

Article 63

Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except insofar as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

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A. Purpose and Function

This provision, which is closely related to Art 74, separates the political issue of diplomatic (and to a lesser extent also consular) relations between States¹ from the legal issues pertaining to their treaty relations. Treaties being important both “as a source of international law and as a means of developing peaceful co-operation among nations”, irrespective of their different constitutional and social systems,² the international community has a strong interest in preserving their stability and making them **independent of the volatility of diplomatic (and consular) relations**.³ This is why the severance (or absence) of such relations neither prevents the conclusion of treaties between States (Art 74), nor does it affect their legal relations under existing treaties (Art 63). Ultimately, Art 63 constitutes a confirmation of the principle of *pacta sunt servanda*.⁴

On the other hand, the severance of diplomatic relations between States usually occurs because of **serious political differences which prevent further genuine co-operation** between them. This necessarily affects their readiness to faithfully fulfil their mutual treaty obligations, all the more since it will make the implementation

¹*H Blomeyer-Bartenstein* Diplomatic Relations, Establishment and Severance (1992) 1 EPIL 1070 *et seq.*

²See 1st recital of the Preamble of the VCLT.

³*N Angelet* in *Corten/Klein* Art 62 MN 2.

⁴Remarks by the Israeli delegate, UNCLOT I 383 para 52.

of treaties difficult, often more onerous and sometimes even impossible. As the Convention includes provisions dealing with both the supervening impossibility of performance (Art 61) and the fundamental change of circumstances (Art 62), it was felt that clarifying the impact of a diplomatic rupture on existing treaties could not be avoided. Art 63 provides in essence that it shall have no effect unless it renders the application of the treaty impossible.

- 3 Some doubts remain whether this clarification was indispensable since the situation covered by the provision had not given rise to any problems or controversies in international practice.⁵ Art 63 constitutes “**a proviso inserted *ex abundanti cautela*”**.⁶ Its main function may be to provide municipal tribunals with the necessary clarification.⁷
- 4 Before the use of force was outlawed by Art 2 para 4 UN Charter, the severance of diplomatic relations was often an **intermediate step on the road to war**. Although the VCLT refrains from regulating the effects which the outbreak of hostilities might have on treaties (→ Art 73, also → Art 62 MN 37), it takes up the diplomatic rupture in Art 63. The principle set out in the provision that the severance of diplomatic relations is irrelevant to treaty relations was generally and easily accepted in the drafting process, but the exception proved to be very contentious.

B. Historical Background and Negotiating History

- 5 Art 25 of the Harvard Draft treated the severance of diplomatic relations between States as an **instance of the impossibility** for those States of performing their treaties⁸:

“Article 25. Effect of Severance of Diplomatic Relations

If the execution of a treaty is dependent upon the uninterrupted maintenance of diplomatic relations between the parties thereto, the operation of the treaty is suspended as between any parties upon the severance of their diplomatic relations; in the absence of agreement to the contrary, however, the operation of the treaty as between such parties will be revived by the reestablishment of their diplomatic relations.”

- 6 Both Draft Art 25 and present-day Art 63 express the same rule/exception relationship, assuming that the severance of diplomatic relations will normally not affect treaty performance unless the execution or application of the treaty exceptionally depends on the existence of those relations. However, whereas Art 63 is formulated in the negative, similar to Art 56 and Art 62, underlining the rule and narrowly circumscribing the exception, Draft Art 25 centers the exception and regulates it in broader positive terms. As the commentary on Draft Art 25

⁵Remarks by *El-Erian* [1966-I-2] YbILC 110 para 90.

⁶Remarks by the Japanese delegate at the Vienna Conference, UNCLOT I 383 para 48.

⁷Remarks by *Rosenne* [1964-I] YbILC 158 para 62.

⁸Harvard Draft 1055 *et seq.* See in particular 1056.

explained, the likelihood that a State would ever sever diplomatic relations with another State for the purpose of avoiding its treaty obligations was so improbable that it need not be taken into account when formulating the provision.⁹

Draft Art 25, in contrast to Art 63, also specified the **legal consequence where the exception should occur**. In that case, the operation of the treaty was to be automatically suspended. Based on the assumption that any interruption of diplomatic relations, unless followed by a declaration of war, would be relatively brief, the Harvard Draft added another automatic rule to the effect that the re-establishment of diplomatic relations would revive the operation of the treaty, unless the parties agreed otherwise.¹⁰

It was common ground in the ILC that the severance of diplomatic relations did not in itself terminate the treaty relationships between the States concerned. In his second report on the law of treaties, *Fitzmaurice* stated categorically that by reason of the **principle of *pacta sunt servanda*** the severance of diplomatic relations could never in itself justify the termination or suspension of treaties. Practical difficulties of implementation, which might be caused thereby could always be met by invoking the good offices of another State, or by appointing a protecting State.¹¹

His successor as Special Rapporteur *Waldock*, while agreeing with *Fitzmaurice's* rule, was less categorical because in his view, no State was obliged either to accept the good offices of another State or to recognize the nomination of a protecting State after diplomatic relations had been broken off.¹² Referring to Art 25 of the Harvard Draft, he proposed to insert the following clarifying provision into Part III of the Convention on the application of treaties and not to place it in the context of the termination of treaties:¹³

“Art 65 A. – The effect of breach of diplomatic relations on the application of treaties¹⁴

Subject to article 43¹⁵ the severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty and, in particular, their obligation under article 55.”¹⁶

Waldock explained that if the **severance of diplomatic relations rendered the performance of the treaty impossible**, that could be invoked as a ground for terminating it or suspending its operation.¹⁷

⁹Harvard Draft 1057 *et seq.*

¹⁰*Ibid* 1056 *et seq.*

¹¹*Fitzmaurice* II 23 (text of Art 5 para 2 cl iii lit a), 42 para 34 (commentary).

¹²*Waldock* III 45 para 5. *Waldock* referred to Art 45 and 46 VCDR which required the consent of the receiving State in either case.

¹³*Waldock* III 45 para 4.

¹⁴*Waldock* III 44 (footnotes added).

¹⁵Supervening impossibility of performance.

¹⁶*Pacta sunt servanda*.

¹⁷*Waldock* III 45 para 45 para 6.

- 11** After the reference to Draft Art 43 on impossibility had been criticized by ILC members because of the implication that the severance of diplomatic relations could lead to the termination of the treaty and not only to the suspension of its operation,¹⁸ the Drafting Committee redrafted Art 65 A, making two paragraphs out of the earlier single paragraph:

“1. The severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty.

2. However, such severance of diplomatic relations may be invoked as a ground for suspending the operation of the treaty if it results in the disappearance of the means necessary for the application of the treaty [. . .].”¹⁹

- 12** The ILC preliminarily adopted that version after having replaced “means necessary” by “necessary channels”.²⁰ For unknown reasons, the provision was included as Draft Art 64 in the ILC Draft of 1964 without the adopted amendment, again speaking of “means necessary”. The commentary, however, made clear that the exception in para 2 had in mind cases where the application of the treaty was dependent upon the existence of diplomatic channels.²¹

- 13** Whereas Draft Art 64 para 1 was unanimously approved by Governments, several of them criticized para 2 as not being strict enough, leaving States with too much scope for invoking the severance of diplomatic relations as a pretext for suspending performance of a treaty.²²

- 14** The Special Rapporteur thereupon suggested that the exception should be reformulated so as to be closely linked again with Draft Art 43 on the supervening impossibility of performance but at the same time make clear that the severance of diplomatic relations could be no more than a temporary obstacle to treaty performance: “[i]f the severance of diplomatic relations should result in a temporary impossibility of performing the treaty in consequence of the disappearance of a means indispensable for its execution, article 43 applies.”²³

- 15** The Drafting Committee to which the matter was referred proposed to drop the reference to any exception, retaining just the plain rule that “[t]he severance of diplomatic relations between parties to a treaty does not in itself affect the legal relations between them by the treaty.”²⁴ This proposal was based on the assumption that supplementing the simple rule by a specific reference to the impossibility of performance would unduly enlarge the scope of the article. As the words “in itself” indicated, a State remained free to argue that the severance of diplomatic relations

¹⁸Remarks by *Jiménez de Aréchaga* and *Rosenne*, [1964-I] YbILC 157 para 55, 158 para 60.

¹⁹[1964-I] YbILC 239 para 5. Art 65A para 3 on partial impossibility, which was later dropped in view of Art 44 para 3 has been omitted here.

