The Relationship Between Reprisals and Denunciation or Suspension of a Treaty

Linos-Alexander Sicilianos *

In the theory of international law, opinions on the relationship between reprisals and denunciation or suspension of the application of an international treaty due to its breach (Article 60 of the Vienna Convention on the law of treaties) appear to be diametrically opposed. This confrontation raises serious questions about the legal nature of the two types of state reaction to an internationally wrongful act.[1] The uncertainty and vagueness which thus result are reflected in the reports submitted to the United Nations International Law Commission (ILC) by Willem Riphagen, former Special Rapporteur on the issue of state responsibility. The problem now acquires a new dimension as the present Special Rapporteur Gaetano Arangio-Ruiz reviews his predecessor's proposals on measures which could be taken in response to an internationally wrongful act. In fact, Professor Arangio-Ruiz, in his third report on state responsibility, stressed the need for further research into this matter.[2]

In the prevailing view, there is a clear distinction between the two types of reaction to wrongful acts. Most international law treatises and manuals examine denunciation of a treaty as a consequence of its breach and reprisals from totally different perspectives. Conventional reactions are considered within the context of the law of treaties; reprisals are examined within the framework of state responsibility, as well as under other labels such as 'measures of coercion', 'pressure',[3] or 'application of international law'.[4] These classifications are to a certain extent unavoidable. However,

* Lecturer at the University of Athens. The author is greatly indebted to Professor Argyris A. Fatouros, University of Athens, for his most valuable observations, as well as to Stavroula Vassilouni, Attorney at Law and Dr. Susannah Verney for their comments on earlier drafts of this paper.

1 The term 'internationally wrongful act' includes omissions.

2 A/CN.4/440, 10 June 1991, paras. 35, 69-83.

3 L. Oppenheim (ed. by H. Lauterpacht), *International Law. A Treatise*, Vol. II. (7th ed. 1952) 132, 135 et seq.

4 D. Carreau, *Droit international* (2nd ed., 1988) 517 et seq.

they give the impression that the law of treaties and the law of state responsibility have no contact point, and are irrevocably separated.

Nevertheless, the opposite view as to the relationship between reprisals and denunciation or suspension of treaties seems also rather simplified. According to this view – which has been maintained in the past and was recently revived – denunciation or suspension of the operation of a breached treaty constitutes a form of reprisal.[5] Reprisals are the genus; denunciation and suspension are the species.

The work of the ILC in the field of state responsibility appears to be rather contradictory in this respect. The comment on Article 30 of the first part of the draft articles, concerning countermeasures,[6] gives the impression that reactions to a wrongful act are dealt with in a unified way and are governed by the same legal regime, no matter whether they consist of reprisals, or of denunciation or suspension of the operation of a treaty. On the other hand, the recent work of the Commission on the second part of the draft articles tends to differentiate between reprisals and denunciation or suspension of a treaty.

The interaction and interdependence of these two forms of response to a wrongful act becomes obvious in the well-known *Case concerning the Air Services Agreement of 27 March 1946 between the United States of America and France* which was judged by a three-member arbitral tribunal on December 9, 1978.[7] In this case, the parties to the dispute simultaneously used arguments from the theory of reprisals and the law of treaties. The tribunal avoided the stumbling block of this dual approach by the use of the broader term 'countermeasures'. This award seems to reject the extreme positions of either total differentiation or identification of reprisals and denunciation or suspension of the operation of a treaty. Nothing is mentioned therein, however, regarding the particular features of these institutions. Thus, our aim is not to analyse the 1978 award which raises the problem without giving any solutions, but to study the dialectical relationship between reprisals and conventional reactions.[8] This relationship is revealed as much by the conditions of their implementation as by their substance.

5 P. Fauchille, *Traité de droit international public*, Vol. I, Part 3 (1926) 388; R.B. Bilder, 'Breach of Treaty and Response Thereto', 61 *Proceedings, American Society of International Law* (1967) 193, 194; M. Akehurst, 'Reprisals by Third States', 44 *BYbIL* (1970) 1, 6 et seq.; P. Pisillo Mazzeschi, *Risoluzione e sospensione dei trattati per inadempimento* (1984) 313 et seq.

6 *YILC* (1979) Vol. II, Part 2, 115 et seq.

7 *United Nations, Reports of International Arbitral Awards* (hereafter referred to as *UNRIAA*), Vol. XVIII, 417 (hereafter referred to as the *United States – France Air Services Agreement* case).

8 On the relationship between the law of treaties and the law of state responsibility in general see D. Bowett, 'Treaties and State Responsibility', in *Le droit international au service de la paix, de la justice et du développement, Mélanges M. Virally* (1991) 137.

I. The Conditions of the Reaction

There are four general conditions for the application of reprisals and denunciation or suspension of an international treaty: (a) a relationship between the wrongful act and the reaction thereto must exist; (b) a state (or several states) must have the legal capacity to react; (c) a state (or states) must qualify as the target of that reaction; and (d) certain procedural steps must be followed.

A. The Relationship Between the Wrongful Act and the Reaction

The wrongful act constitutes the ground as well as the legal basis for reprisals and for denunciation or suspension of the treaty according to Article 60 of the Vienna Convention of 1969. A common feature of these responses is that in themselves, i.e. in the absence of the wrongful act, they are contrary to the rules of international law. According to the traditional definition of the *Institut de droit international*, reprisals are measures of coercion derogatory to ordinary rules of the law of nations.[9] Similarly, denunciation or suspension of the operation of a treaty, to the extent that they may lead to the non-performance of obligations under the treaty, are contrary to the general principle *pacta sunt servanda*. Reprisals and denunciation or suspension are lawful only when viewed in connection with the wrongful act that provokes them and along with the concurrence of other conditions. In other words, the prior wrongful act functions as a circumstance precluding wrongfulness.

From this perspective of the relationship between wrongful act and reaction, we must also consider the problem of the latter's aims. This issue is of fundamental importance since the analysis of the aims of certain measures would clarify their legal nature and function. In addition, the particular objectives of a reaction affect its legality. As correctly stated by the *Institut de droit international*, the state must not deflect reprisals from the objective which first led to their imposition.[10] Otherwise reprisals which were originally legal risk being characterized as illegal.

