Other non-derogable obligations

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OTHER NON-DEROGABLE
OBLIGATIONS
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The topic of prohibited countermeasures requires consideration of those norms from which no derogation is permitted. What is at issue is the intransgressible character of certain norms, or whether they belong to the category of peremptory norms (jus cogens). Equally, prohibited countermeasures raises the issue of the relationship between, on the one hand, the general rules of State responsibility, and on the other, the specific rules which a given treaty or group of treaties may enunciate in relation to their violation. According to Special Rapporteur Arangio-Ruiz:

this problem seems to arise in the presence of those treaty-based systems or combinations of systems which tend to address, within their own contractual or special framework, the legal regime governing a considerable number of relationships among the States parties, including in particular the consequences of any breaches of the obligations of States parties under the system. Such consequences include, in some cases, special, sometimes institutionalized, measures against violations. It follows that such systems may, to some extent, affect, with varying degrees of explicitness, the faculté of States parties to resort to the remedial measures which are open to them under general international law.¹

The notion of 'self-contained' regimes has been evoked in this regard. According to Special Rapporteur Riphagen, the notion of 'self-contained regimes' can be conceived as an ordered set of conduct rules, procedural rules and status provisions, which [form] a closed legal circuit for a particular field of factual relationships'.² Within such a system, primary and secondary rules are closely intertwined. The notion is understood differently by Bruno Simma, who uses the expression 'self-contained regime' in a narrower and more precise sense to designate a category of sub-systems, namely those comprising, in principle, a complete (exhaustive and defined) collection of secondary rules. A 'self-contained regime' would thus be:

a subsystem which is intended to exclude more or less totally the application of the general legal consequences of wrongful acts, in particular the application of the countermeasures normally at the disposal of an injured party.³

In the course of its work, the ILC has equally used other criteria in addressing the issue of prohibited countermeasures, relating to the content or nature of the norms. Without attempting to elaborate a general theory of prohibited countermeasures, one can nevertheless identify certain elements which appear to be crucial for determining the illegality of resort to certain measures as countermeasures in diplomatic law (Section 1); in the field of economic and political coercion (Section 2); and in the area of the environment (Section 3). This analysis complements studies made by other authors concerning the prohibition of countermeasures in the *jus ad bellum*, international humanitarian law and international human rights law, and within particular conventional frameworks, whether the WTO or the European Union.

1 Countermeasures and diplomatic law

Pursuant to article 50(2) of ARSIWA:

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.

It follows that any countermeasures which do not respect the right to inviolability of the person, premises, documents and archives of diplomatic and consular agents would be illegal under article 50. The provision must be assessed in the light of the statements of the International Court of Justice in *United States Diplomatic and Consular Staff in Tehran*. The Court observed that:

the rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once.⁴

Article 50 ARSIWA codifies customary international law in this regard. Countermeasures may no more derogate from the inviolability of the diplomatic mission than from that of diplomatic agents. According to the Court:

... there is no more fundamental requisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose; and ... the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution, are

³ B Simma, 'Self-contained Regimes' (1985) *Netherlands Yearbook of International Law* 111, 115–116; and see further above, B Simma & D Pulkowski, Chapter 13.

essential, unqualified, and inherent in their representative character and their diplomatic function... the institution of diplomacy, with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means.5

The inviolability of a diplomatic mission in substance means the inviolability of the premises of the mission6 and of the goods, furniture, archives and documents of the mission.7 The inviolability of diplomatic agents means the inviolability of their person.8 Article 50 also takes into account the inviolability of consular posts and agents.9

The academic literature supports the view that countermeasures are unlawful if taken in violation of international obligations destined to ensure the protection of diplomatic and consular personnel or of heads of State. According to Oppenheim:

... individuals, such as heads of state and diplomatic envoys, who enjoy the privilege of extraterritoriality when abroad must not be the object of reprisals, although that has indeed occurred on occasion in practice.10

Diplomatic agents cannot be subjected to reprisals, whether against their person or their possessions, by a nation which has received them in the capacity of envoys (legati), since they have placed themselves and their possessions under its protection in good faith.11 Examples of authors who contest the existence of a rule of general international law condemning such acts are rare.12 Some reason that norms of international law cannot be subject to countermeasures by virtue of their jus cogens character.13 Others believe the explanation lies in the peculiar nature of the law of diplomatic relations, in that this body of rules is a 'self-contained regime'.14 This position was defended by Special Rapporteur Riphagen in his Fourth Report on the 'Content, Forms and Degrees of International Responsibility'.15 According to Riphagen:

[a]part from the exclusion of specific reprisals by a universal rule of jus cogens, and the exclusion of specific reprisals by an objective régime (otherwise than in case of a breach of such objective régime), there may be cases of exclusion of specific reprisals even where no extra-State interests are involved.