²⁰[1964-I] YbILC 239 para 15.

²¹[1964-II] YbILC 192 para 5.

²²*Waldock* VI 78 para 3.

²³*Ibid* 78 para 4.

²⁴[1966-I/2] YbILC 212 paras 9–10.

brought about the supervening impossibility of performance, but only if it could make out a case in accordance with Draft Art 43 (now Art 61).²⁵

The ILC adopted this abbreviated version of the article by 17 votes to none, with one abstention.²⁶ It became Art 60 of its Final Draft.²⁷ The Commission gave two reasons for the elimination of the impossibility exception. It first referred to the reformulation of Draft Art 58 (now Art 61) pursuant to which the supervening impossibility of performance was linked to the disappearance or destruction of an indispensable object whereas the severance of diplomatic relations related to means rather than to an object.²⁸ Secondly, the use of third States and even direct channels of communication had become so common that the absence of the normal diplomatic channels could no longer be considered “as a disappearance of a ‘means’ or of an ‘object’ indispensable for the execution of a treaty.”²⁹

At the Vienna Conference, the ILC’s Draft Art 60 was considered as too incomplete a statement of the rule governing severance of diplomatic relations. Moreover, it did not sufficiently take into account the **political sentiment of States and the psychological climate of international relations**.³⁰ Thus, most delegations reacted favourably to an amendment jointly submitted by Italy and Switzerland to add at the end of the draft article the words “unless those legal relations necessarily postulate the existence of normal diplomatic relations”, even though that exception might already be implicit in the ILC’s text.³¹ The Committee of the Whole adopted the principle of this amendment by 62 votes to none, with 25 abstentions, the exact wording being left to the Drafting Committee.³² The Drafting Committee omitted the adjective “normal”, having been criticized as potentially creating uncertainty on the scope of the exception.³³ The Conference adopted the final text of Art 63 by 103 votes to none.³⁴

A Chilean amendment proposing to add a second paragraph to Draft Art 60 with the rule now embodied in Art 74³⁵ was adopted in its substance but transformed into a separate provision (Draft Art 69*bis*).³⁶ The Hungarian amendment that led

²⁵Explanations given by the Chairman of the Drafting Committee and the Special Rapporteur [1966-I/2] YbILC 212 paras 10–11.

²⁶*Ibid* 213 para 27.

²⁷[1966-II] YbILC 260.

²⁸Final Draft, Commentary to Art 60, 260 para 3.

²⁹*Ibid* 261 para 4.

³⁰See the remarks by the delegates of Malaysia and Congo, UNCLOT I 383 para 58, 384 para 61.

³¹A/CONF.39/C.1/L.322, UNCLOT III 185 para 549 subpara a.

³²UNCLOT I 386 para 83.

³³See the criticism by the delegates from Hungary and Singapore UNCLOT I 383 para 47, 384 para 64.

³⁴UNCLOT II 122 para 53.

³⁵UNCLCOT III 185 para 549 [d].

³⁶UNCLOT I 480 paras 53 *et seq.*

to the inclusion of a rule on the severance of consular relations will be discussed *infra* (→ MN 24 *et seq.*).

C. Elements of Article 63

I. Severance of Diplomatic Relations

- 19 The general rule set out in the first half of **Art 63 embodies the progress made in international relations since the 19th century**. At that time, the severance of diplomatic relations was an act of extreme gravity, often a prelude to a declaration of war. It ushered in a period of stony silence and could be considered as excluding the further implementation of most treaties between the parties, except for those few that were specifically intended to apply in cases of diplomatic rupture. Today, even States maintaining no diplomatic relations with each other can and often do communicate unofficially via their permanent missions to the United Nations.³⁷
- 20 The “severance of diplomatic relations” presupposes the prior existence of normal diplomatic relations.³⁸ Art 63 uses that term in the technical sense in which it also appears in Art 41 UN Charter and in Art 2 para 3 VCCR³⁹ and which is synonymous with the term “breaking off of diplomatic relations” preferred in Art 45 VCDR. The ILC obviously saw no need to define the term, although one of its members had indicated that its precise meaning was unclear.⁴⁰
- 21 “Severance of diplomatic relations” means their termination, which effectively ends all direct official communications between the two governments. This can be done by mutual consent, but will **mostly be effected by a unilateral act** of one of the governments, either as an expression of political protest, as a political sanction (*eg* against abuse of diplomatic privilege) or as a means to implement a decision or recommendation of an international organization (*eg* a UNSC resolution pursuant to Art 41 UN Charter).⁴¹ Normally, diplomatic relations are terminated by express notification. There are, however, also **implied forms** such as the actual closure of one’s own mission together with the demand that the other government also closes its mission – actions which clearly manifest the intention of one government to break off diplomatic relations with the other.⁴²
- 22 From the formal severance of diplomatic relations, **less severe forms of diplomatic frictions have to be distinguished**, such as the temporary recall of an ambassador for consultations, his permanent recall without a request for the *agrément* for a successor or the notification that the ambassador of another State is

³⁷See the remarks by *Bartoš* and *Tunkin*, [1966-I/2] YbILC 109 paras 80, 84.

³⁸Final Draft, Commentary to Art 60, 260 para 1.

³⁹See Final Draft, Commentary to Art 60, 261 para 5.

⁴⁰Remarks by *Bartoš*, [1966-I/2] YbILC 109 para 80.

⁴¹*BS Murty* The International Law of Diplomacy (1989) 253; *Blomeyer-Bartenstein* (n 1) 1071.

⁴²*Murty* (n 42) 253.

persona non grata. In all these cases, the diplomatic relations as such remain unimpaired and the diplomatic mission continues to function under the direction of a *chargé d'affaires*.⁴³ While Art 63 technically embraces only the formal severance of diplomatic relations, it clearly implies that those lesser forms of diplomatic frictions do *a fortiori* not affect the treaty relations between the parties.⁴⁴ The question, however, remains whether diplomatic frictions short of the severance of diplomatic relations can also trigger the application of the exception (→ MN 39).

In contrast to Art 25 of the Harvard Draft,⁴⁵ Art 63 does not cover the non-existence of diplomatic relations due to the **non-recognition (or de-recognition)** of a government, an issue that the ILC preferred to discuss under the topic of State succession.⁴⁶ 23

II. Severance of Consular Relations

It was the Hungarian Government that drew the ILC's attention to the severance of consular relations, a move envisaged by the pertinent Convention on Consular Relations,⁴⁷ and suggested that its effect on the application of treaties should also be dealt with either in the present or a separate article.⁴⁸ The Special Rapporteur expressed his reservations because the severance of consular relations could not be placed on the same footing as the severance of diplomatic relations. He also referred to the large number of consular conventions, which would have to be taken account of.⁴⁹ This led the ILC not to adopt the Hungarian suggestion. 24

Hungary thereupon submitted an amendment to the Vienna Conference to insert the words "and consular" between the words "diplomatic" and "relations".⁵⁰ The Hungarian delegate explained that the amendment was intended to fill an important gap in the draft text of the ILC. Consular relations between States often existed in the absence of diplomatic relations. If Art 63 was limited to diplomatic relations, a State having only consular relations with another State might sever them and invoke the article as an escape clause for ridding itself of its obligations under a treaty with that other State it no longer wished to perform.⁵¹ The Committee of the Whole 25

⁴³Murty (n 42) 254 *et seq*; Blomeyer-Bartenstein (n 1) 1071.

⁴⁴*N Angelet* in Corten/Klein Art 62 MN 16.

⁴⁵See the pertinent comment in the Harvard Draft 1060 *et seq*.

⁴⁶Final Draft, Commentary to Art 60, 260 para 1. On de-recognition see *R Jennings/A Watts* Oppenheim's International Law Vol I Parts 2–4 (9th edn 1992) 1309 footnote 2.

⁴⁷Art 2 para 3, 27 VCCR.

⁴⁸*Waldock* VI 77.

⁴⁹*Waldock* VI 79 para 9.

⁵⁰A/CONF.39/L.334, UNLCOT III 185 para 549 [b].

⁵¹UNCLOT I 382 paras 45 *et seq*. The Hungarian delegate impliedly referred to the interpretive maxim '*inclusio unius est exclusio alterius*'.

adopted the Hungarian amendment in principle by a vote of 79 to none, with 11 abstentions.