The overwhelming majority of writers when they refer (generally rather briefly) to the objectives of responses to a wrongful act, only take into consideration the reaction itself without examining its link to the wrongful act which provoked it. When an event, however, is separated from its cause, it is liable to be examined under a random perspective. One is thus led towards a strong empiricism which also explains the plethora of often divergent and *a priori* views on the issue.

On the other hand, it may be argued, on the basis of an analysis of recent international practice,[11] that the aims of countermeasures are determined to a great

9 *AIDI* (1934) 708.

10 Ibid. at 710, Article 6 para. 5.

11 For examples from international practice see L.-A. Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense* (1990) 58 et seq. See also D. Alland, *Les contre-mesures dans l'ordre juridique international. Etude théorique de la justice privée en droit international public*, thesis Univ. of Paris II (1991) 215 et seq.

degree by the intrinsic features of the wrongful act: its nature, its gravity, and the conventional or other origin of the obligation which was breached.

In this way, a reaction which is exclusively directed against an isolated and instantaneous wrongful act – or against an act which has come to an end by the time the measures are implemented – will unavoidably appear strongly *'punitive'*. With an *ex post facto* reaction, the injured state will not, by definition, reap any specific benefit apart from the possible moral satisfaction of imposing a kind of punishment on the author state.[12]

Measures of coercion are a different matter. Such measures do not have the nature of revenge or punishment for an already accomplished act, but consist of pressure on the defaulting state in order to make it alter its illegal behaviour in the future.[13] The reaction is thus carried out against a continuing violation. The measures of coercion may never be irreversible; they should be revoked as soon as the defaulting state abides by the law. The specific form of these measures depends on the nature of the illegal behaviour.

Measures of coercion will aim at compensation whenever the author state refuses to indemnify the injured state for a wrongful act. If the original wrongful act is continuous – e.g. detention of diplomatic agents – the main concern of the injured state will be the termination of the illegal behaviour. This is similar to the case where the original wrongful act is a composite one, i.e. it consists of a series of particular illegal activities.[14] The reaction here has the nature of dissuasion rather than that of compensation. The pursued objective is the non-repetition in the future of the particular activities which result in the composite wrongful act.

Finally, measures of coercion are distinct from *reactions of a purely corrective nature*. These reactions do not aim at changing the behaviour of the defaulting state, but are acts of self-help *stricto sensu*. A typical example of such responses are those which aim at the re-establishment of the equilibrium between the parties. Such responses constitute the most common form of countermeasures applied within treaty relations. This can be explained by the fact that the breach of an international treaty

12 It must be stressed that the imposition of a punishment by one state on another is not accepted in contemporary international law since it is incompatible with the principle *par in parem non habet imperium*, deriving from the principle of equality of states see L.-A. Sicilianos, ibid., at 50-56; E. Roucounas, *International Law III* (in Greek) (1983) 115-116; M. Virally, 'Panorama du droit international contemporain. Cours général de droit international public', 183 *RCADI* (1983 V) 9, 228 et seq.; B. Graefrath, 'International Crimes – A Specific Regime of International Responsibility of States and its Legal Consequences', in J.H.H. Weiler, A. Cassese, M. Spinedi (eds), *International Crimes of State. A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989) 161. It is characteristic that the United Nations Security Council has repeatedly denounced Israel for military reprisals, stressing that these are acts of revenge or punishment. See, e.g., S/RES 262 (1968) 265 (1969) 270 (1970).

13 See analyses by J. Combacau, *Le pouvoir de sanction de l'ONU. Etude théorique de la coercition non militaire* (1974) 18 et seq. and E. Zoller, *Peacetime Unilateral Remedies. An Analysis of Countermeasures* (1984) 51 et seq.

14 Concerning these acts see Article 25 para. 2 of the 1st part of the draft articles on state responsibility, *YILC* (1978) Vol. II, Part 2, 89.

often affects the whole complex of interests of the contracting parties, the balance between their mutual rights and obligations. The application of the treaty as a whole takes on a special significance given that the balancing of the rights of the parties to the treaty, which is often achieved with great difficulty during negotiations, constitutes the quintessence of conventional relations.[15] In the end, the principle *pacta sunt servanda* is merely the legal expression of the *do ut des* which governs most international treaties.

Thus, suspension of the operation of a treaty, in whole or in part, allows the injured state to reach a new equilibrium between its rights and obligations in respect to the defaulting state, being temporarily relieved of the duties under the treaty which remain without counterpart.[16] The case of the denunciation of a treaty is similar: the injured party draws its conclusions from the material breach of the treaty and confirms the impossibility of maintaining burdensome relations with another contracting party when the latter ignores its obligations.

This view is reflected in Article 60 of the Vienna Convention and in its *travaux préparatoires*,[17] as well as in international practice. Thus, for example, the arbitral tribunal which judged the *United States – France Air Services Agreement* case decided that the countermeasures of the Civil Aeronautics Board against Air France were of a corrective nature in so far as they aimed to restore equality between the contracting parties.[18]

It follows from the above that the specific features of conventional relations, and consequently of illegal acts consisting of breaches of international treaties, directly affect the aims of the responses in a given context. Accordingly, although in most cases reprisals have a coercive character, denunciation and suspension of the application of a treaty generally have a corrective aim, which is called for by the imbalance caused by the breach in the complex of reciprocal rights and obligations of the parties.

B. The Legal Capacity to React

The breach of a rule of international law creates new relationships between defaulting and injured states. The problem here is whether the circle of states entitled to react by way of reprisals corresponds to the group of states entitled to respond by denouncing or suspending an international treaty.

It must be stressed at the outset that the greatest majority of international wrongful acts (or omissions) belong to the category of international delicts. Delicts create, as a

15 M. Virally, 'Le principe de réciprocité en droit international contemporain', 122 *RCADI*, (1967) Vol. III, 1, 22 et seq.; E. Decaux, *La réciprocité en droit international*, LGDJ (1980) 53 et seq.

