The Unilateral Enforcement of International Obligations[1]

*Karl Zemanek**

A. Introductory: Concepts used

Permit me, by way of introduction, to explain some of the concepts which I am going to use in analyzing my subject. These concepts have been developed and applied by the ILC during its work on State responsibility, mostly on the initiative of its then Special Rapporteur on the subject, Judge Roberto Ago. I hasten to add however that, although I gladly acknowledge my debt, the use which I make of these concepts, and the sense in which I use them, do not necessarily coincide with the intentions of the ILC.

1. State responsibility as a system of secondary norms

From the outset of its work on State responsibility, the Commission has distinguished between "primary" and "secondary" norms of international law and explained that concept in the following terms:

> "In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one sector of inter-state relations or another impose specific obligations on States, and may, in a certain sense, be termed 'primary'. In dealing with the topic of responsibility, on the other hand, the Commission is undertaking to define other rules which, in contradistinction

* Prof. Dr.iur., Institut für Völkerrecht und Internationale Beziehungen, Universität Wien.

[1] Since a time limit was set for this lecture, it was not possible to deal with all aspects of the subject. Important topics, such as self-help or the effect of reprisals on third States, had to be sacrificed.

to those mentioned above, may be described as 'secondary' inasmuch as they are concerned with determining the legal consequences of failure to fulfil obligations established by the 'primary' rules. Only these 'secondary' rules fall within the sphere of responsibility proper"[2].

This concept bears a certain semblance to the familiar distinction between substantive norms and procedural rules in municipal legal systems, since it distinguishes between substantive obligations and the consequences of their breach, including the procedure to be followed in enforcing their performance. The concept is of fundamental importance for understanding the role of reprisals and I shall return to it in that context.

2. Primary norms as sub-systems

The ILC has further refined the notion of "primary" norms by recognizing the existence of sub-systems within them. It introduced that idea in the following terms:

"Subject to the possible existence of peremptory norms of general international law concerning international responsibility, some States may at any time, in a treaty concluded between them, provide for a special régime of responsibility for the breach of obligations for which the treaty makes specific provision"[3].

As we shall see later, this description, adopted relatively early in the work on State responsibility, does not push the analysis far enough, because, with the exception of the so-called "self-contained régimes"[4], the purpose of the "special régimes of responsibility" established by primary rules is normally self-protection and not enforcement.

Before going further, however, let us first establish what is meant by "sub-system". The Commission refers to a treaty as its basis, but there seems to be no theoretical obstacle for sub-systems to be established by custom, although it would seem that most groups of customary norms that could be considered as sub-systems, such as diplomatic law or treaty law, have already been codified in a convention. However if, for instance, environment protection or liability for lawful activities should harden into customary law, there seems to be no reason for not treating them as sub-systems of primary norms.

---

[2] Report of the International Law Commission (ILC) on the work of its 25th session (1973), A/9010/Rev.1, para.40; Yearbook of the ILC 1973 II.

[3] Report of the ILC on the work of its 28th session (1976), A/31/10, para.78; para.5 of the Commentary to Art.17 of the ILC Draft; Yearbook of the ILC 1976 II.

[4] See the judgment of the ICJ in the "Case concerning US Diplomatic and Consular Staff in Tehran" *(USA* v. *Iran)*, ICJ Reports 1980, p.41 (para.86).

Yet at present it is, indeed, to codification conventions or other multilateral law-making treaties that one looks as typical examples of sub-systems. They quite frequently provide for countermeasures to a violation of obligations established by them, measures that are thus part of the primary system. Although one might expect a victim to consider a measure provided for in the infringed treaty as its first choice for a reaction, we need also contemplate the hypothesis that the victim does not wish to use it because it would lead to an undesirable result.