- 26 After the Drafting Committee had replaced the “and” in the Hungarian proposal by an “or”, which seemed more in conformity with the sponsor’s intention, and included a reference to consular relations in the Italo-Swiss amendment, the text of Art 63 was finalized and approved without a vote by the Committee of the Whole.
- 27 The **interpretation of the consular relations variant of Art 63 follows the interpretation of the diplomatic relations variant**: although it technically also only extends to the formal severance of consular relations, lesser frictions in consular relations will *a fortiori* not affect the treaty relations between the parties (→ MN 22).

III. Regular Consequence: Irrelevance for Legal Relations Established by Treaty

- 28 There was consensus in the ILC and at the Vienna Conference that the severance of diplomatic or consular relations between the parties to a treaty, no matter whether bilateral or multilateral,⁵² should in itself as a general rule have no effect on the legal relations established between them by the treaty, no matter how deeply disturbed their political relations might be.⁵³
- 29 Conversely, some treaties such as the Geneva Conventions of 1949 for the protection of victims of war only become applicable for the most part, if there are no diplomatic relations between the parties. However, it was considered as unnecessary to include a clarification in Art 63 which referred to these treaty types.⁵⁴

IV. Exceptional Consequence: Relevance for Legal Relations Established by Treaty

1. Conditions Under Which Exception Applies

a) Impossibility of Performance

- 30 The real issue both within the ILC and at the Conference was the exception to the general rule: in what exceptional cases and in what regard should the severance of diplomatic or consular relations affect the legal relations between the parties to a treaty? The problem was how to **circumscribe that exception so narrowly that it could not develop into a threat to the stability of treaty relations**.

⁵²Final Draft, Commentary to Art 60, 260 para 1.

⁵³*Ibid* 260 para 2.

⁵⁴See comments by the Israeli government quoted by *Waldock* VI 77, and his own reaction, *ibid* 78 para 6.

There was a general feeling that in some cases, the application of a treaty would become impossible if the parties no longer had diplomatic or consular relations with each other. However, the question of how to define these exceptional cases exactly without providing the parties with an easy pretext for evading their treaty obligations proved very difficult. 31

When the Italian and Swiss delegations introduced the amendment (→ MN 17) containing the exception they referred to **two different categories of treaties whose performance would inevitably be affected by the severance of diplomatic relations**: first, “treaties in which diplomatic relations were the only technical means of execution, through the essential communications that they established in such matters as consultation, extradition [...]”; second, treaties such as the VCDR whose direct and exclusive subject was diplomatic relations.⁵⁵ Treaties in the second category were allegedly “nullified” by the severance of diplomatic relations.⁵⁶ The latter allegation obviously goes too far – the VCDR itself presupposes a continuing treaty relationship after diplomatic ruptures.⁵⁷ On the other hand, most provisions of that Convention are simply inapplicable in the absence of diplomatic relations because their regulatory object disappeared. 32

Opinions on the issue were divided in the ILC. Some members felt that the “frosty atmosphere” in consequence of the breaking off of diplomatic relations alone could make the suspension of the application of treaties inevitable.⁵⁸ Other members observed that instances in which diplomatic ruptures rendered treaty performance impossible were extremely rare, because the permanent missions of States at the UN could always be used as informal channels of communication.⁵⁹ A third group of members rejected the intermediate solution that had consisted in linking Art 63 by cross-reference to Art 61 on the impossibility of performance. To them, that did not seem feasible because the latter provision was too narrow, covering only instances of absolute impossibility.⁶⁰ 33

These difficulties ultimately led the ILC to drop any express exception from its Draft Art 60 (now Art 63, → MN 15 *et seq.*). When the Conference reintroduced such exception, it revived the **problem of indeterminacy**, which the ILC had tried to avoid, without providing any solution. The only safe assumption is that the exception refers to **instances of impossibility of performance, arguably going beyond those covered by the narrow provision of Art 61**.⁶¹ Whereas Art 61 34

⁵⁵UNCLOT I 382 para 44. Extradition treaties and treaties of judicial assistance were examples already mentioned by *Rosenne*, [1964-I] YbILC 21 para 12.

⁵⁶UNCLOT I 384 para 62.

⁵⁷See *ibid.* Art 45 on the duty of the receiving State to respect and protect the premises of the mission *etc*

⁵⁸*Ago and Yasseen*, [1964-I] YbILC 239 paras 7 and 9.

⁵⁹*Bartoš, Tunkin and Tsuruoka*, [1966-I/2] YbILC 109, paras 76 *et seq.*, 84, 89, 104. See also *Aust* 307 *et seq.*

⁶⁰*Jiménez de Aréchaga, El-Erian, Amado*, [1966-I/2] YbILC 108, paras 85 *et seq.*, 94, 101. See also *Ago, MK Yasseen, ibid* paras 60 and 73.

⁶¹See *F Capotorti L'extinction et la suspension des traités* (1971) 134 RdC 417, 530.

concerns the disappearance of an object, Art 63 deals with the **disappearance of avenues of communication**, with both being defined as “indispensable” for the execution or application of the treaty. If one extends the term “object” in Art 61 to a legal situation, the existence of diplomatic or consular relations might be covered (→ Art 61 MN 14, also → MN 57). **“Indispensable” in any event means absolutely required**, which is a rather strict standard.⁶²

35 There is apparently only one case where the exception was invoked in practice (but ultimately not applied because its strict conditions were not met) and which can serve as a guideline for future interpretation: in the *HALB case (LAFICO v Burundi)*, the arbitral tribunal held that the severance of diplomatic relations did not affect the multiple mixed commissions in which the two States Parties (Libya and Burundi) cooperated for the well-being of their citizens, although these all more or less had ‘political connotations’. Accordingly, an inter-State stock corporation whose only stockholders were the States of Libya (later succeeded by the Libyan company LAFICO) and Burundi and which was the principal instrument of cooperation between these two States could continue to function, and the treaty on which it was based could continue to be implemented, despite Burundi’s having severed diplomatic relations with Libya. The exception in Art 63 should not be interpreted broadly, or else the provision would illicitly be turned into an instrument of destabilization of international relations.⁶³

36 In the *Tehran Hostage case*, the ICJ held without referring to Art 63 that the Treaty of Amity, Economic Relations, and Consular Rights of 1955⁶⁴ between the United States and Iran had remained in force and applicable despite diplomatic relations having been severed before the judgement was handed down. The Court expressly stated that

“[a]lthough the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran.”⁶⁵

Obviously, the Court saw no reason to assume that the operation of the Treaty of Amity had been suspended due to the indispensability of diplomatic relations for its application (→ MN 41).

37 One instance where the exception could be applied would be a treaty stipulating that diplomatic remedies had to be exhausted before recourse to other dispute settlement procedures were permitted. After the severance of diplomatic relations, the exhaustion requirement could no longer be fulfilled.⁶⁶ Another example is Art 1

⁶²Villiger Art 63 MN 7.

⁶³*HALB Case (LAFICO v Burundi)* (1990) 24 RBDI 517, 536 paras 38 *et seq.* See also *N Angelet in Corten/Klein* Art 62 MN 31.

⁶⁴284 UNTS 93.

⁶⁵ICJ *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Rep 3 para 54.

⁶⁶See the remarks by Ago and Rosenne, [1964-I] YbILC 157 para 53, 158 para 61.

of the 1954 Convention Relating to Civil Procedure, which provides that in civil and commercial matters, the service of documents on persons abroad shall be effected in the contracting States at the request of the Consul of the requesting State.⁶⁷ This provision can only be applied if consular relations exist.⁶⁸ A third example would be a treaty on immunities granted to consuls, which would become inapplicable for as long as consular relations are interrupted.⁶⁹

The **rules of *pacta sunt servanda* and good faith** (Art 26) advise a narrow interpretation of the indispensability requirement in any event: the parties to a treaty must exhaust all reasonable means to surmount the obstacles put in their way by their political rupture and continue performing the treaty. What is “reasonable” depends on the circumstances of each case, introducing some indeterminacy. Thus, the question what efforts the parties are obliged to make so as to keep the treaty operational despite the absence of diplomatic or consular relations may find different answers, depending on one’s viewpoint, on the developmental stage of international law in general at the given time and on the importance that the further application of the treaty might have for other States or the international community as a whole (*eg* concerning the maintenance of international peace and security).⁷⁰ It seems questionable whether today *Waldock’s* position could be upheld that the parties to a treaty were completely free to reject the good offices offered by a third State or the nomination of a protecting power, if their acceptance would enable them to continuously fulfil their treaty obligations (→ MN 9).⁷¹

If one extends the rule of irrelevance set out in Art 63 *a fortiori* to **lesser forms of diplomatic friction** short of any formal severance of diplomatic relations (→ MN 22), one cannot but also apply the exception in those cases in which that friction makes the application of a treaty impossible.⁷² Either Art 63 would have to be applied analogously, or in conjunction with Art 61, the latter being broadly interpreted as also embracing the disappearance of a legal situation (→ MN 34).

b) Special Rules for Certain Treaty Types?