16 B. Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law', 20 *Österreichische Zeitschrift für öffentliches Recht* (1970) 5, 20-21.

17 2nd Report on the Law of Treaties by Sir Humphrey Waldock, *YILC* (1963) Vol. II, 72-77 and Final Report of the ILC, *YILC* (1966) Vol. II, 253 et seq.

18 *UNRIAA*, Vol. XVIII, 444-445 para. 90.

rule, bilateral relations between the defaulting state and the state directly affected by the breach, the latter of which, apart from the 'legal' or moral injury, may have also sustained material damage. The extremely detailed comment which accompanies Article 19 of the first part of the draft articles on state responsibility – which adopts the distinction between delicts and crimes – does not bring into question the basically bilateral nature of the relations created by an 'ordinary' violation of international law.

In the law of treaties the principle according to which a delict creates, as a rule, bilateral relations, is reflected in Article 60 paragraph 1 of the Vienna-Convention (bilateral treaties) and in paragraph 2(b) of the same Article (multilateral treaties). In the latter it is stated that:

> A material breach of a multilateral treaty by one of the parties entitles: b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part, in the relations between itself and the defaulting state.

This typical form of bilateral relations of defaulting-injured states suffered a serious blow with the introduction in international law of the concepts of *jus cogens*, obligations *erga omnes* and international crimes. The establishment of a hierarchy of international rules and of the gravity of international wrongful acts leads to a universalization of the relations resulting from the attack on the highest values of the international community. As is demonstrated by recent international practice – culminating in the Kuwait and Yugoslav crises – the commission of an international crime or the violation of *erga omnes* obligations affect not only the state directly injured, but all the members of the international community, which are, in principle, entitled to react.[19]

The reactions of states not directly affected by the commission of an international crime are, as a rule, non-conventional. The only exception thereto is the special case of sanctions in the context of the United Nations Charter, which are of an institutional nature. In fact, even if the breach of a treaty – e.g. a non-aggression pact – constitutes an international crime, third states will react not because of the violation of the treaty itself – which is for them *res inter alios acta* – but because of the violation, by the same act, of an international law rule of the highest normative value – e.g. the prohibition to resort to military force. Consequently, new developments in international law leading to the universalization of the legal capacity to react do not concern the denunciation or suspension of treaties, but only pacific reprisals.

Apart from the very specific case of international crime, the question is whether an international delict may, in exceptional cases, lead to multilateral relations; thus not only the states directly injured, but also states indirectly affected may be entitled to react.

19 For a presentation of the doctrine, the case-law and the state practice on this issue see L.-A. Sicilianos, *supra* note 11, at 135-175.

Until very recently the multilateral nature of new relations caused by an international delict was acceptable only in case of violation of a multilateral treaty and under the strictest conditions set out in Article 60 paragraph 2(a) and (c) of the Vienna Convention. However, the recent work by ILC in the field of state responsibility tends to multiply the number of cases where a delict creates multilateral relations. According to an article adopted at first reading in 1985,[20] the circle of states injured by a delict becomes wider in the following cases:

a) when the breach of a multilateral treaty or a customary rule affects the enjoyment of the rights or the performance of the obligations of the other contracting parties, or the states which are bound by the international customary rule;
b) when the wrongful act violates rules provided for the protection of human rights and fundamental freedoms;
c) in the case of infringement of any rights explicitly recognized by a multilateral treaty for the protection of the collective interests of the parties.

The ILC proposals widening the circle of states injured by an international delict require further elaboration if they are to be more generally accepted. One may, nevertheless, note a tendency towards a unified approach to the problem of the legal capacity to react in both conventional and non-conventional contexts. If this *de lege ferenda* approach to the issue prevails in the end, the implementation of non-conventional measures – i.e. reprisals – will be permissible not only for the state directly injured by a delict, but also for other indirectly injured states, as is the case of suspension of a treaty under Article 60 paragraph 2(c) of the Vienna Convention. One must, however, be very cautious regarding this point to prevent uncertainties and confusion in international practice.

C. The Identification of States Affected by the Reaction

The similarities between reprisals and suspension of treaty become obvious in positive law when the identification of the states affected by the reaction is at issue. The general principle – which stands beyond any shadow of doubt both in theory and in practice – is that such reactions can only be directed against the author state or states. As regards reprisals, this principle was clearly stressed, initially by the arbitral tribunal which decided the *Cysne* case,[21] and more recently by the ILC.[22] In the law of treaties the

20 Art. 5 of Part 2 of the draft articles, *YILC* (1985) Vol. II, Part 2, 25. For an analysis of this provision see B. Simma, 'International Crimes: Injury and Countermeasures, Comments on Part 2 of the ILC Work on State Responsibility', in J.H.H. Weiler, A. Cassese, M. Spinedi (eds), *supra* note 12, 283 at 296-300; 'Bilateralism and Community Interest in the Law of State Responsibility', in Y. Dinstein, M. Tabory (eds), *International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne* (1989) 821 at 829 et seq.; L.-A. Sicilianos, *supra* note 11, at 116-119. For a recent discussion of this provision see G. Arangio-Ruiz, 3rd Report on State Responsibility, A/CN.4/440/Add. 1, 14 June 1991, paras. 89-95; 4th Report on State Responsibility, A/CN.4/444/Add. 2, 1 June 1992, paras. 128-153.

21 *UNRIAA*, Vol. II, 1057.