Thus, a material breach of the Agreement on the Rescue and Return of Astronauts[5], for example, would certainly entitle the other affected contracting party under the law of treaties[6] to suspend or terminate the agreement *vis-à-vis* the author State. But that may not be what the victim wants; it may primarily be interested in the correct performance of the treaty obligations by the other party, an aim that the threatened or effected suspension or termination of an agreement will only achieve under special conditions: Either, because the agreement governs a situation of full material reciprocity[7] and both parties have hence the same basic interest in its continued performance; or, because the author of the original violation attaches for other reasons greater value to the continued performance of the agreement than the victim. Thus, except in these cases or in those subsystems which the ICJ has termed "self-contained régimes" in its judgment in the *Tehran Hostages* case – and on which I shall have to say more in the context of reprisals – the enforcement of treaty obligations will in most cases require the application of the secondary rules of State responsibility.

3. Countermeasures against offences: self-protection and reprisals

There are thus apparently two types of countermeasures[8] available to a victim for reacting against a violation of obligations established by a sub-

[5] Text in Annex to GA Resolution 2345 (XXII).

[6] Art.60, para.2 (a) of the Vienna Convention on the Law of Treaties.

[7] On the notion of material reciprocity cf. chapter 4a of my contribution "Codification of International Law: Salvation or Dead End?" to the forthcoming "Essays in Honor of Roberto Ago" and, on the general problem, see B. Simma's fundamental »Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge« (1972).

[8] This relatively new term is used in Art.30 of the provisionally adopted ILC Draft. Since the article deals with one of the "circumstances precluding wrongfulness", it was expedient to use a generic term, covering all cases needing exception. Its use in the second part of the Draft as proposed by the Special Rapporteur seems more doubtful and, rather, a source of some confusion.

system of primary norms: measures of self-protection and/or reprisals. I am deliberately excluding "retorsion" – or "retaliation"[9] as others prefer to call it – from this context. Although a retorsion may in given circumstances be a very effective tool of law enforcement, it is only an "unfriendly act" not forbidden by international law and thus a social, not a legal sanction, unless one assumes a legal duty of "friendliness", in which case a retorsion would either be a measure of self-protection or a reprisal.

Measures of self-protection and reprisals have theoretically different functions. The former are part of the sub-system of primary norms to which they relate. Whether it is self-defence in accordance with Art.51 of the UN Charter or the termination of a treaty in conformity with Art.60 of the Vienna Convention on the Law of Treaties, they essentially protect the victim against further harm arising from the breach of the primary obligation. In a bilateral treaty-relation this means protection against the necessity to further perform obligations which the other party has ceased to perform. Although, as mentioned earlier, one cannot deny that such measures may also induce the author of the violation to cease it, that is not their primary function.

The function of reprisals, on the other hand, is the enforcement of a right. This means, in other words, that the law permits the infringement of otherwise internationally protected rights of another State as a consequence of the latter having violated a secondary international right of the State undertaking the reprisal. The reprisal aims at coercing the object State into ceasing the internationally wrongful act if it still continues and into giving satisfaction or making reparation, as the case may be.

This theoretically clear distinction is however blurred in several ways in practice:

First, no countermeasure fulfils in reality only one function. Punitive, protective and reparative elements are mixed in the considerations of the author State and in the perception of the object State, depending on the circumstances of the particular case. The severance of a treaty, though by nature a measure of self-protection, may, when the object State values the treaty highly, function as a measure of enforcement, while reprisals adopted against the refusal to cease the continuing violation of a primary obligation have a strong protective aspect.

Secondly, not all countermeasures offered in sub-systems, particularly in self-contained régimes, against the violation of obligations, are measures

[9] This term is sometimes used in US literature. Especially when it is styled "retaliation in kind" it is often uncertain whether it refers to "retorsion" or to a reprisal.

of self-protection. Especially when the sub-system is organized, as for instance the EEC[10], it may also provide for enforcement measures.

Thirdly, one and the same act, for instance the suspension of a treaty, may in one set of circumstances be a measure of self-protection – when it is a reaction to the non-performance of the same treaty by another contracting State – while in another it may be a reprisal – namely when the enforced obligation is n o t established by the suspended treaty.