During the debates in the ILC, the question came up of whether **certain types of political treaty** should expressly be excepted from the scope of the general rule that treaty relations remain unaffected by the severance of diplomatic relations. Treaties of alliance were adduced as an example of treaties that would undeniably be

⁶⁷286 UNTS 266.

⁶⁸See also *N Angelet* in *Corten/Klein* Art 62 MN 3.

⁶⁹Final Draft 1982, Commentary to Art 63, 62 para 1.

⁷⁰See the difference between *Fitzmaurice* and *Waldock* on whether the parties were obliged to make treaty implementation possible by using the good offices of other States (→ MN 8–9).

⁷¹But see *N Angelet* in *Corten/Klein* Art 62 MN 32.

⁷²*N Angelet* in *Corten/Klein* Art 62 MN 27 *et seq.*

affected by a diplomatic rupture.⁷³ However, the Commission decided against mentioning any exception and left the question of the termination or suspension of the operation of such treaties to be governed by the general provisions of Part V, Section 3 of the Convention.⁷⁴

41 In contrast, **treaty obligations concerning the peaceful settlement of disputes** were pointed out in the comments of the UK Government as an example for kinds of treaty obligations that ought never be capable of being suspended by reason only of the severance of diplomatic relations. In view of the outstanding importance of those obligations for the maintenance of pacific international relations, the ILC contemplated the insertion of a clarification to the effect that they would in no circumstances be affected by the severance of diplomatic relations.⁷⁵ However, this was considered as unnecessary because so many methods of negotiation remained open to States even in the absence of diplomatic relations that their severance would never bring about the impossibility of performance in any case.⁷⁶ In the *Tehran Hostage* case, the ICJ made clear that the compromissary clause in a treaty of amity forming the basis of its jurisdiction had remained unaffected by the severance of diplomatic relations between the parties.⁷⁷

42 Ultimately, therefore, **Art 63 excepts no treaty types**, neither in the negative sense (that they are normally affected by the severance of diplomatic relations) nor in the positive sense (that they are never thus affected). Rather, all treaty types are treated alike: they are all covered by both the general rule and the exception, provided that they meet the latter's strict conditions.

43 This also holds true for treaties between States forming the constituent instrument of an international organization (Art 5). Art 63 VCLT II only regulates the severance of diplomatic or consular relations between States Parties to such a treaty because relations of that kind can only exist between States. The ILC commented, however, that any severance of relations between a State and an international organization left their treaty relations unaffected, pursuant to the principle of Art 63, which was merely an **application of the general principles of the law of treaties**.⁷⁸

c) Law of Treaties Leaves Discretion of States as to Maintenance of Diplomatic and Consular Relations Unaffected

44 The negotiating States were obviously unwilling to let the law of treaties impose limits on their **political discretion concerning the maintenance of diplomatic or**

⁷³See the remarks by *Waldock*, *Ago*, and *Yasseen* [1966-I/2] YbILC 106 para 39, 108 paras 59, 72.

⁷⁴Final Draft, Commentary to Art 60, 261 para 4.

⁷⁵*Waldock* VI 79 para 7.

⁷⁶*Ibid.* See also the remarks by *Ago* and *Yasseen* [1966-I/2] YbILC 108 para 61, 109 para 74.

⁷⁷ICJ *Tehran Hostage* (n 66) para 54 → MN 36.

⁷⁸See Final Draft 1982, Commentary to Art 63, 62 paras 2–3. See also *C Clavé* in *Corten/Klein* Art 63 MN 1 *et seq.*

consular relations.⁷⁹ The exception in Art 63 in essence provides that this discretion shall prevail over potentially conflicting treaty obligations requiring the existence of diplomatic or consular relations.⁸⁰ After the adoption of Art 63 by the Committee of the Whole at the Vienna Conference, the Australian delegation voiced doubts concerning the Hungarian amendment, which had introduced the reference to consular relations (→ MN 27 *et seq*), stating that “[i]f the existence of consular relations were needed for the application of a treaty, severance might be regarded as a breach.”⁸¹ If that criticism was correct, the consular relations variant of the exception to Art 63 would be incompatible with the general principle of law that a party cannot take advantage of its own wrong, which is itself an offshoot of the principle of *bona fides* (→ Art 61 MN 28). The question would also be raised if the same was true for the diplomatic relations variant.

The fact that no other delegation supported the Australian view clearly indicates that the **severance of both diplomatic and consular relations was regarded as a highly political decision**, which should not be preempted by any treaty relation. While the prohibition of the abuse of rights⁸² also sets limits to that discretion, it will be difficult to prove that the severance of diplomatic or consular relations was effected merely for the purpose to obtain release from certain treaty commitments (→ MN 6 and 11). Apart from that rather theoretical case of abuse, the severance by a party to a treaty of diplomatic or consular relations with another party never violates any international obligation owed to any other party, in contrast to the bringing about of the impossibility of performance in the sense of Art 61 para 2 or a fundamental change of circumstances in the sense of Art 62 para 2 lit b.⁸³

2. Indeterminacy of Exact Legal Consequence if Exception Applies

Art 63 does **not specify the legal consequences** in the event that the exception applies. It states only that if the existence of diplomatic or consular relations was indispensable for the application of the treaty, then their severance would affect the treaty relations. However, in what way this is so remains unclear and was not properly clarified either in the ILC or at the Conference even though such clarification had been suggested in the Committee of the Whole.⁸⁴

One can safely assume that in those few cases in which the existence of diplomatic or consular relations is indeed indispensable for the application of the

⁷⁹See Art 2 VCDR and Art 2 VCCR both of which imply the free political discretion of every State to decide on the entry into and maintenance of diplomatic and consular relations with any other State (*N Angelet in Corten/Klein* Art 62 MN 4 with n 7).

⁸⁰*N Angelet in Corten/Klein* Art 62 MN 4 who assumes that every treaty whose application requires the existence of diplomatic or consular relations is subject to the implicit proviso that all the parties retain the right to sever those relations according to their free discretion.

⁸¹UNCLOT I 480 para 60.

⁸²A *Kiss* Abuse of Rights in MPEPIL (2008).

⁸³*N Angelet in Corten/Klein* Art 62 MN 24.

⁸⁴UNCLOT I 383 para 47.

treaty, their severance will only lead to the suspension and not the termination of that treaty.⁸⁵ Such severance will theoretically always be reversible and thus temporary, although its duration may be practically indefinite and last for a very long time.⁸⁶ As the “except in so far” construction in Art 63 indicates, any severance of diplomatic or consular relations should have the least possible effect on treaty relations and that translates into **their suspension only, and not their termination**. There is no reason why Art 63 should go further in this respect than the related provision in Art 61 para 1 cl 2. The formal maintenance in force of treaties whose operation is suspended for indefinite periods does not impose any unreasonable burden on the parties who are always free to agree on their termination in accordance with Art 54 lit b, 58.

48 Surprisingly, the question was never raised, and the text of Art 63 does not clarify whether the exception, where its conditions are met, automatically suspends the operation of the treaty or whether it only entitles the parties to invoke the severance as a ground for obtaining that result. The latter is the consequence foreseen in Arts 60–62, **initiating the procedure pursuant to Arts 65–68**. There is no reason why the exception in Art 63 should in contrast thereto have automatic suspensive effect. During the drafting process, the close connection of Art 63 and Art 61 was in plain view, and that might have been the reason why the drafters and the negotiators tacitly assumed that the legal consequences should be the same whenever the severance of diplomatic or consular relations resulted in the impossibility of performing a certain treaty.

49 And yet, when the ILC returned to Art 63 in the context of Final Draft 1982, it stated in the pertinent commentary that “the effects of a treaty on immunities granted to consuls are suspended for as long as consular relations are interrupted.”⁸⁷ In this example, the ILC seems to have assumed that the suspension occurs automatically, perhaps because the case was so obvious that no objection in the sense of Art 65 para 3 was to be expected upon notification of the intention to suspend the operation of that treaty.

