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### Reacting against Treaty Breaches

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# The Oxford Guide to Treaties

SECOND EDITION

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DUNCAN B. HOLLIS

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## Reacting against Treaty Breaches

*Bruno Simma and Christian J Tams*

### Introduction

States regularly proclaim the sanctity of treaty obligations and few principles are as firmly established as *pacta sunt servanda*.<sup>1</sup> Yet, treaty breaches are by no means exceptional: adapting one of international law's most celebrated statements, one might even say that 'almost all nations, almost all the time, consider their rights under a given treaty to be violated'.<sup>2</sup> By way of a snapshot, at the time of writing, eleven of fourteen active contentious cases pending before the International Court of Justice (ICJ) involve claims, by one State, that a certain treaty has been violated.<sup>3</sup> And this ignores the many treaty breaches that do not reach the spotlight, but are addressed quietly (eg by means of a phone call between representatives of the States concerned) or are not addressed at all. Against this background, a recent textbook is surely right to state that 'most disputes submitted to international adjudication involve some problem of treaty interpretation'.<sup>4</sup>

The frequency of real or alleged treaty breaches is neither a source for major concern, nor should it come as a great surprise. While some argue that States today are more cautious before entering into new treaties, especially multilateral ones, the last 150 years have seen a significant trend towards 'treatification', and treaty commitments have come to cover ever greater areas of international relations. That some of these commitments should occasionally be breached is only natural: nobody is perfect, and States certainly are not. More importantly, not all treaty breaches are intentional, or show disrespect for international law as a system, let alone its ground rule of *pacta sunt servanda*. Often, breaches result from mere oversights or lack of information: to give just one example, before States like Paraguay, Germany, and Mexico were beginning to raise the matter, few people were likely to be aware of the requirements imposed by the Vienna Convention on Consular Relations (VCCR) with respect to consular notification.<sup>5</sup> Or, treaty disputes may be due to different, plausible interpretations of a given treaty commitment—for example, with respect to the scope of an

<sup>1</sup> In the introductory lines of its commentary on draft Art 23 (which eventually became Art 26 of the 1969 Vienna Convention on the Law of Treaties (VCLT)), the International Law Commission (ILC) observed: 'Pacta sunt servanda—the rule that treaties are binding on the parties and must be performed in good faith—is the fundamental principle of the law of treaties.' [1966] YBILC, vol II, 211.

<sup>2</sup> Cf L Henkin, *How Nations Behave* (2nd edn Columbia University Press, New York 1979) 47 ('almost all nations observe almost all principles of international law and almost all of their obligations almost all the time').

<sup>3</sup> For a list of ICJ cases see <<https://www.icj-cij.org/en/pending-cases>>. The figures given exclude proceedings that remain on the Court's docket after a judgment on the merits has been rendered, such as *Gabčíkovo-Nagymaros* and *DRC v Uganda*.

<sup>4</sup> A Aust, *Modern Treaty Law and Practice* (3rd edn CUP, Cambridge 2013) 205.

<sup>5</sup> Cf Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261, Art 36 (VCCR). For details on the 'litigation saga' see eg B Simma and C Hoppe, 'From *LaGrand* and *Avena* to *Medellin*—A Rocky Road Toward Implementation' (2005) 14 *Tulane J Intl Comp L* 7.

obligation to prevent the commission of acts of genocide, as was the case in the proceedings between Bosnia and Serbia before the ICJ.<sup>6</sup> Finally, at times, conflicting obligations may even require States to disregard obligations arising under one treaty to comply with the demands of another—in which case, conflict resolution techniques such as the *lex specialis* principle, or *jus cogens*, may clarify questions of precedence.<sup>7</sup> And, of course, not every treaty breach is in itself dramatic; the spectrum of what is covered by the term ‘treaty breach’ is huge. It comprises acts of aggression amounting to a large-scale violation of Article 2(4)<sup>8</sup> of the UN Charter just as it does one State’s imposition of an 11 per cent *ad valorem* import tax on foreign goods where a treaty binds the tariff to 10.9 per cent.

Against this background, it seems natural that real or alleged treaty breaches are by no means an exceptional feature of international law, shaped by well over a century of treatification. The real question is whether international law provides means and methods to respond to them. This chapter addresses that question. We do so in four steps. First, we provide an overview of the international regime governing reactions against treaty breaches. In the next two sections, we analyse the two most relevant generally available means of response under the law of treaties and the law of State responsibility respectively. Our final section offers some concluding observations. In addressing questions of treaty breaches and responses, we will focus on rules of international law regulating inter-State behaviour. Notwithstanding this restriction, it seems clear that treaty breaches can be committed by and against different (non-State) subjects of international law, notably by and against international organizations. While these raise some special problems (eg relating to determining whether the organization itself or its members bear responsibility<sup>9</sup>), they are in principle subject to the rules developed to govern inter-State relations.<sup>10</sup>

## I. Specific and General Rules Governing Reactions Against Treaty Breaches: An Overview

### A. Responses ‘in [their] infinite variety’<sup>11</sup>

Just as treaty breaches are manifold, so are the possible reactions against them. The point may be illustrated by reverting to the examples of treaty breaches just mentioned and to

<sup>6</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43.

<sup>7</sup> For many details on these—and other—conflicts see the ILC Study Group, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (13 April 2006) UN Doc A/CN.4/L.682.

<sup>8</sup> See eg UNGA Res 3314 (XXIX) (14 December 1974), fifth preambular paragraph (describing aggression as ‘the most serious and dangerous form of the illegal use of force’).

<sup>9</sup> For brief comment on this see B Simma and C Tams, ‘Article 60 (1986)’ in O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (OUP, Oxford 2011) vol II, [3]–[4].

<sup>10</sup> Leaving aside the inclusion of references to ‘international organizations’, Art 60 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) [1986] 25 ILM 543, follows the wording of Art 60 of the 1969 VCLT (addressed below, in Section II). By the same token, Arts 51–7 of the 2011 Draft Articles on the Responsibility of International Organizations adapt Arts 49–54 of the Articles on the Responsibility of States for Internationally Wrongful Acts (addressed below, in Section III) with only minor modifications. See also Chapter 5, Section III, 107 *et seq.*

<sup>11</sup> Cf R Baxter, ‘International Law “In Her Infinite Variety”’ (1980) 29 ICLQ 549.

consider possible responses. State A's aggression in scenario 1 could prompt State B—the victim of the armed attack—to resort to self-defence under Article 51 UN Charter. State C might want to refer to Article 51 to justify its military support for State B ('collective self-defence'), while State D might decide to freeze assets to exercise pressure on State A. Other States are likely to protest against the violation of international law, while the Security Council could address the matter by imposing sanctions or encouraging enforcement action in defence of State B's territorial integrity.

In scenario 2, the limited violation of tariff bindings by State X is most likely to be addressed bilaterally, through diplomatic channels, perhaps with the assistance of other States, if State Y (whose exports are affected) does not decide to ignore the matter altogether so as not to jeopardize its friendly relations with State X. In a variation to scenario 2 (which one might refer to as scenario *2bis*), violations of tariff bindings that are of a more relevant character might prompt State Y to respond in kind by disregarding its own tariff bindings. If the matter is governed by World Trade Organization (WTO) law, State Y might institute panel proceedings under the WTO Dispute Settlement Understanding. Alongside these more formal responses, States X and Y, but presumably also other States with some interest in the matter, might seek a friendly settlement, which might involve consultations, expressions of concern, incentives, or protests against State X's disregard of international trade rules.

## B. Treaty-specific rules and general legal concepts

From this briefest of illustrations, it becomes clear that the range of possible reactions against treaty breaches is vast. A State's reaction against a treaty breach depends on a variety of factors, including, *inter alia*: (i) the character or gravity of the breach; (ii) the relations between the States involved in the dispute; (iii) the competence of international institutions to address the matter; and (iv) more particularly, the availability of an independent forum for dispute resolution. More importantly, the scenarios illustrate that a State's response to a treaty breach may be governed by two different categories of rules.<sup>12</sup> The first category comprises what might be termed 'treaty-specific' reactions: a treaty can itself regulate reactions against breaches of its provisions. In scenario 1 above, State B's reliance on self-defence would be 'treaty-specific', as Article 51 UN Charter permits a specific form of self-help against a particular breach of the same treaty (namely a qualified use of force against a breach amounting to an 'armed attack'). By the same token, State C could avail itself of the treaty-specific possibility of aiding the victim of an armed attack by means of collective self-defence, just as the Security Council could make use of its treaty-specific enforcement competence under (and subject to the requirements of) Chapter VII of the UN Charter. In scenario *2bis*, State Y's decision to institute WTO dispute settlement proceedings would also be 'treaty-specific', as WTO law envisages Panel and Appellate Body proceedings as suitable modes for resolving disputes about violations of the covered agreements.

However, not all treaties address reactions against breaches, and even those that do need not be exhaustive in their regulation. Irrespective of any treaty-specific provision, reactions

<sup>12</sup> The following distinction draws on C Tams, 'Enforcement' in G Ulfstein and others (eds), *Making Treaties Work* (CUP, Cambridge 2007) 395–6; and further C Tams, 'Regulating Treaty Breaches' in M Bowman and D Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Law of Treaties* (CUP, Cambridge 2018) 440–67.

against treaty breaches can be based on general legal concepts, which comprise the second category of rules governing responses to treaty breach. In the scenarios mentioned above, State D's decision to freeze State A's assets (unless authorized by the Security Council) cannot be based on a specific treaty provision and therefore must be justified differently. Similarly, if State Y decides to respond to State X's violation of tariff bindings by levying excessive import duties outside the WTO context, it is unlikely that there will be a treaty-specific rule justifying such a tit-for-tat response. More generally, few treaties lay down express rules governing protests against treaty breaches. The legality of these responses depends then, not on the express terms of the treaty whose breach prompted them, but on general rules external to the treaty.

The distinction between *treaty-specific* and *general* rules governing reactions against treaty breaches is of considerable importance. While the treaty itself is the obvious *locus* for addressing questions of breaches and responses, treaty-specific rules are of limited relevance for a study focusing on general aspects of treaty law. They are no doubt common and, taken together, constitute an important element of the international regime governing responses against treaty breaches. But precisely because of their heterogeneity, they escape easy classifications. There are but few limits to the creativity of treaty parties in designing regimes of reactions against treaty breaches, and few models that have not been tried out. In fact, the two simplified scenarios already mentioned reveal the spectre of approaches, ranging from bilateral consultations to legal or quasi-legal proceedings, but also encompassing the (potentially massive) use of military force in self-defence. To provide an overview over treaty-specific rules 'in [their] infinite variety'<sup>13</sup> would be impossible; what is more, it would be of limited utility as treaty-specific rules are by definition of no general relevance outside the specific treaty's field of application. For this reason, the subsequent discussion focuses on responses available under general concepts.

### C. Intrinsically lawful responses versus responses presupposing title to respond

Excluding reactions based on treaty-specific provisions considerably narrows the scope of inquiry. It may be further restricted on the basis of functional criteria. Notably, a further distinction can be drawn between responses that depend on a title, or justification; and responses that are permissible as a matter of course. This latter category would comprise protests, or forms of pressure that are unfriendly, but intrinsically lawful (often described as retorsions<sup>14</sup>). International law does not regulate these responses in any detail—and it opts against regulation deliberately, as the responses do not reach the threshold of (*prima facie*) illegality. Like treaty-based responses, intrinsically lawful reactions can be hugely relevant: very often, protests—especially by a large group of States—may be an extremely effective way of resolving a dispute about treaty breaches. On the other hand, they may sometimes exacerbate tensions and deepen existing frictions.

