual *faculté* of resort to countermeasure on the part of the States injured by the breach of an *erga omnes* obligation, do not derive from any alleged indirectness of the injury. They are merely the consequence of the application, in each hypothetical or actual situation, of the general rules or principles governing countermeasures, such as the obligation of prior demand for cessation or reparation or prior exhaustion of dispute settlement procedures, and, of course, the requirement of proportionality.

147. The execution of those obligations explains, for example, the doctrine according to which "indirectly" injured States would be entitled to resort to countermeasures only in the absence of a collective pronouncement on the part of a representative body on the measures to be adopted[322] and, in any case, only as *extrema ratio*, in the absence of other remedies.[323] As explained in chapter I above

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[321] As already recalled in para. 139 above, the problem of resort to countermeasures on the part of States which are "only indirectly affected" has been discussed almost exclusively in the context of the consequences of international crimes and in relation to the practice, beginning in the late 1970s and lasting until the mid-1980s, of some Western States in reaction to particularly serious crimes (proclamation of a state of siege in Poland, Soviet intervention in Afghanistan, occupation of the United States Embassy in Tehran, the Falkland Islands (Malvinas) crisis, and the downing of the Korean airliner). Considering, however, that for the time being discussion is being confined to so-called delicts, the reference here is to the *erga omnes* structure of the responsibility relationship and not to the degree of seriousness of the breach.

[322] This position is taken by Charney, "Third State remedies in international law", loc. cit., pp. 91 and 97-98; Cardona Llorens, "Deberes jurídicos ...", loc. cit.; and among the members of the Commission by Lacleta Muñoz, according to whom

"When the internationally wrongful act affected the collective interests of all the States parties, the response should be collective." (*Yearbook... 1984*, vol. I, 1867th meeting, para. 17.)

This line of reasoning would find some support, according to some authors, in article 60, paragraph 2 (*a*) of the Vienna Convention on the Law of Treaties, according to which the States parties "not specially affected" could only suspend or terminate compliance with the treaty to the detriment of the State which committed the internationally wrongful act by an *inter sese* agreement (see, for example, Sachariew, loc. cit., p. 284). Reference to that article does not, however, appear to be of great significance. It simply spells out the conditions under which a State party to the infringed treaty may resort to suspension or termination by way of countermeasure. However, *nothing is said, or was intended to be said* in article 60 about the conditions under which the States injured by a treaty breach—whether "specially affected" or "not specially affected"—could resort to countermeasures. When Riphagen, for his part, stated in his fourth report that:

"... the common or collective interest created by the group of States parties to an objective regime does indeed exclude the admissibility of reprisals consisting in the non-performance of an obligation under that regime, otherwise than in consequence of a collective decision ... of such group of States" (see *Yearbook ... 1983*, vol. II (Part One) (footnote 51 above), para. 97)

he was concerned with the identification not of the States entitled to react but of the obligations which could not be violated by way of countermeasures. He did not, therefore, submit *any possible reaction* to *erga omnes* violations to the collective decision of the States sharing the infringed collective interest; he simply ruled out the admissibility, outside any collective conclusion, of those unilateral measures which would violate the interest in question.

[323] Charney, "Third State remedies in international law", loc. cit., p. 95 and "Third State remedies for environmental damage ...", loc. cit., p. 161.

The admissibility of resort to any measure by the States in question is summarily *ruled out completely* by Ramcharan, loc. cit., pp. 40-41. In relation to the consequences of *delicts*, a similar position has been taken in the Commission by Tomuschat, according to whom only "directly" injured

(see in particular paras. 13-23), the *faculté* of *any* injured State to resort to reprisals does not arise automatically from the breach but only after a prior intimation or *sommation* has proved unsuccessful, and only after exhaustion of dispute settlement procedures (see chap. II above, in particular paras. 41-51). In some cases the general rules creating "integral" legal relationships are embodied in instruments envisaging ad hoc procedures to be applied in view, or as a consequence of, possible violations.[324] In such cases only if the wrongdoing State failed to meet its liabilities, as determined through the relevant procedures, would any of the injured States be entitled "individually" to resort to unilateral measures in order to protect its (individual) right to obtain respect for the common, legally protected interest (see chap. VII above, in particular paras. 114-115). More precisely, according to the current presentation, the allegedly "special" restriction that would characterize the admissibility of unilateral measures on the part of the so-called "indirectly" injured States, would therefore appear to be an effect of the mere application to the situation of the conditions generally required for lawful resort to countermeasures in any concrete case.

148. A similar general principle explains another allegedly "special" restriction that would characterize the situation of the so-called indirectly injured States, namely the need for any "individual" measures to be in conformity with the pursuit of the collective interest[325] and the condition that adequate measures have not already been

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States would be entitled to adopt countermeasures (*Yearbook ... 1985*, vol. I, 1896th meeting, para. 38). The representative of the Federal Republic of Germany expressed a similar position in the Sixth Committee (see *Official Records of the General Assembly, Fortieth session, Sixth Committee*, 24th meeting, para. 10). In support of the opinion according to which the States in question would not be entitled to resort to countermeasures, reference is sometimes made to the ICJ judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see footnote 147 above); see, for example, Hutchinson, loc. cit., p. 194; Charney, "Third State remedies in international law", loc. cit., p. 57; and Sicilianos, op. cit., pp. 153-154. The passage to which reference is made reads:

"The acts of which Nicaragua is accused ... could only have justified proportionate countermeasures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify countermeasures taken by a third State, the United States, and particularly could not justify intervention involving the use of force" (*I.C.J. Reports 1986* (see footnote 147 above), para. 249).