50 The question if and to what extent the existence of diplomatic or consular relations is truly indispensable for the application of a certain treaty can, however, just as easily give rise to disputes as the question if the requirements of Arts 60, 61 or 62 are met. The endeavour to avoid any automatism and instead give room to an orderly settlement procedure prior to effecting any *fait accompli* is just as important in the case of Art 63 as in all the others. Accordingly, as in all the other cases regulated by Part V of the Convention, where a party considers the existence of diplomatic or consular relations as indispensable in the sense of the exception to the rule of Art 63, it may do no more than **invoke their severance** as a ground for

⁸⁵See *ibid.* See also the remarks by Jiménez de Aréchaga [1964-I] YbILC 1964 I, 157 para 55. But see *N Angelet in Corten/Klein Art 62 MN 25 et seq.*

⁸⁶The United States severed diplomatic relations with Iran in April 1980 and they have not yet been re-established.

⁸⁷Final Draft 1982, Commentary to Art 63, 62 para 1.

suspending the operation of the treaty, thereby initiating the procedure under Art 65.⁸⁸ This avenue is open to both parties, the one who unilaterally severed the relations and the other who is the addressee of such severance.

Where the severance of diplomatic or consular relations is indispensable for the application of only certain treaty provisions, the exception only justifies their suspension (“except in so far as”), provided that these provisions are separable in the sense of Art 44 para 3.⁸⁹ 51

V. Codification of Rule of Customary International Law

Both the rule and the exception laid down in Art 63 are **today part of customary international law**.⁹⁰ While there is no express statement of the ICJ to this effect, the Court in the *Tehran Hostage* case held that the severance of diplomatic relations left the applicability of the 1955 Treaty of Amity between the United States and Iran unaffected, although its effective operation was impaired (→ MN 36). As the VCLT was inapplicable in that case, neither the United States nor Iran being a party to it, the ICJ, which did not cite Art 63, can only have applied an analogous rule of customary international law.⁹¹ 52

One can safely assume that the part of Art 63 concerning the severance of consular relations now also forms part of customary international law. The irrelevance of the severance of diplomatic relations with its much more important political overtones applies *a fortiori* to the severance of consular relations, apart from cases in which the severance causes an impossibility of performance.⁹² 53

The exception set out in Art 63 can also be qualified as a corollary of the principle *impossibilium nulla est obligatio*, which is a general principle of law. 54

Accordingly, when returning to Art 63 in the context of its Final Draft 1982, the ILC explained that the provision was “merely an application of the general principles of the law of treaties”.⁹³ 55

VI. Relationship with Other Rules of International Law

Like the other provisions in the same section of the Convention, Art 63 sets out a **subsidiary rule**, which is subject to any *lex specialis* in the pertinent treaty, such as Art 2 para 3 VCCR and Art 45 VCDR.⁹⁴ Based on both Art 63 and Art 74, the 56

⁸⁸Villiger Art 63 MN 8–9.

⁸⁹*N Angelet* in *Corten/Klein* Art 62 MN 29; Villiger Art 63 MN 7.

⁹⁰Villiger Art 63 MN 10.

⁹¹See *N Angelet* in *Corten/Klein* Art 62 MN 9, 14. → MN 7 *et seq* for further references.

⁹²*N Angelet* in *Corten/Klein* Art 62 MN 13.

⁹³Final Draft 1982, Commentary to Art 63, 62 para 3.

⁹⁴Final Draft, Commentary to Art 60, 260 para 2.

German Model Treaty 2009 concerning the Encouragement and Reciprocal Protection of Investments contains an article that expressly provides that it “shall be in force irrespective of whether or not diplomatic or consular relations exist between the Contracting States.”⁹⁵ Moreover, the parties are of course free to agree *ad hoc* that one or more treaties in force between them shall be suspended or even terminated in consequence of the severance of diplomatic or consular relations, pursuant to the pertinent provisions of the Convention (Art 54 lit b, Art 57 lit b, Art 58).

- 57 The **relation of Art 63 with Art 61 on the one hand and Art 62** on the other hand is somewhat unclear.⁹⁶ The indispensability exception to Art 63 constitutes *lex specialis* with regard to Art 61, adding an instance of the impossibility of performance that would not necessarily meet the requirements of the general rule set out in the latter provision.⁹⁷ Art 63 also constitutes an exhaustive *lex specialis* with regard to Art 62 to the extent that the severance of diplomatic or consular relations can be qualified as a fundamental change of circumstances.⁹⁸ Neither para 1, nor para 2 lit b or para 3 of Art 62 applies to that special kind of fundamental change. The question whether a State may invoke the severance of diplomatic or consular relations as a ground for suspending the operation of a treaty is exhaustively regulated by the rule plus exception in Art 63.

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⁹⁵ Art 11 of the German Model Treaty available at http://www.huethig-jehle-rehm.de/imperia/md/content/hjr/produktinfo/cfmueller/978-3-8114-9610/9783811496101_sonstige_informationen_90.pdf (last visited 12 July 2011).

⁹⁶ This was criticized by the Congolese delegate, UNCLOT I 384 para 61.

⁹⁷ See also *Jennings/Watts* (n 47) 1309 MN 652 footnote 2. However, see *N Angelet* in *Corten/Klein* Art 62 MN 22; *C Clavé* in *Corten/Klein* Art 63 MN 4.

⁹⁸ See the remarks by *S Rosenne*, [1963-I] YbILC 152 para 21.

cannot solve.⁷³⁴ Paragraph 2 (b) can do no more than set out the general principle.

(13) Paragraph 2 (b) refers to the State claiming “[p]erformance of the obligation of reparation in accordance with the preceding articles”. This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example, a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) Paragraph 3 subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

CHAPTER II

COUNTERMEASURES

Commentary

(1) This chapter deals with the conditions for and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures that would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.⁷³⁵ This is reflected in article 22 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an operational system, taking into account the exceptional character of countermeasures as a response

to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term “reprisals” was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.⁷³⁶ More recently, the term “reprisals” has been limited to action taken in time of international armed conflict; i.e. it has been taken as equivalent to belligerent reprisals. The term “countermeasures” covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.⁷³⁷ Countermeasures are to be contrasted with retorsion, i.e. “unfriendly” conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present articles. The term “sanction” is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the Charter of the United Nations refers only to “measures”, even though these can encompass a very wide range of acts, including the use of armed force (Articles 39, 41 and 42). Questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand, the articles are concerned with countermeasures as referred to in article 22. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the 1969 Vienna Convention. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.⁷³⁸ Countermeasures involve conduct taken in derogation from a subsisting treaty

⁷³⁴ See also paragraphs (3) to (4) of the commentary to article 33.

⁷³⁵ For the substantial literature, see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational, 1984), pp. 179–189; O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 227–241; L.-A. Sicilianos, *Les réactions décentralisées à l’illicite: Des contre-mesures à la légitime défense* (Paris, Librairie générale de droit et de jurisprudence, 1990), pp. 501–525; and D. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures en droit international public* (Paris, Pedone, 1994).

⁷³⁶ See, e.g., E. de Vattel, *The Law of Nations, or the Principles of Natural Law* (footnote 394 above), vol. II, chap. XVIII, p. 342.

⁷³⁷ *Air Service Agreement* (see footnote 28 above), p. 443, para. 80; *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 106, para. 201; and *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 82.

⁷³⁸ On the respective scope of the codified law of treaties and the law of State responsibility, see paragraphs (3) to (7) of the introductory commentary to chapter V of Part One.