<sup>13</sup> Baxter (n 11) 549.

<sup>14</sup> ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries' [2001] YBILC, vol II, 128 [3] (ASR). For more on retorsion, see eg OY Elagab, *The Legality of Non-Forcible Countermeasures in International Law* (OUP, Oxford 1987) 4, 29–30; KJ Partsch, 'Retorsion' in R Bernhardt (ed), *Encyclopaedia of Public International Law* (Amsterdam, Elsevier 2000) vol IV, 232.

By contrast, responses that cross the threshold of (*prima facie*) illegality require regulation. Of course, international law must permit effective responses against treaty breaches, but it cannot give *carte blanche* to responding States. Not surprisingly, it seeks to strike a balance between the two competing considerations. This balancing exercise has been influenced by changing views of treaty stability and effectiveness within the international community, and is reflected in the general legal regimes permitting coercive responses against treaty breaches.

#### D. Treaty law responses versus countermeasures

International law enshrines two main categories of coercive responses against treaty breaches: (i) the suspension or termination of treaties under the law of treaties; and (ii) the non-performance of obligations justified as a countermeasure under the law of State responsibility.<sup>15</sup> The first of these is of obvious relevance: given that treaty breaches affect treaty obligations, one would expect the general law of treaties to address the matter—for example, by laying down a general provision on potential responses. This general provision is Article 60 of the 1969 Vienna Convention on the Law of Treaties (VCLT), which puts forward a very nuanced and highly influential regime governing responses to treaty breaches. As discussed in the next section, it draws fine distinctions based on the impact of the breach, and on the character of the treaty affected, while also clarifying which obligations are ‘*sacrosanct*’ and cannot be suspended or terminated even in cases of breach.

The general law of treaties does not exhaustively regulate responses to treaty breaches. It might have done so; however, the VCLT as the key text setting out the law of treaties addresses treaty breaches only in passing.<sup>16</sup> As a consequence, there remains room for

<sup>15</sup> In addition to the two main forms discussed herein, commentators remain fascinated by a third concept, the *exceptio inadimpleti contractus*. This concept, viewed by some as a general principle of law, is said to permit the non-performance of an obligation in relation to a State that had previously violated its own reciprocal obligation. The *exceptio* has clearly influenced the principle of reciprocity, which—as we discuss later—informed the drafting of Art 60 VCLT. However, following the acceptance of Art 60, very little suggests that the *exceptio* continues to exist as an autonomous defence permitting responses to treaty breaches. Quite to the contrary, as far as responses based in the law of treaties are concerned, Article 60 regulates the legal consequences of treaty breach in an exhaustive way, thus no version of the *exceptio* has survived the codification of the law of treaties—may it rest in peace. *Application of the Interim Accord of 13 September 1995* (Judgment) [2011] ICJ Rep 695, 708 [29] (Separate Opinion of Judge Simma); see also *ibid* [4]–[29] for a fuller discussion. It is worth noting that, in the case to which this separate opinion was appended, the majority of the Court showed a curious ‘*Berührungsanst*’ (*ibid* [6] (Separate Opinion of Judge Simma)); it chose not to rule out that there could be some room for the *exceptio*, without however indicating how it could apply. See *Application of the Interim Accord of 13 September 1995* [2011] ICJ Rep 644, 690–91 [161]. For a comprehensive account of the earlier debate, see B Simma, ‘Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law’ (1970) 20 *ÖZÖR* 19–23, 52–5 (‘Simma, Reflections’); for attempts to carve out a *niche* for the *exceptio*, see J Crawford, ‘Third Report on State Responsibility’ (2000) UN Doc A/CN.4/507/Add.2, [324]–[325]; R Provost, ‘Reciprocity in Human Rights and Humanitarian Law’ (1994) 65 *BYBIL* 398–400; and most recently, M Xiouri, ‘The *Exceptio Non Adimpleti Contractus* in Public International Law’ (2019) 21 *Int’l Comm L Rev* 56–92.

<sup>16</sup> See S Rosenne, *Breach of Treaty* (Grotius, Cambridge 1985) 3–8. Rosenne rightly notes that the VCLT approach deliberately distinguishes the ‘law of treaties’ from the ‘law of obligations’ imposed by treaties. *Ibid* 4. This distinction, he observed, ‘made it necessary to find another basis for the systematic classification and treatment of the law of international obligations as such ... This was found in a thorough reconstruction of the nature, scope and treatment of the law of State responsibility’. *Ibid*. The ICJ has emphasized this as well. *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, 38 [47] (the VCLT ‘confines itself to defining—in a limitative manner—the conditions in which a treaty may lawfully be denounced or suspended; while the effects of a denunciation or suspension seen as not meeting those conditions are, on the contrary, expressly excluded from the scope of the Convention by operation of Article 73. It is moreover well established that, when a State has

responses based, not on the general law of treaties, but on the law of State responsibility, which is detailed in the 2001 *Articles on State Responsibility* (ASR). In State responsibility ‘jargon,’ a treaty breach amounts to an internationally wrongful act, and entails the ensuing duties of cessation (where applicable) and reparation.<sup>17</sup> More importantly, the general rules of responsibility also contain provisions governing the invocation of responsibility and inducing the wrongdoer to return to legality by way of countermeasures.<sup>18</sup> Countermeasures can in fact be taken against all forms of wrongful acts, but it is clear that they are *also* available against treaty breaches. They permit ‘the non-performance for the time being of international obligations of the State taking the measures towards the responsible State’<sup>19</sup> (having violated a treaty). And they are subject to a number of conditions and exclusionary clauses.

On the face of it, countermeasures and treaty law responses may seem similar. Subject to certain conditions, both are available against a treaty breach. Both concepts allow for reactions that take the form of suspension of treaty benefits. And, of course, States invoking the two concepts must establish an entitlement to do so—they must be affected by the previous breach against which their response is directed. Yet, notwithstanding these commonalities, international law draws a fine, conceptual distinction between countermeasures, on the one hand, and treaty law responses on the other.<sup>20</sup> It does so, moreover, for good reasons. Despite their similarities, the two types of responses serve different purposes. Countermeasures aim to compel the defaulting State to cease its violation of international law and/or restore the situation that would have existed had there been no such violation.<sup>21</sup> In contrast, treaty law responses aim to remedy a situation in which the balance of rights and obligations within a treaty relationship has been upset due to a prior breach by the defaulting State.<sup>22</sup> At least in theory, treaty law responses must be restricted to synallagmatic pairs of obligations. In contrast, a party resorting to countermeasures may choose—subject to a number of specific exceptions—which obligation it intends to violate. In addition, both forms of reaction may be distinguished by their effect on the norm in question. A countermeasure constitutes the (justified) violation of a binding norm; it has no effect on the continued existence of the norm as such. In contrast, reactions under Article 60 VCLT involve the temporary or permanent extinction of a norm; that is, they—at least temporarily—remove the underlying legal bond between the disputing parties.<sup>23</sup>

committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect’; Art 73 VCLT (VCLT is ‘without prejudice’ to questions arising from a treaty on ‘the international responsibility of a State’).

<sup>17</sup> ASR (n 14) Arts 2, 30, and 31.

<sup>18</sup> Ibid Arts 22, 49–54.

<sup>19</sup> Ibid Art 49(1).

<sup>20</sup> For further details on this point, see B Simma and C Tams, ‘Article 60 (1969)’ in O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (OUP, Oxford 2011) vol II, [4], [69]–[73]. The proceedings in the *Interim Accord* case before the ICJ would seem to confirm the conceptual distinction set out in the text: both the parties and the Court treated treaty-based and responsibility-based responses separately. See *Interim Accord* case (n 15) [118]–[122] and [161]–[165].

<sup>21</sup> See Art 49(1) ASR (countermeasures are taken ‘in order to induce that State to comply with its obligations’); for commentary, see *ibid* 129–30 [7].

<sup>22</sup> F Capotorti, ‘L’extinction et la suspension des traites’ (1971-III) 134 RdC 417, 548–9; Simma, *Reflections* (n 15) 20–1.

<sup>23</sup> Cf Crawford (n 15) [324]–[325] (referencing the *Gabčíkovo-Nagymaros Case* (n 16) 39 [48]). See also Provost (n 15) 398–9.



This difference is reflected in the different legal regimes governing countermeasures and treaty law responses, which the next sections spell out.

## II. The Law of Treaties: Article 60 VCLT

The regime set out in Article 60 constitutes an ambitious attempt to categorize the system of treaty-based responses against violations of international agreements. Within the framework of the general law of treaties, it aims at balancing two competing considerations, namely the need for effective responses against treaty breaches and the overarching interest in preserving treaty commitments. This balancing exercise has resulted in a very complex and perhaps overambitious regime. It is characterized by four features: (a) the decision to make treaty-based responses dependent on a qualified ('material') breach; (b) an attempt to restrict the scope of the right to suspend or terminate treaties; (c) the development of a complex categorization of treaties with a view to identifying States entitled to respond against breaches; and (d) the submission of the right to suspend or terminate treaties to cumbersome procedural preconditions.

### A. The requirement of a material breach

Pursuant to the opening phrases of Article 60(1) and (2) VCLT, suspension and termination of treaties can only be sought in response to breaches of a *material* character.<sup>24</sup> With a view to ensuring the stability of treaty relations, drafters thus chose not to codify any remedies against immaterial breaches,<sup>25</sup> an approach followed for both termination and mere suspension of treaties.<sup>26</sup> Article 60(3) 'defines' a material breach by distinguishing two cases. The first of these is an obvious one: pursuant to Article 60(3)(a), the repudiation of a treaty (ie any attempt by a State to relieve itself from its obligations<sup>27</sup>) will generally<sup>28</sup> constitute a material breach. While practice applying paragraph 3(a) is sparse,<sup>29</sup> the *Namibia* case and

<sup>24</sup> Cf [1966] YBILC, vol II, 255 [7]. The term 'material breach' was adopted in 1963 upon the proposal of the ILC's Special Rapporteur, Sir Humphrey Waldock; it substituted the term 'fundamental breach' suggested by the previous Special Rapporteur, Sir Gerald Fitzmaurice. See H Waldock, 'Second Report on the Law of Treaties' [1963] YBILC, vol II, 75 [11] ('Waldock, Second Report'); GG Fitzmaurice, 'Second Report on the Law of Treaties' [1957] YBILC, vol II, 31 (draft Art 19(2)) ('Fitzmaurice, Second Report'); and the clear account in T Giegerich, 'Article 60' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn Springer, Berlin 2018), [19]–[23].

<sup>25</sup> This raises the question whether reactions against immaterial breaches are permitted under general international law; see Section III, 585–92 *et seq.*

<sup>26</sup> In contrast, Fitzmaurice had drawn a distinction between suspension and termination. In his view, at least partial suspension would have been justified in response to breaches of a lesser character, cf Fitzmaurice, Second Report (n 24) 30 (draft Art 18); GG Fitzmaurice, 'Fourth Report on the Law of Treaties' [1957] YBILC, vol II, 50 (draft Art 37) ('Fitzmaurice, Fourth Report').

