Article 50. Obligations not affected by countermeasures

1. Countermeasures shall not affect:

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

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

(*c*) obligations of a humanitarian character prohibiting reprisals;

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

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

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

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

Commentary

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

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

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

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

(5) The prohibition of forcible countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly proclaimed that "States have a duty to refrain from acts of reprisal involving the use of

force."[2062] [756] The prohibition is also consistent with the prevailing doctrine as well as a number of authoritative pronouncements of international judicial[2063] [757] and other bodies.[2064] [758]

(6) Paragraph 1 (*b*) provides that countermeasures may not affect obligations for the protection of fundamental human rights. In the *"Naulilaa"* arbitration, the tribunal stated that a lawful countermeasure must be "limited by the requirements of humanity and the rules of good faith applicable in relations between States".[2065] [759] The Institut de droit international in its 1934 resolution stated that in taking countermeasures a State must "abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience".[2066] [760] This has been taken further as a result of the development since 1945 of international human rights. In particular, the relevant human rights treaties identify certain human rights which may not be derogated from even in time of war or other public emergency.[2067] [761]

(7) In its general comment No. 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present articles,[2068] [762] as well as with countermeasures imposed by individual States or groups of States. It stressed that "whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights",[2069] [763] and went on to state that:

> it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.[2070] [764]

Analogies can be drawn from other elements of general international law. For example, paragraph 1 of article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) stipulates unconditionally that "[s]tarvation of civilians as a method of warfare is prohibited."[2071] [765]

[2062] [756] General Assembly resolution 2625 (XXV), annex, first principle. The Final Act of the Conference on Security and Co-operation in Europe also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration on Principles Guiding Relations between Participating States embodied in the first "Basket" of that Final Act reads: "Likewise [the participating States] will also refrain in their mutual relations from any act of reprisal by force".

[2063] [757] See especially *Corfu Channel*, *Merits* (footnote [29] 35 above), p. 35; and *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 127, para. 249.

[2064] [758] See, *e.g.*, Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962, 188 (1964) of 9 April 1964, 316 (1972) of 26 June 1972, 332 (1973) of 21 April 1973, 573 (1985) of 4 October 1985 and 1322 (2000) of 7 October 2000. See also General Assembly resolution 41/38 of 20 November 1986.

[2065] [759] *"Naulilaa"* (footnote [990] 337 above), p. 1026.

[2066] [760] *Annuaire de l'Institut de droit international*, vol. 38 (1934), p. 710.

[2067] [761] See article 4 of the International Covenant on Civil and Political Rights; article 15 of the European Convention on Human Rights; and article 27 of the American Convention on Human Rights.

[2068] [762] See below, article 59 and commentary.

[2069] [763] E/C.12/1997/8, para. 1.

[2070] [764] *Ibid*., para. 4.

[2071] [765] See also paragraph 2 of article 54 ("objects indispensable to the survival of the civilian population") and article 75. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II).

Likewise, the final sentence of paragraph 2 of article 1 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights states that "In no case may a people be deprived of its own means of subsistence".

(8) Paragraph 1 (*c*) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60, paragraph 5, of the 1969 Vienna Convention.[2072] [766] The paragraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the Geneva Convention relative to the Treatment of Prisoners of War of 1929, the Geneva Conventions of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.[2073] [767]

(9) Paragraph 1 (*d*) prohibits countermeasures affecting obligations under peremptory norms of general international law. Evidently, a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Subparagraph (*d*) reiterates for the purposes of the present chapter the recognition in article 26 that the circumstances precluding wrongfulness elaborated in chapter V of Part One do not affect the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. The reference to "other" obligations under peremptory norms makes it clear that subparagraph (*d*) does not qualify the preceding subparagraphs, some of which also encompass norms of a peremptory character. In particular, subparagraphs (*b*) and (*c*) stand on their own. Subparagraph (*d*) allows for the recognition of further peremptory norms creating obligations which may not be the subject of countermeasures by an injured State.[2074] [768]

(10) States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50, paragraph 1 (*d*). In particular, a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.[2075] [769] Under the dispute settlement system of WTO, the prior authorization of the Dispute Settlement Body is required before a member can suspend conces-

---

[2072] [766] Paragraph 5 of article 60 of the 1969 Vienna Convention precludes a State from suspending or terminating for material breach any treaty provision "relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties". This paragraph was added at the Vienna Conference on the Law of Treaties on a vote of 88 votes in favour, none against and 7 abstentions.