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

(5) This chapter does not draw any distinction between what are sometimes called “reciprocal countermeasures” and other measures. That term refers to countermeasures which involve suspension of performance of obligations towards the responsible State “if such obligations correspond to, or are directly connected with, the obligation breached”.⁷³⁹ There is no requirement that States taking countermeasures should be limited to suspension of performance of the same or a closely related obligation.⁷⁴⁰ A number of considerations support this conclusion. First, for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have a non-reciprocal character and are not only due to other States but to the individuals themselves.⁷⁴¹ Secondly, a limitation to reciprocal countermeasures assumes that the injured State will be in a position to impose the same or related measures as the responsible State, which may not be so. The obligation may be a unilateral one or the injured State may already have performed its side of the bargain. Above all, considerations of good order and humanity preclude many measures of a reciprocal nature. This conclusion does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as in the *Air Service Agreement* arbitration.⁷⁴²

(6) This conclusion reinforces the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse. Chapter II seeks to do this in a variety of ways. First, as already noted, it concerns only non-forcible countermeasures (art. 50, para. 1 (a)). Secondly, countermeasures are limited by the requirement that they be directed at the responsible State and not at third parties (art. 49, paras. 1 and 2). Thirdly, since countermeasures are intended as instrumental—in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment—they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (arts. 49, paras. 2 and 3, and 53). Fourthly, countermeasures must be proportionate (art. 51). Fifthly, they must not involve any departure from certain basic obligations (art. 50, para. 1), in particular those under peremptory norms of general international law.

⁷³⁹ See the sixth report of the Special Rapporteur on State responsibility, William Riphagen, article 8 of Part Two of the draft articles, *Yearbook ... 1985*, vol. II (Part One), p. 10, document A/CN.4/389.

⁷⁴⁰ Contrast the exception of non-performance in the law of treaties, which is so limited: see paragraph (9) of the introductory commentary to chapter V of Part One.

⁷⁴¹ Cf. *Ireland v. the United Kingdom* (footnote 236 above).

⁷⁴² See footnote 28 above.

(7) This chapter also deals to some extent with the conditions of the implementation of countermeasures. In particular, countermeasures cannot affect any dispute settlement procedure which is in force between the two States and applicable to the dispute (art. 50, para. 2 (a)). Nor can they be taken in such a way as to impair diplomatic or consular inviolability (art. 50, para. 2 (b)). Countermeasures must be preceded by a demand by the injured State that the responsible State comply with its obligations under Part Two, must be accompanied by an offer to negotiate, and must be suspended if the internationally wrongful act has ceased and the dispute is submitted in good faith to a court or tribunal with the authority to make decisions binding on the parties (art. 52, para. 3).

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

(9) In common with other chapters of these articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus, a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. Likewise, a regime for dispute resolution to which States must resort in the event of a dispute, especially if (as with the WTO dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.⁷⁴³

Article 49. Object and limits of countermeasures

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

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

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

⁷⁴³ See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 1, 3, para. 7, and 22.

Commentary

(1) Article 49 describes the permissible object of countermeasures taken by an injured State against the responsible State and places certain limits on their scope. Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two, namely, to cease the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured State.⁷⁴⁴ Countermeasures are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible State under Part Two. The limited object and exceptional nature of countermeasures are indicated by the use of the word “only” in paragraph 1 of article 49.

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

In order to be justifiable, a countermeasure must meet certain conditions ...

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State.⁷⁴⁵

(3) *Paragraph 1* of article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.⁷⁴⁶ In this respect, there is no difference between countermeasures and other circumstances precluding wrongfulness.⁷⁴⁷

⁷⁴⁴ For these obligations, see articles 30 and 31 and commentaries.

⁷⁴⁵ *Gabčíkovo-Nagyymaros Project* (see footnote 27 above), p. 55, para. 83. See also “*Naulilaa*” (footnote 337 above), p. 1027; “*Cysne*” (footnote 338 above), p. 1057. At the 1930 Hague Conference, all States which responded on this point took the view that a prior wrongful act was an indispensable prerequisite for the adoption of reprisals; see League of Nations, Conference for the Codification of International Law, *Bases of Discussion ...* (footnote 88 above), p. 128.

⁷⁴⁶ The tribunal’s remark in the *Air Service Agreement* case (see footnote 28 above), to the effect that “each State establishes for itself its legal situation vis-à-vis other States” (p. 443, para. 81) should not be interpreted in the sense that the United States would have been justified in taking countermeasures whether or not France was in breach of the Agreement. In that case the tribunal went on to hold that the United States was actually responding to a breach of the Agreement by France, and that its response met the requirements for countermeasures under international law, in particular in terms of purpose and proportionality. The tribunal did not decide that an unjustified belief by the United States as to the existence of a breach would have been sufficient.

⁷⁴⁷ See paragraph (8) of the introductory commentary to chapter V of Part One.

(4) A second essential element of countermeasures is that they “must be directed against”⁷⁴⁸ a State which has committed an internationally wrongful act, and which has not complied with its obligations of cessation and reparation under Part Two of the present articles.⁷⁴⁹ The word “only” in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State.⁷⁵⁰

(5) This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.

(6) In taking countermeasures, the injured State effectively withholds performance for the time being of one or more international obligations owed by it to the responsible State, and *paragraph 2* of article 49 reflects this element. Although countermeasures will normally take the form of the non-performance of a single obligation, it is possible that a particular measure may affect the performance of several obligations simultaneously. For this reason, paragraph 2 refers to “obligations” in the plural. For example, freezing of the assets of a State might involve what would otherwise be the breach of several obligations to that State under different agreements or arrangements. Different and coexisting obligations might be affected by the same act. The test is always that of proportionality, and a State which has committed an internationally wrongful act does not thereby make itself the target for any form or combination of countermeasures, irrespective of their severity or consequences.⁷⁵¹

(7) The phrase “for the time being” in paragraph 2 indicates the temporary or provisional character of countermeasures. Their aim is the restoration of a condition of legality as between the injured State and the responsible

⁷⁴⁸ *Gabčíkovo-Nagyymaros Project* (see footnote 27 above), pp. 55–56, para. 83.

⁷⁴⁹ In the *Gabčíkovo-Nagyymaros Project* case ICJ held that the requirement had been satisfied, in that Hungary was in continuing breach of its obligations under a bilateral treaty, and Czechoslovakia’s response was directed against it on that ground.

⁷⁵⁰ On the specific question of human rights obligations, see article 50, paragraph (1) (b), and commentary.

⁷⁵¹ See article 51 and commentary. In addition, the performance of certain obligations may not be withheld by way of countermeasures in any circumstances: see article 50 and commentary.

State, and not the creation of new situations which cannot be rectified whatever the response of the latter State to the claims against it.⁷⁵² Countermeasures are taken as a form of inducement, not punishment: if they are effective in inducing the responsible State to comply with its obligations of cessation and reparation, they should be discontinued and performance of the obligation resumed.

(8) Paragraph 1 of article 49 refers to the obligations of the responsible State “under Part Two”. It is to ensuring the performance of these obligations that countermeasures are directed. In many cases the main focus of countermeasures will be to ensure cessation of a continuing wrongful act, but they may also be taken to ensure reparation, provided the other conditions laid down in chapter II are satisfied. Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased, irrespective of the seriousness of the breach or its consequences, or of the State’s refusal to make reparation for it. In this context an issue arises whether countermeasures should be available where there is a failure to provide satisfaction as demanded by the injured State, given the subsidiary role this remedy plays in the spectrum of reparation.⁷⁵³ In normal situations, satisfaction will be symbolic or supplementary and it would be highly unlikely that a State which had ceased the wrongful act and tendered compensation to the injured State could properly be made the target of countermeasures for failing to provide satisfaction as well. This concern may be adequately addressed by the application of the notion of proportionality set out in article 51.⁷⁵⁴

(9) *Paragraph 3* of article 49 is inspired by article 72, paragraph 2, of the 1969 Vienna Convention, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible. In the *Gabčíkovo-Nagymaros Project* case, the existence of this condition was recognized by the Court, although it found that it was not necessary to pronounce on the matter. After concluding that “the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate”, the Court said:

It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.⁷⁵⁵

However, the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. For example, a requirement of notification of some activity is of no value after the activity has been undertaken. By contrast, inflicting irreparable damage on the responsible State could amount

to punishment or a sanction for non-compliance, not a countermeasure as conceived in the articles. The phrase “as far as possible” in paragraph 3 indicates that if the injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.

Article 50. Obligations not affected by countermeasures

1. Countermeasures shall not affect:

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

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

(c) obligations of a humanitarian character prohibiting reprisals;

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

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

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

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

Commentary

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

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

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

⁷⁵² This notion is further emphasized by articles 49, paragraph 3, and 53 (termination of countermeasures).

⁷⁵³ See paragraph (1) of the commentary to article 37.

⁷⁵⁴ Similar considerations apply to assurances and guarantees of non-repetition. See article 30, subparagraph (b), and commentary.

⁷⁵⁵ *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 56–57, para. 87.