Lastly, measures of self-protection and reprisals may be taken conjointly. Thus, a massive abuse of diplomatic privilege may induce the receiving State to break-off diplomatic relations with the State concerned as a measure of self-protection. At the same time, however, the receiving State may suspend a treaty of commerce with the sending State as a reprisal, if that State has refused satisfaction for or reparation of the injuries caused by the abuse of privilege.

B. Reprisals

After having clarified my concepts and having thus, hopefully, cleared some of the underbrush which obscures the enforcement of international law, let me now turn to reprisals as means of unilateral enforcement.

1. Requirements

Applying the concept of "primary" and "secondary" norms to the examination of reprisals leads to the following step-by-step approach:

First step: When a State violates a subjective right of another State which is established by primary norms of international law, new international rights and obligations arise under the secondary norms of State responsibility[11]. The new obligations of the author of the violation, corresponding to new rights of the victim, are the following:

---

[10] Art.192 of the EEC Treaty which excludes, however, execution against States. Note also Art.88 of the ECSC Treaty.

[11] See the Preliminary Report of the Special Rapporteur (Riphagen), A/CN.4/330, para.28 (more detailed paras.29–61); Yearbook of the ILC 1980 II. In rendering this concept into a draft text (4th Report Riphagen, A/CN.4/366/Add.1, para.38; Yearbook of the ILC 1983 II. And Arts.6–10 proposed by the Special Rapporteur for inclusion in Part II of the ILC Draft [5th Report Riphagen, A/CN.4/380; Yearbook of the ILC 1984 II]) the confusion mentioned in note 8 has unfortunately crept in, and measures provided as remedies in sub-systems of primary norms appear unsorted together with rights arising as a consequence of the violation of a secondary obligation in the same provision.

(a) to stop the violation, if it still continues; and
(b) to establish or restore the situation as required by international law; or
(c) eventually, to compensate material damage and/or to give satisfaction, as the case may be.

Second step: It is for the victim of the violation of the primary norm to request the performance of the appropriate secondary obligation through diplomatic means[12]. A protest against the violation of the primary obligation, eventually accompanied or followed by a request for reparation will be the normal course.

Third step: If the author of the violation of the primary obligation also violates one of its secondary obligations by refusing the request of the victim, the latter has the right to enforce its claim on the author to fulfil the secondary obligation through a reprisal[13].

As long as no force is used – and I shall come back to this question in a short while – and no mandatory settlement-of-disputes procedure binds the States concerned, reprisals do not violate the duty under Art.33 of the Charter, to settle international disputes peacefully[14]. On the contrary: In the present state of international relations reprisals may contribute substantially to the opponent's willingness of engaging in or continuing the peaceful settlement of the dispute in earnest.

A further consequence arises from the concept of secondary norms: Since reprisals are means to enforce the fulfilment of the secondary obligations arising from State responsibility, they are legitimate only as long as the violation of the secondary norm continues. A reprisal is not a punishment, a notion which, except perhaps in special cases like international

---

[12] Cf. the Award in the Naulilaa case *(Portugal* v. *Germany)* of 31 July 1928; Reports of International Arbitral Awards, vol.II, pp.1027–1028, para.e/1. Further Art.1 proposed by the Special Rapporteur for inclusion in Part III of the ILC Draft (7th Report Riphagen, A/CN.4/397 [1986]).

[13] Art.9 proposed by the Special Rapporteur for inclusion in Part II of the ILC Draft (5th Report Riphagen, A/CN.4/380; Yearbook of the ILC 1984 II. The relevant commentary may be found in the 6th Report Riphagen, A/CN.4/389 [1985]). The procedures proposed by the Special Rapporteur for inclusion in Arts.2–4 of Part III of the ILC Draft, which are copied from the Vienna Convention on the Law of Treaties, are a progressive development but do not correspond to present customary law. It is, moreover, doubtful whether procedural delays might not frustrate the effectiveness of a reprisal by giving the object State time to withdraw accounts or take other preventive measures.