<sup>27</sup> See UN Conference on the Law of Treaties, Summary Records of Second Session (9 April–22 May 1969) UN Doc A/CONF.39/11/Add.1, 115 [73] ('Vienna Conference, Second Session'); P Reuter, *Introduction au droit des traités* (PUF, Paris 1995) 182 (note to [301]). During the Vienna Conference, various delegations submitted alternative proposals substituting the term 'repudiation', see M Goma, *Suspension or Termination of Treaties on Grounds of Breach* (Martinus Nijhoff, Leiden 1996) 26 n4.

<sup>28</sup> This does not comprise repudiations 'sanctioned by the present Convention', ie cases in which a State is entitled not to perform a treaty pursuant to Arts 46–64 VCLT; see Giegerich (n 24) [25].

<sup>29</sup> See Goma (n 27) 151. The provision was unsuccessfully raised in some cases before municipal courts, see eg Australian Federal Court, *Hempel and Another v Attorney-General* (Judgment) (1987) 87 ILR 159, 163.

the more recent Slovenia-Croatia case provide illustrations. In *Namibia*, the ICJ held that by disregarding obligations deriving from a 1922 agreement, South Africa had 'disavowed' the mandate,<sup>30</sup> which the majority considered to amount to a repudiation.<sup>31</sup> In the more recent arbitration between Slovenia and Croatia, the Arbitral Tribunal clarified that 'repudiation' meant the 'rejection of a treaty as a whole'.<sup>32</sup> It then found that irregular contacts between the agent of a party and a party-appointed arbitrator in 'blatant violation' of the arbitration agreement did not amount to a repudiation if the defaulting party 'recognised its continuing obligations under the ... agreement'.<sup>33</sup>

The more relevant aspect of the material breach 'definition' is given in Article 60(3)(b), which qualifies as material any 'violation of a provision essential to the accomplishment of the object or purpose of the treaty'. In so doing, it adopts an understanding of 'material breach' that may at first seem counterintuitive. Contrary to what might be expected, there is no reference to the *intensity* or *gravity* of the breach; instead, the provision's focus is on the character of the treaty obligation that is being breached. This notably means that Article 60 does not permit responses against grave breaches of treaty provisions that are not essential.<sup>34</sup> Conversely, but more controversially, the textual analysis suggest that trivial breaches of essential provisions can constitute material breaches under Article 60(3)(b). Whether this is indeed a desirable approach may be open to debate,<sup>35</sup> especially since earlier draft provisions had required a *substantial violation*.<sup>36</sup> The clear wording of Article 60(3)(b), however, admits of little doubt in this respect.<sup>37</sup>

Neither the text of the provision nor the International Law Commission's (ILC's) commentary clarify what is meant by an 'essential provision'. It is clear from the wording that the determination has to be made in light of, and with reference to, the treaty's object and purpose.<sup>38</sup> The term 'essential' suggests that the provision in question must have been at the heart of a treaty.<sup>39</sup> However, from the *travaux*, it appears that the ILC did not intend this to be overly restrictive; hence it considered that provisions of an ancillary character could be

<sup>30</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa)* (Advisory Opinion) [1971] ICJ Rep 16, 47 [95].

<sup>31</sup> *Ibid*; see also *ibid* 218 (Separate Opinion of Judge de Castro). It must be noted, however, that the Court did not clearly distinguish between cases of 'repudiation' (Art 60(3)(a)) and 'violations of essential provisions' (Art 60(3)(b)). In an Annex to his dissenting opinion, Sir Gerald Fitzmaurice criticized the majority's approach; in his view, South Africa had denied the obligation's existence, which was not the same as to repudiate it. *Ibid* Annex [6].

<sup>32</sup> *Arbitration between the Republic of Croatia and the Republic of Slovenia*, Partial Award (30 June 2016) PCA Case No 2012-04, [213]. (The first-named author was a member of the Arbitral Tribunal in this case.)

<sup>33</sup> *Ibid* [208] and [214].

<sup>34</sup> The drafting history is very clear on this point. At the Vienna Conference, delegates rejected a Finnish proposal pursuant to which grave breaches of treaties should generally give rise to a right to suspend performance or terminate the treaty, irrespective of the essential (or otherwise) character of the provision affected. UN Conference on the Law of Treaties, Official Records: Documents of the Conference (1968-1969) UN Doc A/CONF.39/14/Add.2, 181 [522] ('Vienna Conference, Official Records').

<sup>35</sup> DW Greig, 'Reciprocity, Proportionality, and the Law of Treaties' (1994) 34 *VJIL* 295, 342-3; P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn Routledge, London 1997) 143.

<sup>36</sup> See Waldock, Second Report (n 24) draft Art 20 (providing that '[a] material breach of a treaty results from ... a breach so substantial as to be tantamount to setting aside any provisions ... the failure to perform which is not compatible with the effective fulfilment of the object and purpose of the treaty'); [1966] *YBILC*, vol II, 255 [6]; F Kirgis, 'Some Lingering Questions About Article 60 of the Vienna Convention on the Law of Treaties' (1989) 22 *Cornell Int L J* 554.

<sup>37</sup> See Goma (n 27) 33.

<sup>38</sup> As the ILC made clear in its commentary, this primarily requires an analysis of the reasons that led to the conclusion of the treaty. [1966] *YBILC*, vol II, 255 [9]. By way of illustration, cf *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14, 137 [273].

<sup>39</sup> Goma (n 27) 31.

essential.<sup>40</sup> This statement (which may surprise at first sight) has to be seen in the context of debates about dispute settlement clauses. These clauses are typically not a treaty's one and only central aspect, and yet, the drafters were keen to clarify that their violation could amount to a 'material breach'.<sup>41</sup>

Given the absence of clear normative guidance, it is no surprise that courts and tribunals charged with applying Article 60 have not come up with comprehensive definitions. Some judgments in fact merely restate the necessity of distinguishing between 'normal' and 'material' treaty violations.<sup>42</sup> Statements made in proceedings before Austrian courts would seem to confirm that provisions may acquire an 'essential' status over time if the normative framework of the treaty changes.<sup>43</sup> From the ICJ's approach in the *Nicaragua* case, it may be inferred that flagrant violations of generally formulated treaty obligations are likely to be seen as 'material breaches' in the sense of Article 60(3)(b). There, the Court considered the mining of Nicaraguan ports and direct attacks on ports and oil installations to be material breaches of the bilateral Friendship, Commerce and Navigation (FCN) Treaty, while US import restrictions on Nicaraguan sugar and its efforts to prevent international organizations from granting loans to Nicaragua were held not to be 'material'.<sup>44</sup> Finally, in the more recent arbitration between Croatia and Slovenia, the Arbitral Tribunal emphasized that where the parties (or one of them) had taken action in response to a breach, it was necessary to determine *in light of this 'remedial action'* whether the object and purpose of a treaty could still be attained.<sup>45</sup>

Of course, these attempts to make sense of the concept of 'material breach' remain closely tied to the facts of each case, some of which were very particular. Generally, international practice and jurisprudence still seem to grapple with applying the curious 'definition' in Article 60(3) to specific instances.

## B. The scope of the right

Article 60 not only elaborates upon conditions restricting the suspension/termination of a treaty; it also regulates the scope of that right. It does so, however, in a rather rudimentary, and not always compelling, way. To some extent, the regulation had to remain fragmentary, as material breaches, depending on the circumstances, may produce very different effects. Some undermine the treaty as a whole, others affect only some of its aspects—and responding States will tailor their responses accordingly. Even so,

<sup>40</sup> [1966] YBILC, vol II, 255 [9]; see also Waldock, Second Report (n 24) 75 [11]. In order to broaden the scope of the provision, the ILC replaced Fitzmaurice's term 'fundamental breach' with the notion of a 'material breach'. For Fitzmaurice's use of terminology, cf Fitzmaurice, Second Report (n 24) 31 (draft Art 19(2)).

<sup>41</sup> See Waldock, Second Report (n 24) 75 [11]; for a different interpretation of Art 60(3)(b), see the statement of the Uruguayan delegate Jiménez de Arechaga. UN Conference on the Law of Treaties, Summary Records of the First Session (26 March–24 May 1968) UN Doc A/CONF.39/11, 356 [39] ('Vienna Conference, First Session'). Apart from the example of dispute settlement clauses, no other examples of such 'essential ancillary' character are given.

<sup>42</sup> See eg *Malachtou v Armefti and Armefti* (Judgment of the Cyprus Supreme Court of 20 January 1987) 88 ILR 199, 210.

<sup>43</sup> See the position taken by the Austrian government in a Swiss–Austrian dispute relating to the right to acquire real property under a Treaty of Establishment of 1875, noted by P Fischer and G Hafner, 'Austrian Practice in International Law' (1976) 26 ÖZÖR 301, 345–6. The case is discussed in B Simma, 'Termination and Suspension of Treaties. Two Recent Austrian Cases' (1978) 21 German Ybk Intl L 74.

<sup>44</sup> *Nicaragua* case (n 38) 138 [275]–[276].

<sup>45</sup> *Croatia Slovenia* case (n 32) [219]–[225].

Article 60 presents a curious mix of strict limitations and non-regulation. Three features stand out.

First, contrary to what might be suggested by its title—“Termination or suspension of the operation of a treaty . . .”—Article 60 deliberately limits the right of termination. Both Article 60(1) (dealing with material breach and bilateral treaties) and 60(2)(a) (dealing with collective responses to material breach) are addressed later, and both deal with suspension and termination. But States’ individual responses under Article 60(2)(b) and 2(c) (dealing with multilateral treaty breach in the absence of unanimity) are restricted to the *suspension* of an agreement. The exclusion of termination in these latter two provisions reflects the drafters’ opinion that in the case of multilateral treaties, the interest of third parties in the stability of treaty relations had to be taken into account.<sup>46</sup>

Second, compared to responsibility-based responses (addressed in Section III), Article 60 severely limits the discretion of States in choosing how to respond to material breaches. Article 60(1) and (2) make it clear that the responding party may only suspend or terminate the *same* treaty breached by the defaulting State. Article 60 does not justify the suspension or termination of *other* treaties. This reflects the purpose of treaty-based responses, which are designed to re-establish the balance of rights between treaty parties, and as a matter of principle, seems uncontroversial. One might query, however, whether the principle should have been qualified. Notably, the ILC discussed whether (exceptionally) responding States could suspend or terminate *another* treaty, if it was closely linked to the one materially breached.<sup>47</sup> This indeed would have been preferable, especially for formally distinct treaties that could only be agreed by way of a ‘package deal.’<sup>48</sup> The ILC’s decision not to include any provision on interrelated treaties however answered this question in the negative.<sup>49</sup>

Third, and in contrast, within the framework of the same treaty, responding parties enjoy a wide measure of discretion to choose which parts they wish to suspend, terminate, or leave intact. In particular, they may decide whether to suspend or terminate a treaty *in whole or in part*.<sup>50</sup> As Article 44(2) makes clear, this freedom is not affected by the VCLT rules on separability, which, in view of the drafters, would have imposed too big a restraint.<sup>51</sup> Perhaps more surprisingly, Article 60 does not require responses to be proportionate. This was deliberate insofar as the drafters decided against including a requirement of ‘qualitative

<sup>46</sup> See [1966] YBILC, vol II, 255 [7]. For multilateral treaties that are bilateral in application (the subject of Art 60(2)(a)), this approach seems misleading; any response to their violation, whether termination or suspension, would only affect the two parties to the dispute. The complete exclusion of termination thus seems unwarranted here. Simma, *Reflections* (n 15) 67–8; Gomaa (n 27) 104.