22 *YILC* (1979) Vol. II, Part 2, 120-121.

same principle is reflected in Article 60 paragraph 2(b) of the Vienna Convention, which provides that in the case of material breach of a multilateral treaty the specially affected party is entitled to suspend the operation of the treaty in its bilateral relations with the defaulting state. As the ILC stated in its final report on the law of treaties:

> in the case of a multilateral treaty the interests of the other parties have to be taken into account, and a right of suspension normally provides adequate protection to the state specially affected by the breach.[23]

There are, however, cases where a third state, without being the target of a reaction, may be indirectly affected by it. An act of reprisal which affects the rights of a third state leads usually to the international responsibility of the reacting state *vis-à-vis* the third state. The wrongfulness of such an act may be precluded only by virtue of other circumstances precluding wrongfulness, such as the third state's consent, a state of necessity, etc.[24]

The situation in the law of treaties is comparable. The problem arises in regard to the so-called 'integral treaties' in which Article 60 paragraph 2(c) of the Vienna Convention applies. It has correctly been stressed that a state injured by the breach of such a treaty cannot suspend the performance of its obligations towards the defaulting state without at the same time infringing the rights of the other parties.[25] The ILC confronted this difficulty and decided that the best possible solution was to permit the injured state to suspend operation of the treaty not in its bilateral relations with the defaulting state, but in its relations with all the parties. The aim of this proposal, which was finally adopted by the Vienna Conference, was to avoid the fragmentation of multilateral relations into partial bilateral relations, something not compatible with the specific nature of 'integral' treaties. This compromise solution is, nevertheless, still more favourable to the injured state than to the other parties, whose rights in any case risk being affected by a unilateral suspension of the treaty. The *ratio* of Article 60 paragraph 2(c) is to favour, in a borderline case, the position of the injured state not against, but despite the rights of third states. Thus, it would be no exaggeration to consider this case a kind of state of necessity.

D. The Procedural Requirements

In a legal order such as international law, which is not highly formalistic, it would be almost utopian to believe that a reaction to a wrongful act outside an institutional framework could be submitted to strict formalities. It is true that reprisals and unilateral denunciation or suspension of the operation of a treaty often constitute an

23 *YILC* (1966) Vol. II, 255 para. 7.

24 See 8th Report on State Responsibility by R. Ago, *YILC* (1979) Vol. II, Part 1, 46-47 and Report of the ILC on the Work of its Thirty-first Session ibid., Part 2, 120-121.

25 *YILC* (1966) Vol. II, 255. See also the recent observations by G. Aranzio-Ruiz, *supra* note 2, para. 81.

obstacle to the normal development of international relations. On first appraisal, it is thus normal to argue that such reactions should not be accepted except *in ultima ratio*, i.e. after exhaustion of all means of friendly settlement of the dispute.[26] This may risk, however, favouring the author state and significantly harming the interests of the injured state by severely weakening its position. On the other hand, the non-existence of some kind of fail-safe mechanism and the possibility of immediate reaction[27] based on subjective allegations about the execution of a wrongful act can lead to arbitrariness. The question of procedural requirements thus centres on the attempt to balance the parties' conflicting interests and on the combination of the effectiveness of reactions and the minimization of arbitrariness.

The great majority of writers do not present the issue in this light – or at least do not present it clearly – nor do they indicate the similarities between reprisals and denunciation or suspension on this point. Such similarities may only emerge from the consideration of the problem as a whole.

International practice since the end of the 18th century shows clearly that both reprisals and denunciation or suspension have a subsidiary character. The injured state, before reacting, is obliged to attempt a friendly settlement of the dispute through negotiations. This is not to imply that all means of friendly settlement need to have been exhausted, or more particularly, that negotiations must have reached an impasse. In certain cases, countermeasures can function as pressure to induce submission of the dispute to the objective assessment of an arbitral tribunal or other court; this occurred in the *United States – France Air Services Agreement* case. Nevertheless, the application of countermeasures presupposes at least the opening of negotiations, or in any case, an attempt for a friendly settlement on the part of the injured state. This was precisely what the US Government itself accepted in the above-mentioned case by declaring that:

> The United States recognizes the duty under international law ... to engage in good faith consultations with a view toward resolving differences that arise under the Agreement. This duty was met in the present case by consultations held in Paris and Washington on April 24, 1978, June 1-2 and 28-29, and July 10-11, as well as by the written communications which had been exchanged from March 22 on.[28]

Even though the subsidiary nature of the reactions to a wrongful act stands as the rule, in certain exceptional cases one should not exclude the possibility of the injured state

26 This view has been supported especially by N. Politis, 'Le régime des représailles en temps de paix', *AIDI* (1934) 15; De Visscher, 'La responsabilité des Etats', *Bibliotheca Visseriana* (1924) Vol. II, 87 at 110; G. Ténékidès, 'Responsabilité internationale', *Répertoire de droit international* (1969) Vol. II, 780 at 785; G.C. Papastamkos, *International Economic Sanctions. Theory and Practice* (in Greek) (1990) 75. See also Art. 12 para. 1(a) proposed by G. Arangio-Ruiz in his 4th Report on State Responsibility, A/CN.4/444, 12 May 1992, para. 52.

27 The possibility of immediate reaction was supported by H. Kelsen, 'Unrecht und Unrechtsfolge im Völkerrecht', 12 *Zeitschrift für öffentliches Recht* (1932) 481, 492 et seq., 545 et seq., 568 et seq.; E. Zoller, *supra* note 13, at 118 et seq.

28 *Digest of United States Practice in International Law* (hereafter referred to as *Digest USPIL*) (1978) 773-774.

reacting immediately, without taking any preliminary procedural steps. However, this should only be accepted in case of wrongful acts of exceptional gravity, or in case of especially urgent circumstances.

The exceptional gravity of a wrongful act indicates the commission of an international crime or the violation of an *erga omnes* obligation. The criterion of gravity of the wrongful act is undoubtedly the soundest for basing an exception to the subsidiary character of countermeasures. Indeed, as has been stressed by the ILC, the distinction between international delicts and international crimes would only be of academic interest if it was not to be followed by concrete legal consequences.[29] The arguments supporting the view that international crimes justify immediate reaction are the following: due to its gravity, the wrongful act is often so well known that there is no risk of subjective or arbitrary assessment of the facts. Moreover, in cases of blatant violation of international law any effort towards friendly settlement either is out of the question, or is doomed to failure. Finally, the commission of an international crime creates, as a rule, a situation in which any loss of time – which necessarily accompanies preliminary procedures – may result in most serious consequences. On this point let it be noted that the aforementioned arguments are valid mainly in the case of a directly injured state, such as the US in the Tehran hostage affair.[30] The other states normally need to call for the United Nations' intervention before acting on their own initiative.