5 Ibid, 19 (paras 38–39).
6 Art 22, Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95, under which 'the receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage...'.
7 Ibid, art 24: '[t]he archives and documents of the mission shall be inviolable at any time and wherever they may be'.
8 Ibid, art 29: '... [t]he receiving State shall treat [a diplomatic agent] with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity'.
A typical example is the case of diplomatic immunities. It would seem, however, that this is a case which does not lend itself to generalization within the context of the inadmissibility of specific reprisals. Indeed, the case seems rather within the scope of a deviation from the general rules concerning the legal consequences of internationally wrongful acts, implicitly provided for at the time the primary relationship is established.16

However, in the view of Reuter:

[the Court had perhaps been unwise to refer, in that connection, to a 'self-contained régime', an expression which had been interpreted by some as meaning that, in response to the violation by a State of rules concerning privileges and immunities, the injured State could only break off diplomatic relations or declare certain persons non grata . . . in so far as more general obligations such as humanitarian obligations were not involved, the injured State could respond in kind to a manifest violation of the rules on privileges and immunities. For instance, in the event of the violation of a unanimously accepted rule concerning the diplomatic bag, the injured State should be entitled to act in the same way as the State responsible for the violation. In such circumstances, the régime of privileges and immunities did not seem to be particularly self-contained.17

The problem is determining the threshold of legality of countermeasures in diplomatic law, in other words, knowing from what moment and in response to what acts a State may adopt countermeasures, and a contrario, to determine the nature and content of acts which are unacceptable by way of countermeasure in the field of diplomatic relations. International practice demonstrates that not all forms of reprisals exercised against diplomats are considered impermissible. It would be difficult to characterize as illegal measures adopted with a view to restraining the freedom of movement of diplomatic envoys.18

Rather, the category of prohibited countermeasures targets those adopted against diplomatic envoys which are directed against the physical person of diplomats, and which thereby breach the rule of personal inviolability.19 According to Sicilianos:

there is undoubtedly an irreducible core of diplomatic law having a peremptory character—the inviolability of the person of diplomatic agents, the inviolability of premises and archives—which is thereby impervious to countermeasures. Conversely, there are other obligations which do not appear to be binding in all cases and which could, admittedly with all precaution, form the object of proportionate countermeasures.20

In 1992, several members of the ILC observed that the breaking-off of diplomatic relations was a very effective countermeasure which was often resorted to in practice, both on the bilateral level (cessation or suspension of diplomatic relations, non-recognition of governments, recall of ambassadors or of the diplomatic mission en bloc, declarations of persona non grata) and on the multilateral level.21 They also emphasized that there was no reason to prohibit reciprocal measures within the framework of diplomatic law which concerned, for instance, restrictions on the freedom of movement of diplomatic agents. It followed that recourse to countermeasures in this area should not be prohibited, but rather considerably limited.22 The ILC followed this path in the Articles as finally adopted.

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16 Ibid, 17.
18 A de Guttrey, Le rappresaglie non comportanti la coercizione militare nel diritto internazionale (Milan, Giuffré, 1993), 282.
19 Ibid, 283.
22 Ibid.
2 Countermeasures and measures of economic and political coercion

In the Draft Articles adopted in 1995 (there seems to have been no specific provision on economic and political coercion before this date), the ILC incorporated a provision providing that an injured State may not resort, by way of countermeasures, to 'extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed an internationally wrongful act...'. Article 50 of the Articles as finally adopted makes no mention of the illegality of countermeasures adopted by way of economic and political coercion. In truth this issue gave rise to much equivocation within the ILC. It is of interest to retrace certain elements of the debate so as to evaluate the impact of the ILC's silence on this matter.