<sup>47</sup> [1963] YBILC, vol I, 121 [79] (De Luna); cf also A Verdross and B Simma, *Universelles Völkerrecht* (3rd edn Duncker & Humblot, Berlin 1984) 520 n42; E Schwebel, ‘Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach’ (1967) 7 IJIL 316–17; A McNair, *The Law of Treaties* (Clarendon, Oxford 1961) 571; Simma, *Reflections* (n 15) 22; M Virally, ‘Le principe de la réciprocité en droit international contemporain’ (1967–III) 122 RdC 1, 44–5.

<sup>48</sup> By way of example, one might think of the German–Polish negotiations of October 1975, which led to the conclusion of two distinct, but interrelated treaties; the first obliging Germany to grant Poland a credit, the other obliging Poland to modify its hitherto restrictive rules on the freedom of movement. For references see Verdross and Simma (n 47) 520 n42.

<sup>49</sup> Cf G Arangio-Ruiz, ‘Third Report on State Responsibility’ [1991] YBILC, vol II, 23 [72].

<sup>50</sup> This applies to all responses under Art 60, even though the wording of Art 60(2)(a) remains misleading. For details see the debates at the Vienna Conference, First Session (n 41) 167 [30], 168 [32].

<sup>51</sup> As pointed out by Waldock (Expert Consultant), the rules laid down in Art 44 (then draft Art 41) could in some situations have even prevented responding parties from suspending the very provision that had been violated by the defaulting party, cf Vienna Conference, First Session (n 41) 237 [40]. See further Waldock’s explanation for draft Art 26 of the 1963 draft. Waldock, Second Report (n 24) 90 [1]. The Vienna debates (which, at least initially, were controversial) are reproduced in Vienna Conference, First Session (n 41) 229–34.

proportionality,<sup>52</sup> that is, a duty of responding parties to limit their reactions to the very obligations that had been materially breached, or that were connected to them in some way.<sup>53</sup> It is another question whether responding States have to observe the limits of quantitative proportionality, that is, restrict themselves to responses of similar intensity.<sup>54</sup> The question may arise in particular where a State seeks to respond against trivial violations of essential provisions.<sup>55</sup> In this case, the text of Article 60 does not seem to limit the intensity of reactions—once there has been a material breach, the responding State is free to suspend (or indeed terminate) the treaty in whole or in part. The better view would presumably be to ‘read’ proportionality into the text of the provision, in the way this is being suggested for other responses to qualified violations of international law.<sup>56</sup> There is considerable evidence that proportionality constitutes an overriding principle *generally* governing reactions against breaches of international law.<sup>57</sup> However, the matter is far from settled, and the text itself does not support this more restrictive approach.<sup>58</sup>

Finally, the right to suspend or terminate a treaty is restricted by the exclusionary clause of Article 60(5) VCLT, which declares certain treaty provisions to be sacrosanct.<sup>59</sup> Under this provision, States may not suspend or terminate ‘provisions 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’. The purpose of the clause is to protect the beneficiaries of humanitarian treaties from losing their rights in the course of inter-State disputes.<sup>60</sup> The drafting history suggests that despite the curious wording, this exclusion is intended to cover provisions of international humanitarian law and international human rights law.<sup>61</sup> The ICJ, in the *Namibia* opinion, seemed to consider Article 60(5) to reflect general international law.<sup>62</sup> However, upon consideration, its relevance—at least within

<sup>52</sup> Cf Simma, *Reflections* (n 15) 21–2, 78; Arangio-Ruiz (n 49) 24 [77].

<sup>53</sup> Notably, during the Vienna Conference, delegates rejected a US amendment that would have limited reactions to responses in kind: see Vienna Conference, *Official Records* (n 34) 181 [522]; Vienna Conference, *First Session* (n 41) 389.

<sup>54</sup> On quantitative proportionality, see ASR (n 14) Art 51, pursuant to which ‘[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question’, a topic discussed at nn 112–19 and accompanying text.

<sup>55</sup> See nn 24–45 and accompanying text, for comment on the curious way Art 60 seeks to define ‘material breach’. Where a trivial breach of an essential provision qualifies as a material breach, it could not be said that proportionality was ‘pre-built into the mechanism’ of Art 60. Cf Gomaa (n 27) 120.

<sup>56</sup> By way of illustration, see the ICJ’s advisory opinion in *Nuclear Weapons*, reading proportionality (and necessity) into the rules governing self-defence: ‘The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.’ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 245 [41].

<sup>57</sup> In the words of Willem Riphagen, a “rule of [quantitative] proportionality” would seem to govern in principle all ... legal consequences [of an internationally wrongful act]. ILC, ‘Preliminary Report on State Responsibility’ [1980] YBILC, vol II, 112 [27]; see also Verdross and Simma (n 47) 520 [816].

<sup>58</sup> Contrast, for example, the parties’ different approaches in the *ICAO Council* case. In the view of India, reactions under Art 60 did not have to be proportionate. *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* [1972] ICJ Pleadings 422 [52] (Reply by India). Predictably, Pakistan took the opposite approach. *Ibid* 384 [38] (Counter-Memorial of Pakistan).

<sup>59</sup> On the drafting history of the provision, see E Schwelb, ‘The Law of Treaties and Human Rights’ (1973–1975) 16 *Archiv des Völkerrechts* 1, 14–26. In addition, it is worth reiterating that (in line with the *lex specialis maxim*), Art 60 is ‘without prejudice’ to special (treaty-specific) rules agreed in particular agreements. See Section I.B 570–71 *et seq.*; and the discussion in the *Croatia Slovenia* case (n 32) [203]–[206].

<sup>60</sup> For the drafting process, see Vienna Conference, *First Session* (n 41) 354 [12]; Vienna Conference, *Second Session* (n 27) 112 [20]; Vienna Conference, *Official Records* (n 34) 269 (quoting UN Doc A/CONF.39/L31).

<sup>61</sup> See Vienna Conference, *First Session* (n 41) 354 [12] (Bindschedler) and further G Barile, ‘The Protection of Human Rights in Article 60, Paragraph 5 of the Vienna Convention on the Law of Treaties’ in *International Law at the Time of its Codification. Essays in Honour of Roberto Ago* (Giuffrè, Milan 1987) vol II, 3–14.

<sup>62</sup> *Namibia* case (n 30) 47 [95].

human rights law proper—is more limited than is usually assumed. This is so because very often (as will be discussed in the next section), material breaches of human rights treaties do not affect any other treaty party in a particular way. Hence, often no other State has standing to suspend or terminate human rights treaties. Article 60(5), of course, clarifies this and thus removes legal uncertainty; however, even without its inclusion, human rights provisions would have effectively been protected against suspension and termination.<sup>63</sup>

Interestingly, Article 60(5) is the only exclusionary clause expressly restricting the right to suspend or terminate treaties. While seeking to declare human rights provisions sacrosanct, the drafters did not include a more comprehensive exclusionary clause. Since the adoption of Article 60, it has occasionally been discussed whether States should be precluded from suspending or terminating treaty provisions that enshrine provisions of a peremptory nature.<sup>64</sup> Such an approach would indeed seem implicit in the rationale underlying *jus cogens* norms, as norms ‘from which no derogation is permitted’.<sup>65</sup> However, Article 60 fails to take up the matter, and given the paucity of practice, it is no surprise that uncertainties remain.

### C. Standing to suspend or terminate treaties

As the suspension or termination of a treaty affects its international obligations, a State invoking Article 60 must be legally entitled to do so. In this respect, two aspects need to be distinguished. First, any response finds its ultimate justification in the prior breach by the other State party. However, that in itself is not enough: in addition, the responding State must, second, have been affected by that prior breach. It must have ‘standing’ to react. Standing is addressed in Article 60(1) and (2), which distinguish between bilateral and multilateral treaties and collective and individual responses. The result is a very complex regime of ‘standing to respond against treaty breaches.’ This regime is not beyond criticism, but it has had a lasting influence on our understanding of the character of multilateral obligations more generally and in a modified way reappears in the relevant provisions addressing standing to invoke State responsibility.

That the regime of standing is so complex is due to the rise of multilateral treaty obligations. Within the framework of a multilateral treaty, it may be extremely difficult to assess which of the parties should be entitled to respond against another party’s material breach. Of course, some treaties say so expressly (eg by recognizing a right of each and every State party to respond against breaches<sup>66</sup>) and within regimes providing for regular recourse to third-party dispute resolution, some courts or tribunals have clarified the requirement of *locus standi*.<sup>67</sup> But in the absence of such treaty-specific approaches, the

<sup>63</sup> The point is covered below, in Section II.C, and further explored in Simma and Tams (n 20) [45].

<sup>64</sup> See eg *ibid* [49]–[51].

<sup>65</sup> Art 53 VCLT.

<sup>66</sup> See eg European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, Art 33 (ECHR); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, Art 45; African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) [1982] 21 ILM 58, Art 47; Constitution of the International Labour Organization (adopted 9 October 1946, entered into force 20 April 1948) 15 UNTS 35, Art 26; Treaty on the Functioning of the European Union (TFEU), Art 259 (formerly Art 227 of the Treaty establishing the European Community).

<sup>67</sup> See eg the jurisprudence of WTO Panels and the Appellate Body on questions of standing to bring WTO complaints: WTO, *European Communities—Regime for the Importation, Sale and Distribution of Bananas (‘Bananas III’)—Report of the Panel* (22 May 1997) WT/DS27/R [7.46]–[7.51], and *Bananas III—Appellate Body*

general rules governing standing to raise breaches of multilateral obligations are by no means easy to assess.

At the outset, it is worth noting that bilateral treaties present few problems. Where one State violates a bilateral treaty in a material way, the other party obviously has standing to respond to that breach. Subject to the exclusions mentioned in Article 60(5) VCLT, a treaty party can thus suspend or terminate each and every bilateral treaty breached by the other side.

With respect to multilateral treaties, matters are more complex.<sup>68</sup> During the *travaux*, and ever since, the key question has been whether the position of States parties to multilateral treaties should be assimilated to that of States under bilateral treaties, that is, within a clearly defined reciprocal legal relationship. On this, the ILC's debates reveal considerable uncertainty.<sup>69</sup> Drafters on the one hand acknowledged that all parties had an interest in the treaty's observance. On the other hand, they accepted that not all multilateral treaties could be treated alike and that material violations would not always affect all parties in the same way. The ILC initially favoured the first of these approaches and stressed the solidarity of all parties within a multilateral treaty framework: according to draft Article 42(2)(a), adopted in 1963, 'any other party' could respond to breaches of multilateral treaties by way of suspension.<sup>70</sup> This was refreshingly simple, but critically received by governments<sup>71</sup> and in the literature<sup>72</sup>—especially since the 'solidarity view' neglected that a material breach might affect different parties very differently, and seemed to place insufficient emphasis on the stability of treaty relations.<sup>73</sup> Taking up these concerns, the eventual standing regime moved away from the 'solidarity approach'. In so doing, the drafters managed to ensure (more) treaty stability, but had to embrace complexity. The regime eventually put forward in Article 60(2) is best understood in terms of one restrictive rule and two more liberal exceptions.

### 1. *The restrictive rule*

The *restrictive rule* is found in Article 60(2)(b), pursuant to which 'specially affected' States are entitled to suspend (but not terminate) treaties. The attribute 'specially affected' is not defined, but it clearly was introduced to indicate the move away from the solidarity approach just outlined. In order to be specially affected, a party to a treaty must have been individually injured by the material breach in question; the general interest in seeing the

*Report* (9 September 1997) WT/DS27/AB/R [131]–[136], respectively. For comment see J Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron, London 2002) 154–7.