[14] Cf. the critical remarks of some members of the ILC concerning the Special Rapporteur's proposed procedures, summarized in the Provisional Report of the ILC on its 38th session, A/CN.4/L.405, p.9, para.22 (1986).

crimes[15], is incompatible with the sovereignty of States. But the duty to stop reprisals when the secondary obligation is fulfilled raises a delicate question in those cases where the offer to make reparation is considered inadequate by the victim. May the victim continue its reprisal? I submit that in principle it may, since in its view the secondary obligation has not been fully met. However, the circumstances of each particular case will play a decisive role in answering that question in practice. The redress available to the object State is to claim excess of reprisal in the final settlement of the issue or to answer eventually with a counter-reprisal. This unfortunate consequence of auto-judgment followed by self-enforcement was, as the great post-glossator Bartolus observed more than 600 years ago[16], inflicted on us because of our sins.

2. Norms protected from reprisals

That leads us to the next question which is to determine the norms that are susceptible to be infringed by way of reprisal. I shall, however, deal with this problem in reverse order, by identifying those norms which, for one or the other reason, may not be the subject of reprisals.

a) Peremptory norms of international law

A group of norms that immediately comes to mind are the peremptory norms of general international law. According to their definition in Art.53 of the Vienna Convention on the Law of Treaties, they are reserved for the international community as a whole; individual States may not derogate from them, neither by fact nor by treaty or consent. It follows logically from that concept that they may not be infringed by way of reprisal[17].

Thus the principles of non-use of force and of peaceful settlement of disputes, which are generally considered to be part of *jus cogens*[18], prohibit

---

[15] Art.19 of the provisionally adopted ILC Draft and Art.14 proposed by the Special Rapporteur for inclusion in Part II of the ILC Draft (note 13).

[16] Bartolus de Saxoferrato, Tractatus Represaliarum (1354), X/3, quoted in A. Verdross, Völkerrecht (5th ed.1964), p.96.

[17] Art.12(b) proposed by the Special Rapporteur for inclusion in Part II of the ILC Draft (note 13).

[18] No authoritative determination of *jus cogens* exists, the Vienna Conference on the Law of Treaties having failed to establish even an exemplary list (cf. the withdrawn sub-amendment of the UK in A/CONF.39/C.1/L.312 and J. Sztucki, Ius cogens and the Vienna Convention on the Law of Treaties [1974], pp.119–121). Hence the question of which norms of international law are part of *jus cogens* may only be answered in accordance with a defined set of values. Since in the pluralistic world of today different States espouse various,

the use of force in reprisals. This is confirmed by the definition of the principle of non-use of force in the Friendly Relations Declaration of 1970 which states explicitly: "States have a duty to refrain from acts of reprisals involving the use of force".

b) Human rights

Once the exception of peremptory norms of international law from reprisals is accepted, it might *prima facie* not be necessary to consider human rights separately, since there seems to exist a consensus that the Universal Declaration of Human Rights of 1948 is *jus cogens*[19]. But many hold with the Special Rapporteur of the ILC[20] that the exception should and does in fact extend to Human Rights Conventions, some of which are regional in character and cannot, as such, lay claim to *jus cogens*, at least not in provisions exceeding the 1948 Declaration. It is for this reason, that a special exception for Human Rights Conventions has to be considered.

And there is a strong argument in favour of it: According to Art.60 para.5 of the Vienna Convention on the Law of Treaties, "provisions relating to the protection of the human person contained in treaties of a humanitarian character" may not be suspended or terminated, even as a measure of self-protection. This provision was not proposed by the ILC but was inserted at the Vienna Conference on the initiative of the Swiss delegation[21] which made it clear, when introducing its amendment, that it covered Human Rights Conventions too, although it was primarily intended to protect the Geneva Conventions. I submit that this is a more logical way to deal with the problem and that, *a minori ad maius*, what is illegitimate as a measure of self-protection should also be considered illegitimate as reprisal. Consequently, the exception from reprisals should be understood to cover the same treaty provisions as are referred to in Art.60 para.5 of the Vienna Convention on the Law of Treaties.