In 1979 the ILC provided for the possibility for a State to resort to economic and political countermeasures. However, in the commentary adopted in 1995, the ILC indicated that:

[a] great variety of forms of economic or political measures are frequently resorted to and are considered admissible as countermeasures against internationally wrongful acts. Their admissibility, however, is not totally exempt from restriction since extreme economic or political measures may have consequences as serious as those arising from the use of armed force.

The threshold of seriousness required in order for an economic or political measure to be judged illegal, namely that of 'extreme' economic or political coercion, bears witness to a movement which tended to approximate such measures to countermeasures involving the use of force. This appears clearly from the ILC's Commentaries, which themselves seem oriented in favour of a broad interpretation of the notion of use of force. According to the ILC, State practice, although not going so far as to permit the conclusion that certain forms of economic or political coercion are equivalent to forms of armed aggression, nonetheless reveals a distinct and very clear trend towards limiting the ability of States to resort to economic or political measures.

However, the ILC limited its assessment of the illegality of economic and political countermeasures by drawing on the principle of non-intervention. To this end it evoked a

25 See the Commentary to art 30, which states that '... modern international law does not normally place any obstacles of principle in the way of the application of certain forms of reaction to an internationally wrongful act (economic reprisals, for example)'; Report of the ILC, 31st Session, ILC Yearbook 1979, Vol II(2), 116.
27 According to the ILC, 'the prohibition of economic or political coercion by way of countermeasures contained in subparagraph (b) is based on the extreme nature of the measures as determined by the seriousness of their potential consequences in terms of endangering "the territorial integrity or political independence" of the State concerned'. Report of the ILC, 47th Session, ILC Yearbook 1995, Vol II(2), 70.
certain number of international and regional instruments condemning recourse to economic and political coercion which breaches the principle of non-intervention. In this vein, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty adopted by the UN General Assembly affirmed that:

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind.29

Similarly, the Charter of the Organization of American States prohibits States from using 'coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind',30 and in the same way, the Helsinki Final Act of the Conference on Security and Co-operation in Europe provides that all participating States should:

in all circumstances refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.31

In the same manner, the ICJ has recognized the illegality of economic measures in the context of the principle of non-intervention principle in the Military and Paramilitary Activities in and against Nicaragua case. According to the Court:

... [a] State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation; but where there exists such a commitment, of the kind implied in a treaty of friendship and commerce, such an abrupt act of termination of commercial intercourse as the general trade embargo of 1 May 1985 will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty.32

Special Rapporteur Arangio-Ruiz explained that, unlike the general prohibition of armed countermeasures in all circumstances, the prohibition on economic or political coercion concerned only 'non-armed measures with specifically reprehensible aims, such as the 'subordination of the exercise of [the target State's] sovereign rights', or the effort to secure 'advantages of any kind'.33 The condemnation of coercive measures other than those consisting of the threat or use of force therefore targets only those economic or political measures destined to cause very grave, if not catastrophic, consequences for the target state. Such consequences are not necessarily different to those which may result from an illegal use of force. It is this which has led certain authors to dispute that the distinction between the two prohibitions—of recourse to the use of force, and of recourse to extreme economic or political coercion—is valid in practice.

29 GA Res 2131(XX); see also the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (GA Res 2625(XXV)), which proclaims '[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind'.
31 Principle VI, Final Act of the Conference on Security and Co-operation in Europe, signed at Helsinki, 1 August 1975, 14 ILM 1292.
Is the absence of any reference to the unlawfulness of certain economic and political countermeasures in article 50 indicative of an intention to assimilate the prohibition of recourse to measures of economic and political coercion to that of countermeasures involving the threat or use of force? In this regard, it may be argued that this follows from the fact that during the discussions leading to the adoption of the first reading draft in 1996, the members of the ILC enthusiastically adopted article 50(b) which addressed measures of economic or political coercion. However, it should also be recalled that in Military and Paramilitary Activities in Nicaragua, the Court used the generic concept of force to refer to the economic measures taken by the US against Nicaragua. It may equally be asked whether the absence of any reference to the prohibition of such measures might not indicate a desire to exclude extreme measures of economic and political coercion from the field of prohibited countermeasures. On balance, the better view appears to be that economic and political countermeasures may be illegal if they are aimed at coercing a State to subordinate the exercise of its sovereign rights or its independence.