<sup>68</sup> It is worth noting that notwithstanding the heterogeneity of multilateral treaties (which under the VCLT scheme cover narrow tripartite agreements just as much as universal lawmaking agreements), the drafters of the VCLT put forward one rule for all of them.

<sup>69</sup> For further details, see Simma and Tams (n 20) [26]–[40].

<sup>70</sup> [1963] YBILC, vol II, 204. This was based on Waldock's draft (Waldock, Second Report (n 24) 72 (Art 20(4)(a))), which however went further in accepting a right of 'any other party' to suspend or terminate the treaty in relation to the defaulting State. Within the ILC, Waldock's attempt to broaden the circle of parties entitled to respond to material breaches of multilateral treaties was endorsed inter alia by Rosenne (who later changed his view on the matter), Castren, and Briggs. See [1966] YBILC, vol I(1), 60 [26], 61 [40], [47]. The opposite view was taken by Verdross, [1963] YBILC, vol I, 294 [62]; and, in 1966, by Cadieux, de Luna, and Rosenne, [1966] YBILC, vol I(1), 62 [60], 63 [70], and 128 [7].

<sup>71</sup> See eg [1966] YBILC, vol II, Annex, 381 §17 (the Netherlands); and cf Simma, *Reflections* (n 15) 69–70.

<sup>72</sup> See eg Schwelb (n 47) 321–6; H Rolin, 'Statement' (1967) 52 *Annuaire de l'Institut de Droit International*, vol II, 359–61.

<sup>73</sup> One recurring point of concern was that draft Art 42(2)(a) would have permitted non-compliance with standard-setting conventions protecting collective interests. Cf Schwelb (n 47) 321–6; Rolin (n 72) 359–61.

terms of the treaty observed (which is shared by 'any party to the treaty') is not sufficient.<sup>74</sup> In practice, such 'special effects' are accepted in mainly two scenarios.

First, one State may have a particular interest in seeing a multilateral obligation performed. This is notably the case for multilateral obligations that—despite binding a plurality of States—are performed in a strictly bilateral context.<sup>75</sup> Like under bilateral treaties, these obligations are based on synallagmatic relations, giving rise to reciprocal rights and duties between pairs of States. Duties under multilateral diplomatic or consular agreements provide a classic example: while the treaties in question are multilateral, obligations arising under them are to be performed between pairs of receiving and sending States. The same would seem to apply to obligations arising under multilateral treaties on judicial assistance, the exchange of trade benefits, or conventions in the field of humanitarian law. In all these cases, the 'litmus test' is whether the multilateral treaty's application takes place between pairs of States and in what has been described as a 'quasi-bilateral' setting. If this is the case, a material breach of the multilateral treaty will 'specially affect' the other State party to the quasi-bilateral setting—the sending or receiving State; the State having requested judicial assistance; the State party to an armed conflict; or, the State profiting directly from an exchange of benefits.

Second, even where the obligation is to be performed outside quasi-bilateral settings, the effect of the material breach may still 'specially affect' one State.<sup>76</sup> It may occur, for example, where a State violates treaty-based rights of foreign nationals (which would specially affect the State of nationality); where one State's material breach of an environmental obligation produces particularly grave effects on the territory of another State (such as the coastal State suffering from an oil spill); or, arguably, where one State party has a special responsibility to guarantee a treaty status (such as a special right to protect nationals of another State belonging to a distinct ethnic group).<sup>77</sup> Of course, these examples merely illustrate the general approach, and there is no hard and fast rule comprehensively defining instances of special effects based on special consequences. Thus, Article 60(2)(b), on the one hand, sets out a flexible requirement of 'special effects', but on the other hand, in requiring some form of special effect in the first place, requires States seeking to respond against a treaty breach to establish some form of individual injury. This marks a significant modification of the ILC's initial approach, and restricts the circle of States entitled to respond to material breaches under Article 60(2)(b).

## 2. *Two liberal exceptions*

There are two limited settings where this rather restrictive approach limiting standing to respond against material breaches is given up. The first of these exceptions is found in Article 60(2)(a), which addresses collective responses. As is clear from the text, when acting collectively, all other parties enjoy wide freedom to react against material breaches of multilateral treaties. They can suspend the treaty in whole or in part or terminate it

<sup>74</sup> See DN Hutchinson, 'Solidarity and Breaches of Multilateral Treaties' (1988) 59 BYBIL 188–9; Schwelb (n 47) 324.

<sup>75</sup> See Simma and Tams (n 20) 1362 *et seq.*

<sup>76</sup> Cf Provoost (n 15) 401; Schwelb (n 47) 324.

<sup>77</sup> Schwelb (n 47) 324. See, for example, Annex IV and Art 10(2) of the 1946 Peace Treaty with Italy—providing for a right of protection of the Austrian government with respect to German-speaking inhabitants of South Tyrol—and the decision by the European Commission on Human Rights in *Austria v Italy* (App 788/60) (1961) 4 Yearbook 116, 142 (EComHR).



either in the relations between themselves and the defaulting State, or as between all the parties. In other words, they may choose between finally or temporarily expelling the violator from the treaty, or bringing the whole treaty relationship to an end. In order to do so, however, they have to act unanimously. This may be a realistic option in treaties with a limited number of parties, but it is increasingly difficult in universal multilateral treaty regimes with wide membership. It does not come as a surprise, then, that Article 60(2)(a) has been of limited practical relevance. In its 1971 advisory opinion on *Namibia*, the ICJ seemed to interpret the termination of the mandate for South West Africa as an exercise of the Article 60(2)(a) right.<sup>78</sup> Perhaps the suspension of Egypt's membership in the Organisation of the Islamic Conference (OIC), in 1979, could be seen as another instance on point (provided one is willing to accept that Egypt's entering into peace agreements with Israel could amount to a material breach of the OIC Charter).<sup>79</sup> Yet these are isolated—and dubious—incidents.

The second exception is found in Article 60(2)(c). It, too, has limited practical relevance, but is conceptually important. Article 60(2)(c) recognizes that, for a small circle of obligations, each party to a treaty can respond to material breaches individually, irrespective of any special injury, thus accepting the premise of the 'solidarity approach'. It does so, however, only with respect to a very narrowly formulated category of obligations, namely so-called 'integral' obligations.<sup>80</sup> These are described, in rather complicated terms, as obligations 'a material breach of [which] by one party radically changes the position of every party with respect to the further performance of its obligations'. The provision refers back to a category of treaties, initially described by Sir Gerald Fitzmaurice,<sup>81</sup> that operate on the basis of 'global reciprocity'.<sup>82</sup> The objective of such treaties can only be achieved through the interdependent performance of obligations by all parties.<sup>83</sup> Examples discussed by the drafters include disarmament treaties or treaties prohibiting the use of particular weapons; to these, treaties prohibiting the acquisition of territory by force may be added.<sup>84</sup> In order to be meaningful, the VCLT drafters assumed, these treaties would have to be performed by every party vis-à-vis every other party. Conversely, one party's non-compliance would affect all other parties to the treaty. On the basis of this understanding, Article 60(2)(c) recognizes the right of each and every other party to respond to material breaches. What is more, because of the obligations' interdependent (or

<sup>78</sup> Cf *Namibia case* (n 30) 47 [94]. This interpretation would be problematic because the UNGA's resolution was not unanimous, but adopted by 114 votes to two with three abstentions. As evident from the wording of the provision, Art 60(2)(a), however, requires unanimity.

<sup>79</sup> See OIC Charter, 914 UNTS 103, and OIC Resolution 18/10-P of 12 May 1979. The case is discussed in KD Magliveras, *The Exclusion from Participation in International Organisations* (Brill, Leiden 1999) 237–8.

<sup>80</sup> For brief comments, see M Fitzmaurice and O Elias, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing, Utrecht 2005) 158–64; LA Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 EJIL 1127.

<sup>81</sup> Fitzmaurice, Second Report (n 24) 31, 54 [126] (draft Art 19(1)(ii)(b) and (iii) and commentary); GG Fitzmaurice, 'Third Report on the Law of Treaties' [1958] YBILC, vol II, 27–8, 41 [78] and 44 [91]–[93] (draft Art 18(2), 19(a) and commentary), Fitzmaurice, Fourth Report (n 26) 45–6, 66 [82], 70 [102].

<sup>82</sup> Sicilianos (n 80) 1135.

<sup>83</sup> Crawford (n 15) [91]; J Crawford, 'The Standing of States: A Critique of Article 40 of the ILC's Draft Articles on State Responsibility' in D Fairgrieve (ed), *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer Law International, The Hague 2000) 29–32 ('Crawford, The Standing of States'); C Feist, *Kündigung, Rücktritt und Suspendierung von multilateralen Verträgen* (Duncker & Humblot, Berlin 2001) 49–52; Gomaa (n 27) 34–5; Simma, Reflections (n 15) 76; Sicilianos (n 80) 348.

<sup>84</sup> See eg Fitzmaurice, Second Report (n 24) 54 [126] and n73.

'integral') structure, responses cannot be restricted to relations between the defaulting and responding party because the responding party's suspension would necessarily be a violation of its obligation vis-à-vis all other (non-defaulting) parties. Article 60(2)(c) spells out the implications of this 'global reciprocity' concept; and exceptionally allows for responses by each and every treaty party.

As is clear from the preceding paragraphs, to lay down a general regime governing standing to respond against breaches has been a considerable challenge. The ILC's debate on what became Article 60 is relevant precisely because it marked one of the first occasions at which the UN's main codification body discussed questions of standing in depth, and in full awareness of the rise of multilateralism. Not surprisingly, then, Article 60's approach has 'spilled over' into subsequent attempts to formulate rules of standing, notably in the context of the ILC's State responsibility project. That said, as much as it was a 'first', the ILC's Article 60 debates were also a 'last' in some respects. They reflect the international community's approach to standing at a time when the key concepts giving expression to collective interests were only beginning to be considered. While a 'solidarity approach' was considered, the drafters did not discuss public interest concepts such as obligations *erga omnes* (to be defined, one year after the VCLT's adoption, as obligations in whose observance 'all States can be held to have a legal interest'<sup>85</sup>), and they decided not to reflect the new category of *jus cogens* within a regime governing standing against treaty breaches. On that basis, they generally favoured a restrictive regime of standing, which remained premised on specially sustained injury, resisting the temptation to turn Article 60 into an instrument of public interest enforcement.

#### D. Procedural conditions governing the exercise of the right of response

A mere two years after the VCLT's opening for signature, the ICJ held that Article 60 might 'in many respects be considered as a codification of existing international law on the subject'.<sup>86</sup> In line with this statement, the preceding discussion has treated Article 60 and treaty-based responses under customary international law together. With respect to the procedural conditions governing the exercise of the right, matters are different. The VCLT subjects individual responses to treaty breaches to a cumbersome regime that, to date, has not been applied; and customary international rules on treaty-based responses do not contain equivalent restrictions.

Article 60(1), 2(b), and 2(c) (ie those provisions addressing individual responses) expressly provide that the responding State is entitled to *invoke* the prior breach *as a ground* for suspension or termination.<sup>87</sup> This formula clarifies that the Article 60 invocation does not itself affect the treaty relationship, but that the legal effects of suspension or

<sup>85</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, 32 [33].

<sup>86</sup> *Namibia case* (n 30) 47 [94]–[95].