---

partly even contradictory value systems, the area where these value systems overlap would appear closest to an objective determination of what at present is considered *jus cogens* by the international community as a whole. Evidence of such a convergence is provided by the lack of objection to public statements by States, for instance in the General Assembly of the UN, that in their opinion a certain norm or principle possesses that quality. This seems to be the case with the two principles referred to in the text.

19 The remarks in note 18 apply *mutatis mutandis* here.

20 Art.19, para.1(c) proposed by the Special Rapporteur for inclusion in Part II of the ILC Draft (note 13).

21 A/CONF.39/L.31, adopted at the 21st Plenary Meeting, 13 May 1969 (UNCLT, Official Records, Second Session).

c) Self-contained régimes

Lastly, we have to consider the exception of self-contained régimes. As you will recall, this notion was introduced by the ICJ in the *Tehran Hostages* case and it may help to clarify the situation if I quote the relevant passage from the judgment. After having explained the relation between the abuse of the diplomatic function and the remedies provided in the form of a declaration as *persona non grata* or the breaking-off of diplomatic relations, the Court stated:

> "The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, forsees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse"[22].

It is my submission that this formulation is too broad and lends itself to misinterpretation and, further, that in the ensuing discussion it has in fact been taken out of context and was misconstrued.

The obvious intention of the Court was to protect diplomats from countermeasures not envisaged in the Vienna Convention on Diplomatic Relations of 1961. This is clearly indicated in a sentence following shortly after the quoted text and which reads:

> "... the principle of inviolability of the person of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime"[23].

However, the notion of self-contained régimes lends itself to a wider interpretation which is unwarranted. The Court wanted to protect diplomats from reprisals, not their sending States. The situation is therefore somewhat similar to that of humanitarian conventions. To suggest that reprisals against offending States are prohibited even if they do not touch the protected person seems unfounded in law. I can see no valid reason why the abuse of the diplomatic function could not give rise to a reprisal consisting in the suspension of a commercial treaty or of any other bilateral treaty existing between the two States. Nor do I see any reason why the breaking-off of diplomatic relations could not take place as a reprisal for other reasons than a violation of the diplomatic function. I therefore sub-

---

[22] Case concerning *US Diplomatic and Consular Staff in Tehran* (note 4), p.41.
[23] Ibid.

mit that the dictum of the Court should be construed in the narrowest possible sense.

Unfortunately, however, the idea has caught on and the Special Rapporteur of the ILC seems to give it wider application[24]. I feel that caution is indicated for at least two major reasons:

First, nearly all sub-systems, whether self-contained or open, provide for countermeasures against the violation of obligations established by them. Only one, the Vienna Convention on the Law of Treaties, explicitly reserves State responsibility in Art.73 and makes it thus clear that it is an open system. But what, if in other sub-systems a similar provision was simply forgotten? What is the objective criterion to distinguish an open sub-system from a self-contained régime?

Secondly, let us consider the most advanced examples of what could by analogy be claimed as self-contained régimes, namely organizational treaties, such as the UN Charter, the EEC Treaty, or the European Convention on Human Rights. Is it reasonable to argue that if a State party to the European Convention on Human Rights violates a protected right by mistreating a foreigner, national of another contracting State, and thereafter ignores the judgment of the European Court of Human Rights and appropriate actions of the Committee of Ministers of the Council of Europe while persisting in the mistreatment of the foreigner, the State of nationality is prevented from taking a reprisal[25]?

It is for these considerations that I suggest caution in giving the concept of self-contained régimes wider application before it is fully explored.

3. Limits of reprisals

Having disposed of the question of category of norms not subject to reprisals we may now turn to the limits which are imposed on otherwise legitimate reprisals.

---

[24] Art.12(a) proposed by the Special Rapporteur for inclusion in Part II of the ILC Draft.