Apart from the case of the commission of an international crime or the violation of an obligation *erga omnes*, the need for immediate reaction may also arise in other especially urgent circumstances. As was noted by several representatives at the Sixth Committee of the UN General Assembly in the context of recent discussions on international responsibility, such an escape clause is indispensable.[31] It is significant that Article 65(2) of the Vienna Convention includes a similar reservation. The term 'especially urgent circumstances' must in any case be defined on the basis of specific criteria; otherwise the principle of the subsidiary character of the reaction to a wrongful act will be devoid of practical significance.

One such basic criterion is the intrinsic nature of the wrongful act itself. As a rule, only a continuous wrongful act can lead to urgent reaction with the aim of coercing the defaulting state to end its illegal behaviour. This, however, does not mean that every such wrongful act constitutes an especially urgent circumstance that permits

29 *YILC* (1976) Vol. II, Part 2, 102 paras. 15-17, 117 para. 51. See also the Preliminary Report on State Responsibility by G. Arangio-Ruiz, *YILC* (1988) Vol. II, Part 1, A/CN.4/416, paras. 10-15.

30 *Case Concerning United States Diplomatic and Consular Staff* ICJ Reports (1980) 3. The view that the directly injured state can take countermeasures immediately is also supported by J. Combacau, D. Alland, '"Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations', 16 *NYIL* (1985) 81, 107. The opposite opinion is supported by A. de Guttry, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale* (1985) 307.

31 See the statements by the representatives of Ireland A/C.6/41/SR 32 para. 10, Italy A/C.6/41/SR 32 para. 20, Romania A/C.6/41/SR 36 para. 73, Bulgaria A/C.6/41/SR 38 paras. 88-89, the United Kingdom A/C.6/41/SR 39 para. 11, China A/C.6/41/SR 39 paras. 26-27, Greece A/C.6/41/SR 42 para. 36, and Kuwait A/C.6/41/SR 43 para. 34.

immediate reaction, as has been argued.[32] This position carries the risk of leading to the rejection of the subsidiary character of countermeasures, given that in practice the states decide in most cases to react to continuous breaches. Moreover, state practice contradicts this position. It is characteristic, for example, that in the *United States – France Air Services Agreement* case, the US Government emphasized the continuous nature of the violation of the agreement which it attributed to France, while stressing, however, the obligation to attempt a friendly settlement.[33] It seems therefore that the continuous character of the wrongful act, although necessary, is not sufficient to permit immediate reaction. In the author's opinion, the existence of a danger of irreversible damage to the injured state is also necessary. In any case, especially urgent circumstances only allow the application of temporary measures which tend to ensure the *status quo*. In other words, only the reactions which have the nature of interim measures of protection may be justified in such circumstances, such as, for instance, the freezing of assets of the author state deposited in banks under the jurisdiction of the injured state.

II. The Substance of Reactions

Thus far the preconditions for lawful reprisals and denunciation or suspension of a treaty have been examined. The substance of such reactions also needs to be discussed, and particularly the rules they infringe, their extent and their legal effects.

A. The Infringed Rules

As mentioned above, a common feature of reprisals and denunciation or suspension is that in themselves they are contrary to certain rules of international law. Their wrongfulness is precluded only if both the preliminary conditions already examined and certain substantive conditions examined below are met. In the present context two questions arise:

i) what limits are set by general international law on the discretionary power of the state to infringe, by its reaction, a rule of law? Are they identical in the case of reprisals and denunciation or suspension?

ii) what is the difference between reprisals and conventional reactions regarding the infringed legal rule?

The traditional school of international law either did not raise the issue of the discretionary power of the injured state, or argued that this state had, in principle, complete freedom of choice as to the international rules which it could infringe by its

32 See J. Combacau, D. Alland, *supra* note 30, at 102; C. Dominicé, 'Observations sur les droits de l'Etat victime d'un fait internationalement illicite', 2 *Droit international* (1981/1982) 1, 44.

33 *Digest USPIL* (1978) *supra* note 28, at 771, 773-774.

response.[34] This view was based, implicitly in most cases, on two closely interwoven axiomatic propositions: a) that the reciprocity principle, the cornerstone of international relations, did not yield to exceptions; and b) that no hierarchy existed between international norms. It is indeed obvious that if all the rules of the international legal order were placed on the same level in terms of hierarchy, then the principle *lex specialis derogat legi generali* could always be applied. This means that the rule allowing countermeasures would systematically prevail, as a special rule, over the substantive – or 'primary' – rule infringed. Thus, the wrongfulness of the reaction would be precluded regardless of the content and nature of this primary rule.

Such a view, however, does not conform to contemporary developments in international law, which have led to the rejection of levelling of the rules of the international legal order. The existence of a hierarchy between rules – although it is at times unclear – is nowadays indisputable. As a consequence, if a primary rule is hierarchically superior to the rule allowing countermeasures, the former will constitute an obstacle in the implementation of the latter. There are in fact certain rules creating 'absolute' obligations which do not permit derogation under any circumstances, even in the form of countermeasures. If such a rule is violated by state A, injured state B may not avoid its application by invoking its capacity to adopt countermeasures. Reciprocity, in the narrower sense of the term, is inconceivable in the case of rules creating absolute obligations.[35]

Peremptory norms constitute the nucleus of these rules. The notion of *jus cogens* does not only relate to the nullity of international treaties. It also extends to unilateral acts or actions,[36] such as countermeasures. It is significant that in the context of the draft articles on state responsibility, the former Special Rapporteur W. Riphagen had proposed a provision excluding countermeasures consisting of the suspension of performance of obligations arising from peremptory norms. This proposal was supported in both the discussions of the ILC and the Sixth Committee of the General Assembly, where many state representatives stated that the rules of *jus cogens* constitute a barrier to the application of countermeasures. The same opinion seems to be held by the present ILC Special Rapporteur Professor G. Arangio-Ruiz.[37]

A similar barrier results from the rules which create obligations *erga omnes*. A typical example of such rules are, as was recently stressed by the Institute of

34 See H. Kelsen, *supra* note 27, at 572-573.

35 The injured state can, however, take countermeasures which affect another field of its relations with the author state. A typical example of such a situation would be the Tehran hostages affair. The US could certainly not behave like Iran, capturing, for instance, Iranian diplomats. They could, however, take economic countermeasures, as they did in fact.