<sup>87</sup> In the ILC's draft articles, this formula was used only for its versions of [1] and [2(b)]; the ILC's version of [2(c)] had entitled parties 'to suspend the operation of the treaty'. The inconsistency between [2(b)] and [2(c)] was removed following a proposal by the United Kingdom. Vienna Conference, Official Records (n 34) 269 (quoting UN Doc A/CONF.39/L.29); for the relevant debates see Vienna Conference, First Session (n 41) 478, 484; Vienna Conference, Second Session (n 27) 115.

termination are only entailed according to the procedural rules of Articles 65–68 VCLT.<sup>88</sup> A responding State's intention to suspend or terminate a treaty in whole or in part therefore only takes effect once the procedure of Articles 65–68 has been followed.<sup>89</sup> And this is by no means a mere formality. Rather, these provisions envisage the notification of any claims; the lapse of a three-month period during which other parties can protest; dispute resolution by a method chosen by the responding and protesting parties; and, failing their agreement on a mode of dispute resolution, a process of mandatory conciliation pursuant to Annex 1 VCLT.<sup>90</sup>

Predictably, the 'procedural straightjacket' set out in Articles 65–68 has not proved particularly popular. States and other actors of international law have drawn a distinction between Article 60's substantive aspects—which, by and large, they have applied as customary international law—and its procedural implementation mechanism. In practice, this has meant that States affected by a material breach have suspended or terminated treaties without instituting the VCLT's dispute settlement procedures. In line with that understanding, the ICJ, in *Armed Activities (DRC v Rwanda)* expressly noted that Article 66 (providing for compulsory conciliation) was not 'declaratory of customary international law'.<sup>91</sup> In the *Racke* case, which concerned the parallel problem whether responses based on the *clausula rebus sic stantibus* would require prior attempts at dispute settlement, the European Court of Justice adopted the same line of reasoning, holding that 'the specific procedural requirements there laid down [ie in Article 65 VCLT] do not form part of customary international law'.<sup>92</sup> While some decisions have taken a more favourable position,<sup>93</sup> the more convincing view is that Articles 65–68 do not reflect general international law. This in turn provides some justification for the approach of States just described: because of its temporal restrictions,<sup>94</sup> and still rather modest ratifications record,<sup>95</sup> the VCLT more often than not, is not applicable *as treaty law*, but merely insofar as it reflects custom. As Articles 65–68 do not reflect custom, States enjoy considerable leeway in seeking to avoid the cumbersome implementation procedure governing the exercise of the right to suspend or terminate a treaty.<sup>96</sup>

<sup>88</sup> Goma (n 27) 98.

<sup>89</sup> Kirgis maintains that Arts 65–68 do not apply to partial suspension of treaties, as neither Art 65 nor Art 42(2) referred to it. See Kirgis (n 36) 558. The argument is, however, not convincing, as the Art 60 formula 'to invoke as a ground' is to be understood as a comprehensive reference to the procedure envisaged in Arts 65–68.

<sup>90</sup> For details, including on the dramatic debates surrounding the adoption of Arts 65 *et seq*, see I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn MUP, Manchester 1984) 226–33.

<sup>91</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility, Judgment) [2006] ICJ Rep 6, 51 [125].

<sup>92</sup> *Racke GmbH and Co v Hauptzollamt Mainz*, Case C-162/96 [1998] ECR I-3655, [52]–[59].

<sup>93</sup> See especially the *Gabčíkovo-Nagymaros* case, where the ICJ's judgment noted that '[b]oth Parties agree[d] that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain[ed] certain procedural principles which are based on an obligation to act in good faith'. *Gabčíkovo-Nagymaros* case (n 16) [109].

<sup>94</sup> Cf Arts 4 and 84(2) VCLT (providing for non-retroactivity).

<sup>95</sup> Fifty years after its adoption, the Convention has been ratified, or acceded to, by 116 States (cf <[https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=en)>). Prominent 'non-ratifying' States include France, the United States, India, Iran, and Indonesia.

<sup>96</sup> For further comment on this point, see ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden 2009) 813–14; Verdross and Simma (n 47) [840]; J Verhoeven, 'Jus Cogens and Reservations or "Counter-Reservations" to the Jurisdiction of the International Court of Justice' in K Wellens (ed), *International Law: Theory and Practice; Essays in Honour of Eric Suy* (Martinus Nijhoff, Leiden 1998) 199–200.

### E. Interim conclusions

The preceding considerations suggest that Article 60 has shaped our thinking about responses against treaty breaches, but that it is not immune from criticism. Drafters were keen to ensure that States would not lightly suspend (let alone terminate) treaties—hence the requirement that the right to suspend/terminate presupposes a prior *material* breach, the cumbersome conditions governing its exercise, the restriction of responses to *the treaty affected by the prior breach*, and the rather cautious approach to standing. If one accepts the drafters' approach, one might wonder whether the notion of 'material breach' ought not to have been defined differently, or why the scope of the right is not limited by a proportionality test.

Yet, more fundamentally, it seems that the drafters may have lost sight of the necessary balance between the need to ensure the stability of treaties, while also permitting effective responses against breaches. Article 60 is really designed to address major ruptures in treaty relations, but leaves the smaller, 'everyday' problems unaddressed. In hindsight, the regime devised in Article 60 may well have been an over-ambitious attempt to 'civilize' inter-State relations. Article 60 certainly achieves its aim—that is, to preserve the stability of treaties. But by subjecting treaty suspension and termination to rather stringent conditions, the drafters inadvertently restricted Article 60's 'appeal' to States seeking to respond against another State's treaty breaches. Not surprisingly, treaties adopted after the VCLT have increasingly formulated treaty-specific rules on responses against breaches. And perhaps more importantly, with respect to general concepts, the VCLT's narrow approach has meant that responding States intending to suspend treaty obligations have relied, not on the general law of treaties, but on the law of State responsibility instead. Inadvertently, then, Article 60's limited 'appeal' may have paved the way for a 'renaissance' of the concept of countermeasures.

### III. The Law of State Responsibility: Countermeasures

The second general concept permitting *prima facie* unlawful responses against treaty breaches is that of countermeasures. The concept of countermeasures is situated within the law of State responsibility and has been shaped by that doctrine rather than by the general law of treaties. As noted earlier,<sup>97</sup> conceptually, countermeasures follow a different rationale than treaty-based responses based on Article 60: their aim is not to re-establish a balance of rights among treaty partners, but to induce or compel the State responsible for a treaty breach back into compliance. Compared to treaty-based responses, countermeasures are a broader concept, and their regulation under international law is more flexible. In order to bring out these features, this section clarifies the legal regime of countermeasures by comparing it to Article 60 treaty-based responses. This comparative approach will enable us to highlight four main aspects of the countermeasures regime: (i) the possibility of resorting to countermeasures against *any* treaty breach (as well as any other breach of international law); (ii) the wide discretion of States in calibrating their response, limited largely by the

<sup>97</sup> See nn 20–3 and accompanying text.

requirement of proportionality; (iii) the different approach to the problem of standing; and (iv) the decision not to submit countermeasures to far-reaching procedural preconditions.

### A. The requirement of a prior breach

The first element is that in order to be justified, a countermeasure ‘must be taken in response to a previous international wrongful act of another State and must be directed against that State.’<sup>98</sup> This is at times formulated as a limitation, indicating that it is not sufficient for the responding State to *consider* international law to have been breached.<sup>99</sup> And indeed, in prescribing that there must be an *actual* breach, the international legal regime of countermeasures embraces an objective standard. This is fully in line with the overall legal regime governing responses to wrongfulness, and should not be read to require an objective assessment of the situation *by a third party*. A responding State remains free to determine whether there has been a breach, but it does so at its own risk.<sup>100</sup>

From the comparative perspective adopted here, what stands out in this element is not the decision to require the actual commission of a breach, but the fact that, unlike in the law of treaties, *any* actual breach can be met by way of a countermeasure. There are two aspects to this. First, the formulation very clearly brings out the breadth of the concept of countermeasures, which is available against all ‘previous international wrongful act[s] of another State’, including (but not limited to) treaty breaches.<sup>101</sup> Second, and more pertinently, unlike under Article 60, there is no threshold requirement. Countermeasures can be taken against all treaty breaches, irrespective of their material character. This means that, even within the field of treaty breaches, countermeasures have a wider scope of application than treaty-based measures. Conversely, the decision to leave out any threshold requirement reinforces the need for limits on the scope of responses, notably through the concept of proportionality.

### B. The scope of the right to respond

The breadth of the concept of countermeasures is reflected in the rules governing the scope of the right to resort to them. These rules are clearly influenced by the purpose of countermeasures as an instrument of law enforcement. Beyond that, moreover, countermeasures are characterized by their flexibility. Unlike treaty-based responses, States enjoy an

<sup>98</sup> *Gabčíkovo-Nagymaros* case (n 16) 55 [83].

<sup>99</sup> ASR (n 14) [3] (commentary to Art 49 ASR). Clarification of this point is often felt to be necessary, since the *Air Services* arbitral award misleadingly stated that ‘each State establishes for itself its legal situation vis-à-vis other States’. *Case Concerning the Air Services Agreement of 27 March 1946* [1978] 54 ILR 304, [81].

<sup>100</sup> The matter is, of course, different if applicable rules make resort to countermeasures dependent upon some form of authorization, such as within the WTO regime. Cf WTO Dispute Settlement Understanding [1994] 33 ILM 1226, Annex 2, Art 22; WTO, *United States—Sections 301–310 of the Trade Act of 1974—Panel Report* (22 December 1999) WT/DS152/R [7.35]–[7.46]. On procedural preconditions restricting the resort to countermeasures see nn 141–145 and accompanying text.

<sup>101</sup> This is in line with the international law approach to questions of responsibility generally, which does not draw distinctions between breaches of treaty and breaches of general international law: cf ASR (n 14) Art 12 (‘There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character’).

extremely wide margin of discretion in choosing how to respond to treaty breaches via countermeasures. This wide discretion in turn is limited by the overarching requirement that countermeasures must be proportionate, as well as by a range of exclusionary clauses protecting particularly important obligations. Against this background, the legal rules governing the scope of countermeasures can be presented in four steps.

### 1. Countermeasures focus on inducing compliance

As an enforcement concept, countermeasures must be taken for a specific purpose. They must 'induce the wrongdoing State to comply with its obligations under international law'.<sup>102</sup> This limited function implies that countermeasures are not designed to alter the underlying legal relationship between the responding and targeted State. Rather, they merely justify non-compliance with international law for an interim period and a specific purpose.<sup>103</sup> It follows that countermeasures—notwithstanding the negative connotations of the traditional term 'reprisals'—are *not* an instrument of private vengeance and must not be used as a form of punishment.<sup>104</sup>

While firmly established conceptually (and indispensable as a matter of legal policy), these guidelines are rather difficult to translate into strict rules in practice. The prohibition against punishment mainly goes to the State's motivation in adopting countermeasures. Unless States go on record,<sup>105</sup> this motivation may often be difficult to police, especially since—like punishment—countermeasures are by definition coercive. As for the interim character of countermeasures, the general rule is that countermeasures be temporary and reversible. But Article 49(3) ASR deliberately opts against any absolute approach, instead stating that '[c]ountermeasures shall, *as far as possible*, be taken in such a way as to permit the resumption of performance of the obligations in question' (emphasis added).<sup>106</sup> Even with this caveat, it is clear that countermeasures only justify non-compliance as long as this is required to induce compliance.<sup>107</sup>

### 2. Countermeasures are not limited to the treaty breached

It is with respect to the choice of obligations that can be violated that countermeasures are most clearly different from treaty-based responses. Unlike Article 60 VCLT, the law of countermeasures does not prescribe which obligations can be disregarded in order to induce the targeted State back into compliance. Subject to a number of exclusionary rules (addressed later), this is a matter for the responding State to decide. There are two aspects to this. First, given the general character of the concept, it is clear that countermeasures cannot be restricted to the non-performance of obligations *under the same treaty*. Second, and less obviously, international law has refrained from formulating special rules for responses that affect obligations connected to the ones initially breached.<sup>108</sup> A responding State may no

<sup>102</sup> *Gabčíkovo-Nagymaros* case (n 16) [85]. This is taken up in ASR (n 14) Art 49(1).