[25] The opposite view is defended by W. K. Geck, Die Ausweitung von Individualrechten durch völkerrechtliche Verträge und der Diplomatische Schutz, Festschrift Carstens, vol.1 (1984), pp.339–360, at 359. I submit, however, that the State of nationality, as a contracting party, has a subjective international right that the other contracting parties fulfil their obligations under the Convention, in particular towards its nationals. Whether one justifies an eventual reprisal with Diplomatic Protection or with the violation of that subjective right, and whether one restricts the right of applying a reprisal to the State of nationality or extends it to all contracting States is immaterial for my argument, that a reprisal by the State of nationality is permissible.

a) Limit in time

I have already examined the time-limit and need only repeat the conclusion here: Reprisals are legitimate only after a claim to perform the secondary obligations arising from State responsibility has been unsuccessful, and may not be continued when it is honoured.

b) Limits in choice: proportionality

There is, however, a further limitation on reprisals, concerning the choice of norms to be affected by them, imposed by the principle of proportionality. Although this is a time-honoured principle, endorsed in the famous *Naulilaa Arbitration* between Portugal and Germany in 1928[26] and appearing in every text-book, it is also a dangerous principle[27] which is invoked in practice mostly to justify counter-reprisals against pretended excess of reprisal.

And indeed, if one means by proportionality that the reaction to a violation of rights should not be disproportional to the violation or, in other words, that it should not affect more essential interests than those violated, one is faced with an empty formula. When not dealing with measures of self-protection taken within the same sub-system, which are, however, not subject to proportionality, how is one to compare the respective interests? It is like comparing apples with pears. And who, except an impartial tribunal, will compare objectively? The perception of the parties might in good faith be different.

I therefore submit that the concept should be re-examined. It would seem preferable to enlarge the group of norms exempted from reprisals instead of relying on a concept which in the past, especially in times of war, has only served as a tool to justify the infringement of nearly all rights in an unbreakable chain of counter-reprisals.

---

[26] Note 12, p.1028, para. c/2.

[27] The Special Rapporteur seems to share my misgivings (2nd Report Riphagen, A/CN.4/344, para.49; Yearbook of the ILC 1981 II) although he inserted the principle in Art.9, para.2 proposed for inclusion in Part II of the ILC Draft. However, in orally presenting the proposal to the ILC he has again voiced doubts and has used them as arguments for the necessity of mandatory dispute settlement procedures in Part III of the ILC Draft (Report of the ILC on its 38th session [1986], A/41/10, paras.45 and 46).

4. Individual enforcement and political expediency

Permit me one last remark in concluding. As I see it, one cannot properly understand the functioning of international law without taking its political dimension into account. This is particularly true in respect of State responsibility. States' acts are determined by political and economic considerations in the first instance and only *inter alia* also by notions of justice and law. The possible presentation of an international claim is therefore examined in the general context of relations with the author of the internationally wrongful act. When the latter is a big power, a major supplier of essential resources or a principal trading partner, misgivings about the effect on other essential relations may induce the victim not to pursue the claim. A further deterrent is the weakness inherent in a decentralized enforcement system: When the chances of success through the application of available measures are small, it may not be expedient to risk imperilling relations for nothing. It is thus not rare that States, after having considered their interests and the chances to succeed, do not claim or claim only *pro forma*. The consequences of this consideration are, however, quite different when the positions are reversed and it is the victim that is an economically or politically important State, maybe even a great power: The aforementioned restraints will then turn into advantages. In dealing with reprisals one should therefore keep in mind that in a decentralized system of law the latter's unilateral enforcement is, ultimately, a function of power[28].

[28] This is true even in centralized legal systems, although to a considerably lesser extent. From a long list of examples one may cite recent laws to protect consumers against the overwhelming bargaining power of organized market forces, which implies that before such laws existed the power was used; or equally recent plans to make civil litigation more independent of the financial power of the plaintiff, who might have to abandon proceedings or agree to an unfavourable settlement when facing a more potent respondent, who is unaffected by the costs and therefore likely to exhaust all technically available means of appeal.