36 Among the first to examine the possibility of applying *jus cogens* in unilateral acts and actions was Prof. C. Rozakis in his work: *The Concept of Jus Cogens in the Law of Treaties* (1976) 16 et seq. See also G. Gaja, 'Jus Cogens beyond the Vienna Convention', 172 *RCADI* (1981) Vol. III 217.

37 *Supra* note 20, paras. 118-122; G. Arangio-Ruiz, 4th Report on State Responsibility, A/CN.4/444/Add. 1, 25 May 1992, paras. 89-95.

International Law,[38] those protecting fundamental human rights. Contrary to what has been argued by certain states, these rules do not fall under the condition of reciprocity as they do not protect state legal interests but aim at the protection of human value as such. The special nature of state obligations in this field excludes the possibility of responses, whether reprisals or conventional reactions based on the principle *inadimplenti non est adimplendum*, which violate fundamental human rights. This principle is not applied in the field of human rights. It therefore follows that the restrictions deriving from rules creating absolute obligations – whether peremptory rules, or norms creating obligations *erga omnes* – are applied in a unified way as much for reprisals as for conventional reactions.

Beyond these restrictions, general international law is known for its flexibility, allowing significant margin to the injured state in its choice of rules to be affected by the countermeasures it intends to apply.

It is true that Article 60 of the Vienna Convention creates the impression, at first sight, that the consequences of a breach of treaty are limited to the specific context of the same treaty. And in fact, this article regulates only the possibility of the state injured by a material breach of denouncing or suspending the operation of the breached treaty, thus reacting within the sphere of relations created by the treaty. The denunciation or the suspension of operation according to Article 60 constitutes the expression of a close connection between the wrongful act and the reaction. This is an indisputable feature of conventional reactions.[39]

It could be argued, however, that if broadly interpreted, Article 60 also encompasses the case where a state denounces or suspends the operation of a treaty due to a material breach of another treaty, if the two treaties are interlinked. It is indeed possible that two or more states can conclude two or more conventions simultaneously or consecutively, thus regulating different, but closely connected, aspects of a particular field of their relations. A 'global reciprocity' is then created,[40] within the context of which a provision may be directly tied to another provision inserted, for technical reasons, in a different conventional text. The formal independence of individual conventions does not negate their substantive connection.

Apart from the aforementioned possibility, general international law does not rule out reprisals in a field of interstate relations completely different from the one regulated by the breached treaty. In fact, Article 60 of the Vienna Convention, regulating only conventional reactions, does not exhaust all the consequences of a breach of an international treaty. As the last ILC Special Rapporteur on the law of

38 Art. 1 of the Resolution on 'The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States', 63 *Yearbook of the Institute of International Law* (1989) Part II 341.

39 Nevertheless, close connection does not necessarily mean strict symmetry between the wrongful act and the reaction. The view according to which the breach of a conventional rule exclusively justifies, in certain circumstances, the non-execution of the same rule by the injured state (see W. Riphagen, Preliminary Report, *YILC* (1980) Vol. II, Part 1, 127 para. 92) cannot be based on Art. 60 of the Vienna Convention.

40 According to the expression of M. Virally, *supra* note 15, at 44-45.

treaties, Sir Humphrey Waldock, characteristically noted, the right to denounce or suspend the operation of a breached treaty does not influence the other rights of the injured state as regards reprisals.[41] Actually, the ILC explicitly reserved the right of the injured state to resort to reprisals.[42] Moreover, Article 73 of the Vienna Convention stipulates that 'the provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty ... from the international responsibility of a State'. Granted that reprisals fall indisputedly within the field of international responsibility, this provision functions as a reservation on the possibility of carrying out reprisals because of the violation of an international treaty. While these reprisals cannot oppose *jus cogens* rules or *erga omnes* obligations, they may touch upon customary rules, unilateral obligations, general principles of law, as well as treaty rules regulating a field of interstate relations not connected in any way to the one governed by the breached treaty. In other words, the breach of an international treaty may justify reprisals beyond the specific conventional 'sub-system'.

The opposite, however, may also be the case: the violation of non-conventional obligations – customary or otherwise – may constitute a justification for the non-performance of treaty obligations in the form of reprisals. As shown by international practice, in most cases reprisals are characterized by the non-existence of symmetry or a close relationship between the rule violated by the wrongful act and the rule infringed by the reaction of the injured state.[43] As a result, the difference between reprisals and denunciation or suspension of treaties according to Article 60 of the Vienna Convention is that the former are not usually located in the specific context of interstate relations in which the violated rule belongs, whereas conventional reactions are closely connected to the breach.

B. The Legal Effects of the Reactions

Besides the fact that reactions to wrongful acts infringe upon certain rules of international law and, as a consequence, upon the rights of the defaulting state deriving from

41 Sir Humphrey Waldock, 2nd Report in the Law of Treaties, *YILC* (1963) Vol. II, 76 para. 14.

42 *YILC* (1966) Vol. II, 254 para. 1, 255 para. 6. See also the observations by G. Aranzio-Ruiz, *supra* note 2, paras. 71-73.