<sup>103</sup> Cf ASR (n 14) Art 49(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').

<sup>104</sup> *Ibid* 130 [1] (commentary on Art 49).

<sup>105</sup> By way of illustration, see the discussions reflected in the ICJ's *Interim Accord* case (n 15) [120]–[122] and [164], and for statements placed on record, [74]–[80].

<sup>106</sup> For details see ASR (n 14) 131 [9]; *Gabčíkovo-Nagymaros* case (n 16) [87].

<sup>107</sup> This is expressly spelled out in ASR (n 14) Arts 52(3)(a), 53.

<sup>108</sup> For a discussion of whether such 'reciprocal countermeasures' are subject to an autonomous regime see Crawford (n 15) [327]–[329]. For an attempt to formulate autonomous rules cf W Riphagen, 'Sixth Report on State

doubt choose to take such so-called ‘reciprocal countermeasures’,<sup>109</sup> but the legal regime of countermeasures does not require it to do so, nor indeed does it subject reciprocal countermeasures to a special legal regime.<sup>110</sup> As a consequence, the circle of obligations that can be disregarded by way of countermeasures is much wider than those affected by treaty-based responses. A responding State can respond against treaty breaches notably by violating its obligations towards the targeted State under *other treaties*, or indeed under *general international law*. For example, a breach of a bilateral treaty on economic cooperation may be met with economic sanctions violating WTO law, just as violations of diplomatic immunity may prompt the freezing of assets. The law of countermeasures does not presuppose any nexus, or requirement of qualitative proportionality,<sup>111</sup> between the initial violation and the response thereto. This flexibility, in turn, reinforces the need for some limitations on the response, which are found in exclusionary clauses and the overarching requirement of proportionality.

### 3. *Proportionality: countermeasures must be commensurate with the injury suffered*

Proportionality—in its ‘quantitative’ variant<sup>112</sup>—is the key substantive criterion limiting the exercise of the right to take countermeasures. It is a common limitation on responses against wrongfulness and a crucial element in the quest to ‘tame’ countermeasures. Its application to the law of countermeasures raises few conceptual problems: what is required is a comparison between the effects of the initial breach and the responding State’s reaction. In the words of the ICJ (endorsed by the ILC), ‘the effects of a countermeasure must be commensurate with the injury suffered’.<sup>113</sup> This indeed is a necessary limitation, one instrumental to ensuring that countermeasures do not become measures of punishment and which helps keep its results acceptable. As the ILC’s work clarifies, the proportionality comparison is primarily between the levels of injury (ie quantitative), but also the importance of the interest protected by the rule infringed and the seriousness of the breach.<sup>114</sup>

While relatively unproblematic conceptually, the *application* of proportionality poses two problems. First, because States have discretion in choosing which obligations they intend to disregard to induce the targeted State back into compliance, any proportionality analysis may involve a comparison between ‘disparate integers’<sup>115</sup> or ‘apples and oranges’.<sup>116</sup> This is not a specific problem of countermeasures, but rather one that affects many fields of proportionality analysis. However, the fact that States enjoy a large measure of discretion

Responsibility’ [1985] YBILC, vol II(1), 10 (draft Art 8 of Part Two, drawing on PCIJ’s judgment in *Diversion of Water from the Meuse* [1937] PCIJ Rep Series A/B No 70, 4, 50, 77).

<sup>109</sup> See eg the *Air Services* arbitration (n 99) 304.

<sup>110</sup> See eg ASR (n 14) 128–9 [4]–[5].

<sup>111</sup> Cf the terminology used at nn 52–54 and accompanying text.

<sup>112</sup> *Ibid.*

<sup>113</sup> ASR (n 14) Art 51. This goes back to the ICJ’s judgment in the *Gabčíkovo-Nagymaros* case (n 16) [85]–[87]. For earlier attempts to formulate versions of a proportionality requirement, cf *Air Services* arbitration (n 99) [83] (‘It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach’); *Naulilaa Award* (1930) 2 RIAA 1011, 1028 (‘[E]ven 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’).

<sup>114</sup> ASR (n 14) 135 [6] (commentary to Art 51).

<sup>115</sup> T Franck, ‘On Proportionality of Countermeasures in International Law’ (2008) 102 AJIL 715, 729.

<sup>116</sup> M Schmitt, ‘Fault Lines in the Law of Attack’ in S Breau and A Jachec-Neale (eds), *Testing the Boundaries of International Law* (BIICL, London 2006) 293.

in choosing which obligations to ‘target’ by way of countermeasures renders it particularly acute. To illustrate, consider the fictitious example of a State responding to a prior violation of an FCN Treaty by adopting a travel ban. The two acts are so different that it is not easy to assess their equivalence. Second, the absence of a regular scrutiny procedure further complicates matters. As shown later, as a matter of principle, countermeasures are not subject to any form of prior authorization or independent assessment; like other private responses, they are to be taken by the responding State on the basis of its own (auto)assessment of the situation.<sup>117</sup>

Both problems, taken together, limit the effectiveness of a proportionality test in taming countermeasures—but they do not render it pointless. Quite to the contrary, in the absence of regular independent assessments, it is the unorganized international legal community that evaluates responses, through statements, protests, or approval (whether tacit or express). In its evaluation, the community is guided by occasional pronouncements by international courts and tribunals, which—notwithstanding the absence of *regular* judicial scrutiny—have assessed the proportionality of countermeasures in cases such as *Naulilaa*, *Air Services*, and *Gabčíkovo*.<sup>118</sup> Based on these pronouncements, international practice, and clarification exercises like the ILC’s work on State responsibility, the notion of proportionality—it is submitted—offers at least a benchmark for scrutinizing responses and acts as a restraint in clear-cut cases.<sup>119</sup>

#### 4. Countermeasures must not affect obligations under rules of *jus cogens* and dispute settlement procedures

Finally, beyond the overarching requirement of proportionality, international law shields a number of particularly important obligations from the application of countermeasures. Within the ILC’s text, these exclusions are spelled out in Article 50 ASR. They follow the same logic as the exclusionary clause of Article 60(5) VCLT, but (having been adopted in 2001) are more up-to-date with contemporary international law.<sup>120</sup> In essence, two categories of obligations are ‘ringfenced’ against countermeasures. First, countermeasures do not justify the non-performance of obligations imposed by rules of *jus cogens*. This takes account of the fact that modern international law accepts *jus cogens* effects beyond the VCLT<sup>121</sup> and that fundamental substantive interests protected by the concept cannot be opted out of unilaterally.<sup>122</sup> It follows that obligations flowing from recognized peremptory rules—notably the duty not to use force in violation of the UN Charter, or obligations under peremptory rules of human rights law or international humanitarian law—must not be the subject of countermeasures.

<sup>117</sup> See nn 141–145 and accompanying text.

<sup>118</sup> See *Naulilaa Award* (n 113) 1101; *Air Services* arbitration (n 99) 304; *Gabčíkovo-Nagymaros case* (n 16) 7, respectively.

<sup>119</sup> Cf Franck (n 115) 764.

<sup>120</sup> Contrast the authors’ more sceptical analysis of Art 60(5) at nn 59–65 and accompanying text.

<sup>121</sup> Within the ILC’s text on State responsibility, see notably ASR (n 14) Arts 26, 40–1. For an early and balanced study of these and other instances, see G Gaja, ‘Jus Cogens Beyond the Vienna Convention’ (1981) 172 RdC 273. For an ambitious attempt to ‘peremptorize’ broad areas of international law, see A Orekhelashvili, *Peremptory Norms in International Law* (OUP, Oxford 2006).

<sup>122</sup> In the words of the ILC, ‘[e]vidently, 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.’ ASR (n 14) 132 [9] (Commentary to Art 50).



Second, good reasons suggest that countermeasures may not affect obligations that were agreed precisely to peacefully resolve disputes between the responding State and the targeted State. This implies that, as the ICJ put it in the *ICAO Council* case when speaking about treaty suspension, ‘a merely unilateral suspension [cannot] per se render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.’<sup>123</sup> It follows that where States are bound by dispute settlement provisions covering the dispute in question, the responding State is not relieved from fulfilling these obligations when resorting to countermeasures.<sup>124</sup> According to the ILC, the same rationale applies to minimum obligations designed to ensure the inviolability of diplomatic and consular immunities. Following this argument—which draws some support from the ICJ’s *Tehran Hostages* judgment<sup>125</sup>—countermeasures ought not to affect the existence of basic channels of communication since they may be a conduit for the resolution of the dispute.<sup>126</sup>

### C. Standing to take countermeasures

Given the broad character of the concept, the identification of States entitled to resort to countermeasures assumes particular importance. Not surprisingly, there is much debate about ‘standing to take countermeasures’. The ILC’s work on State responsibility—which addresses the matter within the framework of the rules governing the implementation of responsibility—has helped clarify some of the issues, but leaves open one crucial question. The regime set out in Articles 42 and 49 of the ILC’s text to a large extent follows the VCLT rules on standing to suspend or terminate treaties, while Article 54 points to an unresolved question ignored by Article 60 VCLT.

Articles 42 and 49 ASR deal with standing on the basis of the *acquis* of agreed rules devised in Article 60 VCLT, whose approach—as noted earlier—has ‘spilled over’ into the law of State responsibility.<sup>127</sup> In essence, these provisions recognize the right of States to resort to countermeasures if the obligation breached was owed to them bilaterally or if the breach of a multilateral obligation ‘specially affected’ them (because of the quasi-bilateral structure of performance or because the wrongful act had produced specific, individualized consequences).<sup>128</sup> What is more, the standing regime set out in the ASR follows Article 60 even into the muddy terrain of integral obligations.<sup>129</sup> Taking up the rationale of ‘global reciprocity’<sup>130</sup> informing Article 60(2)(c) VCLT, Article 42(b)(ii) ASR accepts that where

<sup>123</sup> *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* [1972] ICJ Rep 46, 53.

<sup>124</sup> ASR (n 14) Art 50(2)(a).

<sup>125</sup> *United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep 3, 38–40 [83]–[86] (misleadingly describing diplomatic law as 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’). For a critical analysis cf B Simma, ‘Self-contained Regimes’ (1985) *Netherlands Ybk Intl L* 111.

<sup>126</sup> ASR (n 14) 133–4 [14]–[15] (commentary to Art 50).

<sup>127</sup> See Section II.C, 579–83 *et seq.* During the course of its second reading on State responsibility, the ILC deliberately opted to follow the Art 60 VCLT approach: cf ASR (n 14) 117 [4]; J Crawford, *The Standing of States* (n 83) 23.

<sup>128</sup> Cf ASR (n 14) Art 42(a) and 42(b)(i).