(4) *Paragraph 1* (a) deals with the prohibition of the threat or use of force as embodied in the Charter of the United Nations, including the express prohibition of the use of force in Article 2, paragraph 4. It excludes forcible measures from the ambit of permissible countermeasures under chapter II.

(5) The prohibition of forcible countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly proclaimed that “States have a duty to refrain from acts of reprisal involving the use of force”.⁷⁵⁶ The prohibition is also consistent with the prevailing doctrine as well as a number of authoritative pronouncements of international judicial⁷⁵⁷ and other bodies.⁷⁵⁸

(6) *Paragraph 1* (b) provides that countermeasures may not affect obligations for the protection of fundamental human rights. In the “*Naulilaa*” arbitration, the tribunal stated that a lawful countermeasure must be “limited by the requirements of humanity and the rules of good faith applicable in relations between States”.⁷⁵⁹ The Institut de droit international in its 1934 resolution stated that in taking countermeasures a State must “abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience”.⁷⁶⁰ This has been taken further as a result of the development since 1945 of international human rights. In particular, the relevant human rights treaties identify certain human rights which may not be derogated from even in time of war or other public emergency.⁷⁶¹

(7) In its general comment No. 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present articles,⁷⁶² as well as with countermeasures imposed by individual States or groups of States. It stressed that “whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on

Economic, Social and Cultural Rights”,⁷⁶³ and went on to state that:

it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.⁷⁶⁴

Analogies can be drawn from other elements of general international law. For example, paragraph 1 of article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) stipulates unconditionally that “[s]tarvation of civilians as a method of warfare is prohibited”.⁷⁶⁵ Likewise, the final sentence of paragraph 2 of article 1 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights states that “In no case may a people be deprived of its own means of subsistence”.

(8) *Paragraph 1* (c) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60, paragraph 5, of the 1969 Vienna Convention.⁷⁶⁶ The paragraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the Geneva Convention relative to the Treatment of Prisoners of War of 1929, the Geneva Conventions of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.⁷⁶⁷

(9) *Paragraph 1* (d) prohibits countermeasures affecting obligations under peremptory norms of general international law. Evidently, a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Subparagraph (d) reiterates for the purposes of the present chapter the recognition in article 26 that the circumstances precluding wrongfulness elaborated in chapter V of Part One do not affect the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. The reference to “other” obligations under

⁷⁵⁶ General Assembly resolution 2625 (XXV), annex, first principle. The Final Act of the Conference on Security and Co-operation in Europe also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration on Principles Guiding Relations between Participating States embodied in the first “Basket” of that Final Act reads: “Likewise [the participating States] will also refrain in their mutual relations from any act of reprisal by force.”

⁷⁵⁷ See especially *Corfu Channel, Merits* (footnote 35 above), p. 35; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 127, para. 249.

⁷⁵⁸ See, e.g., Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962, 188 (1964) of 9 April 1964, 316 (1972) of 26 June 1972, 332 (1973) of 21 April 1973, 573 (1985) of 4 October 1985 and 1322 (2000) of 7 October 2000. See also General Assembly resolution 41/38 of 20 November 1986.

⁷⁵⁹ “*Naulilaa*” (see footnote 337 above), p. 1026.

⁷⁶⁰ *Annuaire de l’Institut de droit international*, vol. 38 (1934), p. 710.

⁷⁶¹ See article 4 of the International Covenant on Civil and Political Rights; article 15 of the European Convention on Human Rights; and article 27 of the American Convention on Human Rights.

⁷⁶² See below, article 59 and commentary.

⁷⁶³ E/C.12/1997/8, para. 1.

⁷⁶⁴ *Ibid.*, para. 4.

⁷⁶⁵ See also paragraph 2 of article 54 (“objects indispensable to the survival of the civilian population”) and article 75. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II).

⁷⁶⁶ Paragraph 5 of article 60 of the 1969 Vienna Convention precludes a State from suspending or terminating for material breach any treaty provision “relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties”. This paragraph was added at the Vienna Conference on the Law of Treaties on a vote of 88 votes in favour, none against and 7 abstentions.

⁷⁶⁷ See K. J. Partsch, “Reprisals”, *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 2000), vol. 4, p. 200, at pp. 203–204; and S. Oeter, “Methods and means of combat”, D. Fleck, ed., *op. cit.* (footnote 409 above) p. 105, at pp. 204–207, paras. 476–479, with references to relevant provisions.

peremptory norms makes it clear that subparagraph (d) does not qualify the preceding subparagraphs, some of which also encompass norms of a peremptory character. In particular, subparagraphs (b) and (c) stand on their own. Subparagraph (d) allows for the recognition of further peremptory norms creating obligations which may not be the subject of countermeasures by an injured State.⁷⁶⁸

(10) States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50, paragraph 1 (d). In particular, a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.⁷⁶⁹ Under the dispute settlement system of WTO, the prior authorization of the Dispute Settlement Body is required before a member can suspend concessions or other obligations under the WTO agreements in response to a failure of another member to comply with recommendations and rulings of a WTO panel or the Appellate Body.⁷⁷⁰ Pursuant to article 23 of the WTO Dispute Settlement Understanding (DSU), members seeking “the redress of a violation of obligations or other nullification or impairment of benefits” under the WTO agreements, “shall have recourse to, and abide by” the DSU rules and procedures. This has been construed both as an “exclusive dispute resolution clause” and as a clause “preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations”.⁷⁷¹ To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are “intransgressible”,⁷⁷² they may entail the exclusion of countermeasures.

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

respect to diplomatic and consular inviolability. The justification in each case concerns not so much the substantive character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.

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

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

Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.⁷⁷³

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

In any event, any alleged violation of the Treaty [of Amity] by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.⁷⁷⁴

(14) The second exception in paragraph 2 (b) limits the extent to which an injured State may resort, by way of countermeasures, to conduct inconsistent with its obligations in the field of diplomatic or consular relations. An injured State could envisage action at a number of levels. To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors in situations provided for in the Vienna Convention on Diplomatic Relations—such acts do not amount to countermeasures in the sense of this chapter. At a second level, measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met. On the other hand, the scope of prohibited countermeasures under article 50, paragraph 2 (b), is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in

⁷⁶⁸ See paragraphs (4) to (6) of the commentary to article 40.

⁷⁶⁹ On the exclusion of unilateral countermeasures in European Union law, see, for example, joined cases 90 and 91-63 (*Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*), *Reports of cases before the Court*, p. 625, at p. 631 (1964); case 52/75 (*Commission of the European Communities v. Italian Republic*), *ibid.*, p. 277, at p. 284 (1976); case 232/78 (*Commission of the European Economic Communities v. French Republic*), *ibid.*, p. 2729 (1979); and case C-5/94 (*The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd.*), *Reports of cases before the Court of Justice and the Court of First Instance*, p. I-2553 (1996).

⁷⁷⁰ See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 3, para. 7 and 22.

⁷⁷¹ See WTO, Report of the Panel, United States—Sections 301–310 of the Trade Act of 1974 (footnote 73 above), paras. 7.35–7.46.

⁷⁷² To use the synonym adopted by ICJ in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79.

⁷⁷³ *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, *Judgment*, I.C.J. Reports 1972, p. 46, at p. 53. See also S. M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), pp. 13–59.

⁷⁷⁴ *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 28, para. 53.

all circumstances, including armed conflict.⁷⁷⁵ The same applies, *mutatis mutandis*, to consular officials.

(15) In the *United States Diplomatic and Consular Staff in Tehran* case, ICJ stressed that “diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions”,⁷⁷⁶ and it concluded that violations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State. As the Court said:

The rules of diplomatic law, in short, constitute a self-contained 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.⁷⁷⁷

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds. It does not affect the various avenues for redress available to the receiving State under the terms of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.⁷⁷⁸ On the other hand, no reference need be made in article 50, paragraph 2 (b), to multilateral diplomacy. The representatives of States to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations themselves, no retaliatory step taken by a host State to their detriment could qualify as a countermeasure since it would involve non-compliance not with an obligation owed to the responsible State but with an obligation owed to a third party, i.e. the international organization concerned.

Article 51. Proportionality

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

Commentary

(1) Article 51 establishes an essential limit on the taking of countermeasures by an injured State in any given case, based on considerations of proportionality. It is relevant in determining what countermeasures may be applied and

⁷⁷⁵ See, e.g., Vienna Convention on Diplomatic Relations, arts. 22, 24, 29, 44 and 45.