43 As an indication, reference can be made to the trade embargo by the US against Uganda in 1978, because of massive violations of human rights by the latter. See Talkington, 'International Trade: Uganda Trade Embargo', 20 *HILJ* (1979) 206; other examples include the economic countermeasures by the US against Iran in the Tehran hostage affair; the EEC's economic measures against Argentina during the Falkland Islands crisis; the economic measures by European and other states against the former USSR after the invasion of Afghanistan in 1979-1980, as well as after the downing of the Korean Jumbo on September 1st 1983; the economic measures by the US against South Africa in 1986 (see in particular the *Comprehensive Anti-Apartheid Act*, of October 2nd 1986, Public Law 99-440 (1986), reproduced in 26 ILM (1987) 79; the EEC's economic measures against Yugoslavia (see *Bulletin EC*, 7/8-1991, point 1.4.3; ibid., 10-1991, point 1.4.7; ibid., 11-1991, point 1.4.4.) and more recently against Serbia (see *Bulletin EC*, 5-1992, point 1.2.19) etc.

these rules, what is of interest here is how these reactions are realized in time, that is, whether the effects of reactions are provisional or irreversible.

It is difficult to doubt the generally temporary nature of reprisals. Indeed, in the *Naulilaa* case the arbitral tribunal stressed that reprisals result in the 'momentary suspension' of the performance of some rule of international law.[44] In its resolution on the regime of reprisals in peacetime, the Institute of International Law declared that reprisals must be terminated as soon as the injured state succeeds in obtaining 'reasonable satisfaction'.[45] The ILC spoke generally about 'temporary suspension of the application of a rule of law as between the parties'.[46] The provisional character of reprisals in any case follows from their main purpose which is the coercion of the defaulting state to comply with the law. As soon as this aim is achieved, reprisals are no longer justified.

The principle of the provisional character of reactions to wrongful acts also prevails today in the field of the law of treaties. It is in fact noted that in Article 60 of the Vienna Convention, the suspension of a treaty in whole or in part constitutes a 'normal' consequence of its violation. Without prejudice to any provision in the treaty applicable in the event of a breach and to rules of a humanitarian nature,[47] the possibility of suspending the treaty is recognized, irrespective of its nature. On the other hand, denunciation of the treaty is restricted to bilateral treaties and, with regard to multilateral treaties, it is subject to the unanimous agreement of all the parties – apart from the defaulting state – which is most rare in practice. With regard to multilateral treaties, the final report of the ILC on the law of treaties refers to the necessity of limiting the right of the specially affected state to suspension of the treaty between itself and the defaulting party. The Commission emphasized that the interests of the other parties must be taken into account, and concluded that suspension constitutes a sufficient guarantee for the affected state.[48] The same applies *a fortiori* to the other parties. These proposals were accepted by the Vienna Conference and were incorporated in paragraph 2(b) and (c) of Article 60 of the Vienna Convention. According to Article 72 of the same Convention, the suspension of a treaty releases the parties from the obligation to perform the treaty in their mutual relations during the period of the suspension; this without influencing in any other way the legal relations between the parties established by the treaty. In other words, the treaty relationship is not brought to an end, the treaty does not disappear, only its consequences are temporarily paralysed. What actually occurs here, as in the case of reprisals, is the 'temporary suspension of the application of a rule of law as between the parties'.

The question, however, arises whether reprisals of an irreversible character, that is measures which by their very nature cannot be terminated after the illegal behaviour

44 *UNRIAA*, Vol. II, 1026.
45 Art. 6, para. 6, *AIDI* (1934) 710.
46 *YILC* (1979) Vol. II, Part 2, 117 para. 7.
47 See Art. 60 paras. 4 and 5.
48 *YILC* (1966) Vol. II, 255 para. 7.

has ended, may exceptionally be permissible in contemporary international law. Legal doctrine is divided on this point.[49] Post-war international practice, except for one case which, as we shall see, is completely idiosyncratic, is lacking in examples which could support the view in favour of possible irreversible reprisals. Such a view is in danger of deflecting reprisals from their main aim, adding to them a hue of revenge or punishment of the defaulting state. However, the 'punishment' of one state by another is inconceivable in international law as it is contrary to the fundamental principle of equality between states.

There is a case, however, where irreversible reprisals do not constitute 'punishment', but merely aim to enforce judicial decisions or arbitral awards which the defaulting state has ignored. It is well known that after Albania's refusal to grant the United Kingdom the compensation provided for by the ICJ judgment in the *Corfu Channel* case,[50] the British authorities attempted to seize Albanian public assets and property on British territory in an attempt to enforce the Court's judgment.[51] The attempt was not successful. If it had succeeded it would have constituted an act of reprisal, *per se* incompatible with the principle of immunity of the property of foreign states. However, the credibility and effectiveness of international decisions would have been seriously jeopardized if international law did not permit a state, in favour of which a final decision has been passed by an international jurisdictional organ, to proceed with enforcement in the event of intransigence by the other party.[52] In this case the injured state does not act on the basis of its own subjective appreciation of the facts and the law, but upon the objective assessment of an international court or tribunal. Moreover, reprisals respond to a double illegality: to the initial violation ascertained by the tribunal and to the non-execution of its decision. This is therefore not merely an exceptional, but rather a borderline case where irreversible reprisals must be accepted.

49 The following authors tend to support the possibility of reprisals of a defined nature: H. Kelsen, *Principles of International Law* (2nd ed., 1966) 21; R. Pisillo Mazzeschi, *supra* note 5, at 321; O.-Y. Elagab, *The Legality of Non-Forcible Countermeasures in International Law* (1988) 87, 94. The opposite view is supported particularly by E. Zoller, *supra* note 13, at 75; H. Rolin, 'Avis sur la validité des mesures de nationalization décrétées par le gouvernement indonésien', 6 *NILR* (1959) 260, at 274-275; L. Seidl-Hohenveldern, 'Reprisals and the Taking of Private Property', in *De conflictu legum, Studies in honour of R.D. Kollewijn, J. Offerhaus* (1962) 470, at 473.

50 *Corfu Channel Case*, ICJ Reports (1949) 244.

51 This dispute has been only recently resolved by an agreement between UK and Albania according to which Albania will pay an indemnity of 1 million US dollars to the UK and the latter will return to Albania the monetary gold seized in Rome, in 1943, by the Nazi regime (see the Greek newspaper *Kathimerini*, 9 May 1992, 21).