<sup>129</sup> *Ibid* 119 [13]–[14] (commentary to Art 42).

<sup>130</sup> Sicilianos (n 80) 1135.

an interdependent/integral obligation has been breached '[t]he other States parties . . . must all be considered as individually entitled to react to a breach', including by means of countermeasures.<sup>131</sup>

In another respect, however, debates about standing to take countermeasures have moved beyond the Vienna Convention *acquis*. There is much debate about a new version of the 'solidarity approach'<sup>132</sup> to questions of standing—namely the question whether States could resort to countermeasures in order to defend collective interests protected by treaties dealing with humanitarian matters or other public policy concerns.<sup>133</sup> These renewed discussions are part of a more general debate about the right of individual States to act as guardians of collective interests.<sup>134</sup> Given the crucial role of multilateral treaties as 'workhorses of community interest',<sup>135</sup> this general debate directly implicates the legal regime(s) governing responses to treaty breaches. The international community has yet to reach agreement on this matter, but developments since the mid-1960s (when the VCLT rules were drafted) point in favour of allowing 'solidarity measures' under certain circumstances.

More specifically, in its 1970 judgment in the *Barcelona Traction* case, the ICJ recognized that all States can be held to have a legal interest in seeing certain fundamental rules complied with (which it termed obligations *erga omnes*).<sup>136</sup> Since 1970, States have accepted the rationale behind this *erga omnes* dictum and, on a number of occasions, have taken countermeasures in response to grave and systematic breaches of collective interest provisions.<sup>137</sup> In its work on State responsibility, the ILC considered these instances to be too sporadic to amount to a settled practice, and was cautious not to endorse expressly a right of individual States, irrespective of any individual injury, to take 'solidarity measures'.<sup>138</sup> However, it did embrace the idea of collective interest enforcement in Article 48 of its text and accepted that a practice was emerging.<sup>139</sup> Other bodies, such as the *Institut de droit international* have (rightly) gone beyond the ILC's approach and recognized that where a State is responsible for a 'widely acknowledged grave breach of' a treaty protecting obligations *erga omnes*, 'all the States to which the obligation is owed: . . . are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach'.<sup>140</sup> Indeed, this last position seems to reflect the current state of the law and marks the acceptance of a modest version of the solidarity approach within the law of countermeasures.

<sup>131</sup> ASR (n 14) 119 [14] (commentary to Art 42). For critical comment, see Tams, 'Enforcement' (n 12).

<sup>132</sup> Cf n 70–73 and accompanying text.

<sup>133</sup> For details, see M Akehurst, 'Reprisals by Third States' (1970) 44 BYBIL 1; J Charney, 'Third State Remedies in International Law' (1989) 10 Michigan J Intl L 57; C Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP, Cambridge 2005) 198 *et seq*.

<sup>134</sup> On which see C Tams, 'Individual States as Guardians of Community Interests' in U Fastenrath and others (eds), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (OUP, Oxford 2011) 379.

<sup>135</sup> B Simma, 'From Bilateralism to Community Interest' (1994) 250 RdC 217, 322.

<sup>136</sup> *Barcelona Traction* (n 85) 32–3 [33]–[34].

<sup>137</sup> For a detailed assessment see Tams (n 133) 198–249.

<sup>138</sup> See ASR (n 14) 140 [3] (commentary to Art 54, noting 'Practice on this subject is limited and rather embryonic').

<sup>139</sup> *Ibid* (listing some of the more prominent examples).

<sup>140</sup> Institut de droit international, 'Resolution on "Obligations and Rights Erga Omnes in International Law"' [2006] 71 *Annuaire de l'Institut de droit international* 289. The *Institut's* approach is convincing because, while going beyond the ILC's position, it is careful to limit the right to take collective countermeasures to instances of 'widely acknowledged grave breaches' of international law, and ties it back to the *erga omnes* concept.

#### D. Procedural conditions governing the exercise of the right to countermeasures

The question remains whether States seeking to resort to countermeasures need to comply with procedural requirements. Just as with treaty-based measures, this is a matter of some controversy.<sup>141</sup> From a policy perspective, the imposition of procedural conditions has seemed to many to be the best way of taming the archaic countermeasures concept. During the first reading of the ILC's work on State responsibility, the ILC's Special Rapporteur Arangio Ruiz submitted far-reaching proposals in this respect. He proposed to require the prior exhaustion 'of all the amicable settlement procedures available under general international law, the United Nations Charter or any other dispute settlement instrument to which [a State seeking redress] is a party' and a system for 'post-countermeasures' dispute settlement.<sup>142</sup> These proposals certainly marked one of the high-points of attempts to 'civilize' the private enforcement of international law, but they proved overly ambitious. Stressing the legitimacy of countermeasures (which were a fact of life and served to uphold the rule of law), States and commentators responded by arguing for a leaner regime, which would balance the interests of responding and targeted States in a more nuanced way.<sup>143</sup> Debates eventually resulted in Article 52 ASR, which requires responding States to give 'advance warning' to the targeted State and provide it with an opportunity to respond to the claims underlying the dispute.<sup>144</sup>

Beyond this minimum requirement, Article 52 deliberately refrains from making resort to countermeasures dependent on the prior exhaustion of further dispute settlement procedures (nor does it establish mechanisms for 'post-countermeasures' dispute settlement). It does, however, recognize the primacy of third party dispute resolution in two settings. First, it affirms that comprehensive dispute settlement systems can exclude the availability of coercive self-help altogether. Second, it excludes resorting to countermeasures in situations in which the underlying dispute is pending before a court or tribunal, with the caveat that where the dispute settlement process breaks down, the right to take countermeasures revives. These safeguards are complemented by the provision—mentioned above, as part of the exclusionary clauses<sup>145</sup>—that countermeasures must not affect dispute settlement obligations agreed between the disputing parties. Taken together, it would seem that the more modest system devised by the ILC indeed preserves existing institutionalized dispute settlement without 'choking' countermeasures.

<sup>141</sup> See notably the symposium on 'Counter-measures and Dispute Settlement' in (1994) EJIL, vol 5 (contributions by G Arangio-Ruiz, V Vereshchetin, M Bennouna, J Crawford, C Tomuschat, D Bowett, B Simma, and L Condorelli).

<sup>142</sup> See notably G Arangio-Ruiz, 'Fourth Report on State Responsibility' [1992] YBILC, vol II(1), 1; G Arangio-Ruiz, 'Fifth Report on State Responsibility' [1993] YBILC, vol II(1), 1 (proposals for draft Art 12 and a 'dispute settlement annex').

<sup>143</sup> See eg B Simma, 'Counter-measures and Dispute Settlement: A Plea for a Different Balance' (1995) 5 EJIL 102 (on which the subsequent observations draw).

<sup>144</sup> See ASR (n 14) Art 52(1) ('[b]efore 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'). As the ILC noted, exceptionally, such notification can be dispensed with where 'urgent countermeasures' are necessary to preserve the responding State's rights, notably where the notification would allow the targeted State to avoid the effects of the countermeasure: see ASR (n 14) Art 52(2), and paragraph 6 of the commentary.

<sup>145</sup> See nn 120–126 and accompanying text.

## Conclusion

The legal regime governing countermeasures differs markedly from the treaty law rules permitting the suspension or termination of treaties in response to breaches. Mindful not to lay down overly restrictive rules that States would merely circumvent, the international community's 'agents' of legal development—the ILC, States in their comments on the ILC's work, and international courts and tribunals—have devised a regime that is considerably more flexible than that of Article 60, and which permits the suspension of treaty obligations under less stringent conditions. The divergence can be explained by reference to differences between the enforcement concept of countermeasures, on the one hand, and the defensive concept of treaty law responses on the other. But presumably, they are *also* a reflection of a more sceptical approach towards over-ambitious attempts to civilize inter-State relations. As the more flexible general concept permitting coercive responses against treaty breaches, countermeasures thus still retain their role as an important feature of the international regime governing response against treaty breaches.

If, nevertheless, even resort to the more flexible concept of countermeasures today is rather rare, then this reflects the increasing prominence of treaty-specific regimes providing for 'tailor-made' rules on responses against treaty breaches. Modern treaty regimes in fields such as international environmental law, arms control, or human rights law have reached a degree of sophistication that general legal concepts (like countermeasures or treaty law responses) simply cannot match. If we may be permitted to adapt a well-known statement by a well-known international lawyer, coercive responses to treaty breaches—whether justified as countermeasures or under Article 60 VCLT—today seem to be 'vehicle[s] that hardly ever leav[e] the garage'.<sup>146</sup> Yet, like rarely used vehicles, they do remain around, ready to be taken out for the occasional trip, when the circumstances so require. Thus, they should not be discarded lightly.

## Recommended Reading

- DW Bowett, 'Treaties and State Responsibility' in D Bardonnet and others (eds), *Le droit international au service de la paix, de la justice et du développement. Mélanges Michel Virally* (Pédone, Paris 1991) 137
- F Capotorti, 'L'extinction et la suspension des traités' (1971-III) 134 RdC 417
- OY Elagab, *The Legality of Non-Forcible Countermeasures in International Law* (OUP, Oxford 1987)
- C Feist, *Kündigung, Rücktritt und Suspendierung von multilateralen Verträgen* (Duncker & Humblot, Berlin 2001)
- T Giegerich, 'Article 60' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn Springer, Berlin 2018)
- M Gomaa, *Suspension or Termination of Treaties for Grounds of Breach* (Martinus Nijhoff, Leiden 1996)
- DW Greig, 'Reciprocity, Proportionality, and the Law of Treaties' (1994) 34 VJIL 295
- DN Hutchinson, 'Solidarity and Breaches of Multilateral Treaties' (1988) 59 BYBIL 151
- FL Kirgis, 'Some Lingering Questions About Article 60 of the Vienna Convention on the Law of Treaties' (1989) 22 Cornell Intl L J 549

<sup>146</sup> Cf I Brownlie, 'Comment' in J Weiler and A Cassese (eds), *Change and Stability in International Law-Making* (Walter de Gruyter, Berlin 1988) 108, 110. The original statement referred to *jus cogens*. Developments since 1988 show that even vehicles that at one point hardly left the garage may become rather over-used subsequently.

- R Mazzeschi Pisillo, 'Termination and Suspension of Treaties on Grounds of Breach' in B Simma and M Spinedi (eds), *United Nations Codification of State Responsibility* (Oceana, New York 1987) 57
- S Rosenne, *Breach of Treaty* (Grotius, Cambridge 1985)
- E Schwelb, 'Termination or Suspension of a Treaty as a Consequence of its Breach' (1967) 7 IJIL 309
- LA Sicilianos, 'The Relationship Between Reprisals and Denunciation or Suspension of a Treaty' (1993) 4 EJIL 341
- B Simma, 'From Bilateralism to Community Interest' (1994) 250 RdC 217
- B Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law' (1970) 20 ÖZÖR 5
- B Simma and C Tams, 'Article 60 (1969)' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP, Oxford 2011) vol II, 1352
- BP Sinha, *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party* (Martinus Nijhoff, Leiden 1966)
- CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP, Cambridge 2005; revised paperback 2010)
- CJ Tams, 'Regulating Treaty Breaches', in M Bowman and D Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Law of Treaties* (CUP, Cambridge 2018) 440–467
- M Xiouri, 'The *Exceptio Non Adimpleti Contractus* in Public International Law' (2019) 21 Int'l Comm L Rev 56–92