However, that statement cannot be interpreted as supporting the inadmissibility, in general terms, of measures by States "not specially affected" by an *erga omnes* violation. In the first place, because the Court's principal aim was to condemn measures "involving the use of force" taken by the United States, measures *which are always prohibited*—except in self-defence—regardless of whether the State resorting to them may be "more or less directly injured", and most importantly, because the alleged wrongful act committed by Nicaragua consisted essentially in the violation of an obligation of non-intervention (as well as "minor" violations of the prohibition of the use of force). The Court, therefore, simply considered—and rightly so—that the obligation in question, under both general international law and the Charter of the United Nations, is of a bilateral not an *erga omnes* nature. In other words, that rather than there being a right of *every* State to respect for the principle of non-intervention, there was only a right of *each* State to be protected from intervention in violation of its own sovereignty. As the breach of the obligation only violates a bilateral relationship, it is obvious that no "third" State will enjoy secondary rights with respect to that legal relationship. Less still will it be entitled to resort to countermeasures against the author of the wrongful act.

[324] Consider, for example, in the field of human rights, the system of the international covenants (articles 16-23 of the International Covenant on Economic, Social and Cultural Rights and articles 28-45 of the International Covenant on Civil and Political Rights and the Optional Protocol thereto) or the more "jurisdictional" systems of the European Convention on the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights. On the systems covering environmental protection and areas not falling within the jurisdiction of any State, see Charney, "Third State remedies for environmental damage...", loc. cit., pp. 166-174.

[325] See, for example, Sachariew, loc. cit., p. 285.

taken by another injured State.[326] These conditions derive from the general principle inherent in the very function of international responsibility, namely to ensure compliance with international obligations. As pointed out in previous reports, the aim of the rules to ensure implementation of the rights created by the rules that have been infringed is to obtain cessation, *restitutio*, pecuniary compensation, satisfaction and guarantees of non-repetition. Countermeasures are, in turn, instrumental to cessation or *restitutio* and to the other forms of reparation, and ultimately to compliance with the so-called primary obligation. Once that aim is achieved, the rules on responsibility cease to operate, so to speak. They leave the field open to the normal play of the so-called primary rules with regard to which their supporting function has been performed (see chap. I above, in particular paras. 3-4). This is precisely the mechanism that comes into operation when an *erga omnes* obligation has been breached and there are a number of injured States.

149. Indeed, two features characterize the instrumental consequences of a violation of an *erga omnes* obligation. The first is that the result to be pursued by the unilateral measures, because of the identity of the collective interest protected by the rule, is the same for all the injured parties. The second is that that result may be pursued severally by a plurality of injured parties. The first peculiarity explains why unilateral countermeasures by any single State are justified only in so far as they conform to the common interest. As the infringed rule protects a collective interest, any reactions to the breach, however numerous and unilateral, may be lawfully resorted to only to the extent to which they perform the function of guaranteeing the (primary) legal situation represented by the common legal interest. Were any reactions not to be in conformity with such a function (for example, because they pursue individual aims of a given State or ends otherwise not protected by the infringed rule) they would fall outside the sphere of the consequences (substantive or instrumental) of the given *erga omnes* breach: to the extent that they were in violation of international obligations, they would in turn be unlawful. Both features explain why, if adequate unilateral measures have at any given time been taken—collectively or individually—no further reaction would be lawful on the part of any of the remaining injured States. Once redress has been obtained for all (in one or more of the relevant forms) through the action of one or more of the injured parties, any further measures would serve no legitimate purpose and thus be unlawful.

150. If, on the contrary, the measure(s) taken did not achieve the right result, the question of admissibility of any further measures cannot be resolved positively or negatively *a priori.* The question can only be approached in the light of proportionality. This is a general, flexible principle ensuring that the exercise of international responsibility does not lead to inequitable results (see chap. IV above, in particular, paras. 54-56). Where measures are taken by several States as a consequence of one and the same breach, respect for proportionality should prevent

[326] Charney, "Third State remedies in international law", loc. cit., pp. 95-96, and—at least in so far as reactions referred to as "solidarity reactions *stricto sensu*" are concerned—Hutchinson, loc. cit., pp. 163-164. In the Commission, McCaffrey expressed the opinion that the position of "indirectly" injured States is supplementary to that of the main victim of the internationally wrongful act (see *Yearbook ... 1985*, vol. I, 1892nd meeting, paras. 7-11). The representative of the United States of America in the Sixth Committee expressed similar doubts as to whether an "indirectly" injured State may resort to countermeasures when a "directly injured" State exists (*Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee*, 42nd meeting, para. 9).

any disproportion arising between the reaction and the breach or its effects as a result of the cumulative effect of the unilateral measures.

151. In conclusion, it is believed that the particular problems raised by the violation of *erga omnes* obligations—wrongly presented in terms of a plurality of "directly" or "indirectly" injured States—call neither for amendments to the draft articles adopted or proposed so far, nor for the addition or interpolation of further adhoc draft articles. Those problems, which are more correctly to be identified in terms of a plurality of equally or unequally injured States, call simply for a proper understanding and application of the general rules adopted or proposed so far. The only useful—and probably indispensable—ad hoc provision would be a new draft article to follow article 5 as adopted on first reading for the definition of injured State. The additional draft article would simply provide that whenever an internationally wrongful act affects more than one injured State, each one of them is entitled to exercise the rights and *facultés* laid down in the relevant articles, to the extent that any such rights or *facultés* appertain to it by virtue of the right infringed and the injury sustained.

CHAPTER IX

IX. PROPOSED DRAFT ARTICLE

152. A very tentative draft of a possible article 5 *bis* is proposed, reading as follows:

***Article 5* bis**

Whenever there is more than one injured State, each one of them is entitled to exercise its legal rights under the rules set forth in the following articles.