3 Countermeasures and international protection of the environment

Article 50 of ARSIWA makes no mention of the possible illegality of countermeasures by reason of potential damage to the environment. The Gabčíkovo-Nagymaros Project case has, however, shed light on some aspects of the question which deserve mention. During the course of the proceedings before the Court, Slovakia argued that Hungary’s decision to suspend, then to abandon, the construction of the works had made it impossible for Czechoslovakia to carry out the construction work as originally envisaged by the 1977 Treaty, and that the latter thus was entitled to resort to a solution as close as possible to the original design. Slovakia equally maintained that Czechoslovakia had been under an obligation to mitigate the damage resulting from Hungary’s illegal acts. It argued that a State which is confronted by the illegal act of another State is bound to minimize its losses, and thus reduce the damages claimable from the responsible State. The damages claimed by Slovakia were nonetheless considerable, taking into account the investments made and the extra damage, economic as much as ecological, which would have resulted from leaving the works at Dunakiliti/Gabčíkovo unfinished and from the non-operation of the system; on this basis it was argued that Czechoslovakia had not only a right, but was even under an obligation, to put Variant C into action. Although Slovakia had asserted that Czechoslovakia’s conduct had been lawful, it maintained, as a secondary argument, that, even were the Court to find otherwise, the putting into action of Variant C could be justified as a countermeasure.

Was such a ‘countermeasure’ lawful? In answering that question, the Court enumerated the conditions to be satisfied in relation to the recourse to countermeasures, including the condition according to which the ‘effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question’. It concluded that the

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38 Ibid, 51-52 (paras 68-69).
39 Ibid, 56 (para 85).
countermeasure was unlawful by reason of the fact that it deprived Hungary of its right to a fair and reasonable share of the natural resources of the Danube. The Court thus favoured an economic approach, without attaching much importance to an ecological approach to proportionality. It was only in an incidental and rather timid manner that the Court considered that the unilateral diversion of the Danube could have continuing effects on the ecology of the riparian region of Szigetköz. The judicial body adopted a classic approach to assessment of the impact of countermeasures, one which is certainly important, but nevertheless is somewhat limited, given the way in which international environmental law is currently developing and taking root in the international legal system.

Could it nevertheless be argued that countermeasures disturbing the ecological and ecosystemic balance of a given area are prohibited? Can countermeasures be permitted to have negative repercussions on the environment? In other words, above and beyond the issue of proportionality or potential reversibility, could it not be envisaged that there are measures prone to damage the environment which cannot be taken in any circumstances?

Having found Slovakia’s countermeasure to be illegal by reason of its disproportionality, the Court went on to hold that it did not need to rule on further conditions on which the legality of countermeasures depends, namely that the latter must have the aim of encouraging the responsible state to carry out its obligations under international law, and that the measure must consequently be ‘reversible’. However, the issue of ‘reversibility’ could have provided the Court with an opportunity to hold that countermeasures having an impact on the environment are unlawful. After all, the particular and substantial characteristic of much environmental damage is its irreversibility.

The restrictive list as set out in article 50 ARSWA does not take into account all of the complexity of the system of countermeasures. Scientific uncertainty in environmental matters makes it necessary to rethink the criteria of validity or legality of countermeasures according to different paradigms. One is led to the conclusion that the uncertainty which might surround the risks and effects of a countermeasure on the environment could be a factor in assessing the inadmissibility of a countermeasure. In this context the precautionary principle could act as a framework norm which would oblige all States to refrain from adopting in any significant way countermeasures which would threaten the environment and human health.