⁷⁷⁶ *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 38, para. 83.

⁷⁷⁷ *Ibid.*, p. 40, para. 86. Cf. article 45, subparagraph (a), of the Vienna Convention on Diplomatic Relations; article 27, paragraph 1 (a), of the Vienna Convention on Consular Relations (premises, property and archives to be protected “even in case of armed conflict”).

⁷⁷⁸ See articles 9, 11, 26, 36, paragraph 2, 43 (b) and 47, paragraph 2 (a), of the Vienna Convention on Diplomatic Relations; and articles 10, paragraph 2, 12, 23, 25 (b) and (c) and article 35, paragraph (3), of the Vienna Convention on Consular Relations.

their degree of intensity. Proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.

(2) Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence. According to the award in the “*Naulilaa*” case:

even if one were to admit that the law of nations does not require that the reprisal should be approximately in keeping with the offence, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them.⁷⁷⁹

(3) In the *Air Service Agreement* arbitration,⁷⁸⁰ the issue of proportionality was examined in some detail. In that case there was no exact equivalence between France’s refusal to allow a change of gauge in London on flights from the west coast of the United States and the United States’ countermeasure which suspended Air France flights to Los Angeles altogether. The tribunal nonetheless held the United States measures to be in conformity with the principle of proportionality because they “do not appear to be clearly disproportionate when compared to those taken by France”. In particular, the majority said:

It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule ... It has been observed, generally, that judging the “proportionality” of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal’s view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in three countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation.⁷⁸¹

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

(4) The question of proportionality was again central to the appreciation of the legality of possible countermeasures taken by Czechoslovakia in the *Gabčíkovo-Nagyymaros Project* case.⁷⁸² ICJ, having accepted that

⁷⁷⁹ “*Naulilaa*” (see footnote 337 above), p. 1028.

⁷⁸⁰ *Air Service Agreement* (see footnote 28 above), para. 83.

⁷⁸¹ *Ibid.*; Reuter, dissenting, accepted the tribunal’s legal analysis of proportionality but suggested that there were “serious doubts on the proportionality of the counter-measures taken by the United States, which the tribunal has been unable to assess definitely” (p. 448).

⁷⁸² *Gabčíkovo-Nagyymaros Project* (see footnote 27 above), p. 56, paras. 85 and 87, citing *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27.

Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 1977, went on to say:

In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

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

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

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

The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.

Thus, the Court took into account the quality or character of the rights in question as a matter of principle and (like the tribunal in the *Air Service Agreement* case) did not assess the question of proportionality only in quantitative terms.

(5) In other areas of the law where proportionality is relevant (e.g. self-defence), it is normal to express the requirement in positive terms, even though, in those areas as well, what is proportionate is not a matter which can be determined precisely.⁷⁸³ The positive formulation of the proportionality requirement is adopted in article 51. A negative formulation might allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.

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

(7) Proportionality is concerned with the relationship between the internationally wrongful act and the countermeasure. In some respects proportionality is linked to the

requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49. Proportionality is, however, a limitation even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.

Article 52. Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

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

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

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

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

(a) the internationally wrongful act has ceased; and

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

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

Commentary

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

⁷⁸³ E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Milan, Giuffrè, 2000).

(2) Overall, article 52 seeks to establish reasonable procedural conditions for the taking of countermeasures in a context where compulsory third party settlement of disputes may not be available, immediately or at all.⁷⁸⁴ At the same time, it needs to take into account the possibility that there may be an international court or tribunal with authority to make decisions binding on the parties in relation to the dispute. Countermeasures are a form of self-help, which responds to the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that the responsible State is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives.

(3) The system of article 52 builds upon the observations of the tribunal in the *Air Service Agreement* arbitration.⁷⁸⁵ The first requirement, set out in *paragraph 1 (a)*, is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. This requirement (sometimes referred to as “*sommation*”) was stressed both by the tribunal in the *Air Service Agreement* arbitration⁷⁸⁶ and by ICJ in the *Gabčíkovo-Nagymaros Project* case.⁷⁸⁷ It also appears to reflect a general practice.⁷⁸⁸

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

(5) *Paragraph 1 (b)* requires that the injured State which decides to take countermeasures should notify the responsible State of that decision to take countermeasures and offer to negotiate with that State. Countermeasures can have serious consequences for the target State, which should have the opportunity to reconsider its position faced with the proposed countermeasures. The temporal relationship between the operation of subparagraphs (*a*)

and (*b*) of *paragraph 1* is not strict. Notifications could be made close to each other or even at the same time.

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

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

(8) A dispute is not “pending before a court or tribunal” for the purposes of *paragraph 3 (b)* unless the court or tribunal exists and is in a position to deal with the case. For these purposes a dispute is not pending before an *ad hoc* tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which will take some time even if both parties are cooperating in the appointment of the members of the tribunal.⁷⁸⁹ *Paragraph 3* is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international courts and tribunals.⁷⁹⁰ The rationale behind *paragraph 3* is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will

⁷⁸⁴ See above, *paragraph (7)* of the commentary to the present chapter.

⁷⁸⁵ *Air Service Agreement* (see footnote 28 above), pp. 445–446, paras. 91 and 94–96.

⁷⁸⁶ *Ibid.*, p. 444, paras. 85–87.

⁷⁸⁷ *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 56, para. 84.

⁷⁸⁸ A. Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (Milan, Giuffrè, 1997).

⁷⁸⁹ Hence, *paragraph 5* of article 290 of the United Nations Convention on the Law of the Sea provides for ITLOS to deal with provisional measures requests “[p]ending the constitution of an arbitral tribunal to which the dispute is being submitted”.

⁷⁹⁰ The binding effect of provisional measures orders under Part XI of the United Nations Convention on the Law of the Sea is assured by *paragraph 6* of article 290. For the binding effect of provisional measures orders under Article 41 of the Statute of ICJ, see the decision in *LaGrand, Judgment* (footnote 119 above), pp. 501–504, paras. 99–104.

make countermeasures unnecessary pending the decision of the tribunal. The reference to a “court or tribunal” is intended to refer to any third party dispute settlement procedure, whatever its designation. It does not, however, refer to political organs such as the Security Council. Nor does it refer to a tribunal with jurisdiction between a private party and the responsible State, even if the dispute between them has given rise to the controversy between the injured State and the responsible State. In such cases, however, the fact that the underlying dispute has been submitted to arbitration will be relevant for the purposes of articles 49 and 51, and only in exceptional cases will countermeasures be justified.⁷⁹¹

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

Article 53. Termination of countermeasures

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

Commentary

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

(2) The notion that countermeasures must be terminated as soon as the conditions which justified them have ceased is implicit in the other articles in this chapter. In view of its importance, however, article 53 makes this clear. It underlines the specific character of countermeasures under article 49.

⁷⁹¹ Under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, the State of nationality may not bring an international claim on behalf of a claimant individual or company “in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute” (art. 27, para. 1); see C. H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) pp. 397–414. This excludes all forms of invocation of responsibility by the State of nationality, including the taking of countermeasures. See paragraph (2) of the commentary to article 42.

Article 54. Measures taken by States other than an injured State

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

Commentary

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. However, “injured” States, as defined in article 42, are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group. By virtue of article 48, paragraph 2, such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus, with respect to the obligations referred to in article 48, such States are recognized as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches.⁷⁹²

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organizations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the Charter of the United Nations, is not covered by the articles.⁷⁹³ More generally, the articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.⁷⁹⁴

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

⁷⁹² See, e.g., M. Akehurst, “Reprisals by third States”, *BYBIL*, 1970, vol. 44, p. 1; J. I. Charney, “Third State remedies in international law”, *Michigan Journal of International Law*, vol. 10, No. 1 (1989), p. 57; Hutchinson, *loc. cit.* (footnote 672 above); Sicilianos, *op. cit.* (footnote 735 above), pp. 110–175; B. Simma, “From bilateralism to community interest in international law”, *Collected Courses ...*, 1994–VI (The Hague, Martinus Nijhoff, 1997), vol. 250, p. 217; and J. A. Frowein, “Reactions by not directly affected States to breaches of public international law”, *Collected Courses ...*, 1994–IV (Dordrecht, Martinus Nijhoff, 1995), vol. 248, p. 345.

⁷⁹³ See article 59 and commentary.

⁷⁹⁴ See article 57 and commentary.