52 Taking into account the dispute between UK and Albania, the following authors tend towards this view: W.M. Reisman, *Nullity and Revision. The Review and Enforcement of International Judgments and Awards* (1971) 794; E. Nantwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law* (1966) 139; S. Rosenne, *The Law and Practice of the International Court* (1985) 142 et seq. For the enforcement of judgments of the International Court of Justice see also K. Ioannou, *Problems in the Enforcement of Judgments of the International Court of the United Nations. International Institutional Mechanisms and Internal Procedures*, (in Greek), (1971).

The situation appears different in the context of conventional reactions. Even though the possibility of denunciation is significantly restricted by Article 60 of the Vienna Convention, it is recognized independently of any international decision. The state injured by a material breach of a bilateral treaty may denounce it on its own initiative, while in the case of multilateral treaties the denunciation is subject to the unanimous agreement of the parties, with the exception of the defaulting one. According to Article 70 of the Vienna Convention, unless the treaty otherwise provides or the parties otherwise agree, the denunciation releases the parties from their obligation to perform the treaty, without however affecting rights, obligations or legal situations already created through the execution of the treaty. In other words, the denunciation terminates *ex nunc* the legal rule, abolishing for the future the legal regime established by the treaty. At this point denunciation differs from irreversible reprisals, given that the latter do not abolish the primary rule of law: they merely constitute its definite non-application in the specific case. However, it is also possible for denunciation not to result in abolition of the primary rule, if, and to the extent that, the treaty codifies customary law. In this case, the rule continues to be in force as customary law, on the basis of the non-existence of hierarchy between treaty and custom.

As a conclusion one could maintain that irreversible reprisals constitute an extreme case, while in the context of conventional relations denunciation is recognized within a broader range, even though it still remains the exception. This variation is mainly due to the different functions of these two forms of reaction: reprisals have mainly a coercive aim, while denunciation tends towards balancing the interests of the parties.

C. The Principle of Proportionality

The obligation to respect the principle of proportionality during the application of countermeasures is generally accepted in contemporary international law. However, views differ significantly in regard to its meaning and content; this may be attributed to the flexibility and fluidity of the concept of proportionality.

One may propose two basic criteria for delimiting the concept: i) the effects, or even better, the results of both the wrongful act and the reaction; and ii) the objective which the injured state wishes to achieve by its reaction. In other words, countermeasures are in conformity with the proportionality principle if their effects are proportional to the gravity of the situation created by the illegal behaviour for the injured state, as well as with respect to the desired aim, as this is determined by the nature of the violation.

Despite these clarifications, the proportionality principle always remains flexible and there is unavoidably an increased measure of subjectivity in assessing how it will be upheld in any specific situation. The fluidity of this principle is especially evident in the case of reprisals. This is due to the fact that, as stated above, the rule of law violated and the one the response infringes usually belong to different fields. The looser the

connection between wrongful act and reaction, the more difficult the assessment and comparison of the effects of one on the other. On the contrary, in the case of denunciation or suspension of a breached treaty, the close connection between violation and reaction facilitates the comparison of their respective effects.

For this reason in particular, it should not be surprising that Article 60 of the Vienna Convention does not expressly refer to the proportionality principle. This however, does not mean that this principle is not applicable in the case of denunciation or suspension of a treaty. In fact, contrary to what has been argued in the past,[53] an unimportant breach does not justify a radical reversal of the treaty status. Examination of international practice proves that even before the Vienna Convention, the states usually invoked 'serious', 'significant' or 'manifest' violations of a treaty in order to justify its denunciation or suspension.

As the International Court of Justice declared in its Advisory opinion on the *Namibia* case,[54] Article 60 of the Vienna Convention codifies customary law, which stipulates in paragraphs 1 and 2 that only a material breach of a treaty can be invoked as a ground for its denunciation or suspension. The Court especially referred to paragraph 3 of the same Article, according to which a material breach is defined as repudiation of the treaty or as violation of a provision essential to the accomplishment of its object or purpose. The combination of these three paragraphs implies that the proportionality principle is not only recognized by Article 60, but, on the contrary, it co-exists and is inherent therein. It is in fact characteristic that during the Vienna Conference, as well as in the most recent international practice, this principle was referred to repeatedly in relation to Article 60.[55]

It therefore follows that the restrictions that involve the proportionality principle are valid just as much for reprisals as for the denunciation or suspension of a breached treaty. Despite the uncertainties that may arise in practice concerning the meaning of 'material breach', the proportionality principle is much more evident in the case of denunciation or suspension than with regard to reprisals.

Conclusion

It follows from the above that neither of the two diametrically opposed views maintained in regard to the relation between reprisals and denunciation or suspension

53 P. Fauchille, *supra* note 5, at 389; C. Rousseau, *Principes généraux du droit international public*, (1944) Vol. I, 540.

54 ICJ Reports (1971) 16 at 47.

55 As an indication, reference can be made to the statements by representatives of the following countries; USA, UN Conference on the Law of Treaties, First Session, Vienna, March 26 – May 24, 1968, Off. Records, UN, New York (1969) Vol. I, 354 paras. 8-11; Pakistan, ICJ, *Pleadings, Appeal relating to the Jurisdiction of the ICAO Council*, 384 para. 38; Canada, 'Canadian Practice in International Law', 16 *Canadian Yearbook of International law* (1978) 367. See also G. Aranzio-Ruiz, *supra* note 2, at para. 74.

of a breached treaty fully reflects reality. The one which differentiates the two institutions in an absolute manner clearly overlooks their significant similarities. The other while identifying them, does not take their differences into account. Given however that the similarities clearly outweigh the differences, reprisals and conventional responses can be regulated by a common regime in the context of the draft articles on state responsibility. Both reprisals and denunciation or suspension constitute 'countermeasures' in the broadest sense of the word. Any exclusion of treaty reactions from the scope of application of these draft articles would mean exclusion of one part of the consequences of the wrongful act from the field of state responsibility. This cannot be justified theoretically and may also lead to inconsistencies and confusion in international practice.