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40 See also the Separate Opinion of Judge Bedjaoui: ‘In any case, Variant C is not a countermeasure whose illegality can be excused. It is not proportionate, because from the outset it deprives Hungary of the waters of the Danube, a shared resource, and of all right to involvement in a common investment provided for by the treaty of 1977’, ibid, 134 (para 52).
41 Ibid, 56 (para 85).
42 Ibid, 56 (para 87).
43 In his separate opinion, Judge Weeramantry explained that ‘The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments. While, therefore, all peoples have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment’: ibid, 91–92.
44 See Principle 15, 1992 Rio Declaration on Environment and Development, whereby ‘[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’, reproduced in L Boisson de Chazournes, R Desgagné, M Mbaye, & C Romano, Protection internationale de l'environnement (Paris, Pedone, 2005), doc 1.1.
In this context, the notion of 'collective/multilateral treaties' appears to be another relevant criterion for comprehending the applicability of countermeasures in the environmental field. This category of treaties highlights the notion of 'collective interests'.\(^{45}\) The traditional approach, bearing the imprint of bilateralism, is ill-adapted to the subject of the environment because it places countermeasures in a closed relational procedure, limited to the injured/responsible State relationship.\(^{46}\) The protection of the environment demands the incorporation of an open relational process, that is to say, one which takes into account in the taking of countermeasures the damage which could affect States other than the State breaching its international obligation due to the relationship between the different components of the environment in areas under the jurisdiction of a State (the notion of ecosystem thus calls into question again the compartmentalized view of the regime of countermeasures, in favour of a global vision), but also, and above all, because of the necessity and obligation to preserve the environment as a common good or as a common interest of mankind. As early as his 1970 report on State Responsibility, Special Rapporteur Ago argued that:

whilst in all cases an internationally wrongful act creates a new relationship between the guilty state and the injured state ... new problems present themselves once one considers that the new legal relationship may extend not only to the guilty state but to other states and to international organizations; thus, a state committing an internationally wrongful act can assume responsibilities towards all states.\(^{47}\)

Although Ago's analysis is interesting, it is nevertheless limited; it does not take into account the fact that the injured State, in taking countermeasures, can cause damage to other States not guilty of the original wrongful act, and thus engage its responsibility towards these States. This concern is ever-present in relation to the category of multilateral treaties.\(^{48}\)

Thus the assessment of the legality of a response to a violation of international law by way of countermeasures cannot be limited to the relationship between the States responsible for, or injured by, the violation. It must reflect the global dimension of the relationship between the injured State, the State committing the violation and other States which could be injured by a countermeasure. For instance, in the Nuclear Tests cases, New Zealand sought to draw a distinction between France's violation of erga omnes obligations (prohibition of nuclear experiments causing radioactive fallout, prohibition of unjustified contamination resulting from artificial radioactivity of the terrestrial, maritime or aerial environment) and France's violation of New Zealand's own rights (violation of territorial integrity, harm to the health of its population, infringement of its navigational freedom, etc).\(^{49}\)

45 In this regard, see K Sachariew, 'State responsibility for multilateral treaty violations: identifying the "injured State" and its legal status' (1988) 35 Netherlands International Law Review 273. According to Sachariew, 'multilateral treaties play an increasingly important role in the structure and process of present-day international law. They have proved to be a flexible, multi-purpose instrument for finding a common denominator to the interests of a growing number of States and co-ordinating the international effort for dealing with global problems facing mankind. There is a growing awareness that the traditional bilateralist approach is inadequate for the solution of problems such as the maintenance of international peace and security, ensuring world-wide respect for human rights, democratizing international economic relations, preserving the human environment, etc.'


48 See L-A Sicilianos, above Chapter 80.

Although it does not prohibit countermeasures completely, the environmental law regime imposes additional conditions to the procedural framework governing their exercise. For example, obligations to notify and consult other States beforehand, or indeed to obtain authorization from a collective body, or to undertake studies of environmental impact may be applicable, although it may be envisaged that some adjustments may have to be made to the procedure. These remarks contribute to the broadening of the scope of conditions for validity of countermeasures, and thus to the restriction of recourse to them.\(^5\)

**Further reading**

D Anzilotti, *Corso di diritto internazionale* (Padova, CEDAM, 1955)


A de Guttry, *Le rappesaglie non comportanti la coercizione militare nel diritto internazionale* (Milan, Giuffré, 1995)


D Bowett, ‘Economic Coercion and Reprisals by States’ (1972) 13 Virginia Journal of International Law 1


F Lattanzi, ‘Sanzioni internazionale’, in *Enciclopedia del diritto* (Milan, Giuffré, 1958), 536


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