[2073] [767] See K. J. Partsch, "Reprisals", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 2000), vol. 4, p. 200, at pp. 203–204; and S. Oeter, "Methods and means of combat", D. Fleck, ed., *op. cit.*, p. 105, at pp. 204–207, paras. 476–479, with references to relevant provisions.

[2074] [768] See paragraphs (4) to (6) of the commentary to article 40.

[2075] [769] On the exclusion of unilateral countermeasures in European Union law, see, for example, joined cases 90 and 91–63 (*Commission of the European Economic Community* v. *Grand Duchy of Luxembourg and Kingdom of Belgium*), *Reports of cases before the Court*, p. 625, at p. 631 (1964); case 52/75 (*Commission of the European Communities* v. *Italian Republic*), *ibid*., p. 277, at p. 284 (1976); case 232/78 (*Commission of the European Economic Communities* v. *French Republic*), *ibid*., p. 2729 (1979); and case

sions or other obligations under the WTO agreements in response to a failure of another member to comply with recommendations and rulings of a WTO panel or the Appellate Body.[2076] [770] Pursuant to article 23 of the WTO Dispute Settlement Understanding (DSU), members seeking "the redress of a violation of obligations or other nullification or impairment of benefits" under the WTO agreements, "shall have recourse to, and abide by" the DSU rules and procedures. This has been construed both as an "exclusive dispute resolution clause" and as a clause "preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations".[2077] [771] To the extent that derogation clauses or other treaty provisions (*e.g.* those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are "intransgressible",[2078] [772] they may entail the exclusion of countermeasures.

(11) In addition to the substantive limitations on the taking of countermeasures in paragraph 1 of article 50, paragraph 2 provides that countermeasures may not be taken with respect to two categories of obligations, viz. certain obligations under dispute settlement procedures applicable between it and the responsible State, and obligations with respect to diplomatic and consular inviolability. The justification in each case concerns not so much the substantive character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.

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

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

> Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.[2079] [773]

Similar reasoning underlies the principle that dispute settlement provisions between the injured and the responsible State and applicable to their dispute may not be suspended by way of countermeasures. Otherwise, unilateral action would replace an agreed provision

---

C-5/94 (*The Queen.* v. *Ministry of Agriculture, Fisheries and Food,* ex parte *Hedley Lomas (Ireland) Ltd.*), *Reports of cases before the Court of Justice and the Court of First Instance*, p. I–2553 (1996).

[2076] [770] See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 3, para. 7 and 22.

[2077] [771] See WTO, Report of the Panel, United States–Sections 301–310 of the Trade Act of 1974 (footnote [94] 73 above), paras. 7.35–7.46.

[2078] [772] To use the synonym adopted by ICJ in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), p. 257, para. 79.

[2079] [773] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 46, at p. 53. See also S. M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), pp. 13–59.

capable of resolving the dispute giving rise to the countermeasures. The point was affirmed by the Court in the *United States Diplomatic and Consular Staff in Tehran* case:

> In any event, any alleged violation of the Treaty [of Amity] by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.[2080] 774

(14) The second exception in paragraph 2 (*b*) limits the extent to which an injured State may resort, by way of countermeasures, to conduct inconsistent with its obligations in the field of diplomatic or consular relations. An injured State could envisage action at a number of levels. To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors in situations provided for in the Vienna Convention on Diplomatic Relations—such acts do not amount to countermeasures in the sense of this chapter. At a second level, measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met. On the other hand, the scope of prohibited countermeasures under article 50, paragraph 2 (*b*), is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict.[2081] 775 The same applies, *mutatis mutandis*, to consular officials.

(15) In the *United States Diplomatic and Consular Staff in Tehran* case, ICJ stressed that "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions",[2082] 776 and it concluded that violations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State. As the Court said:

> The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.[2083] 777

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds. It does not affect the various avenues for redress available to the receiving State under the terms of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.[2084] 778 On the other hand, no reference need be made

---

[2080] 774 *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 28, para. 53.

[2081] 775 See, *e.g.*, Vienna Convention on Diplomatic Relations, arts. 22, 24, 29, 44 and 45.

[2082] 776 *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 38, para. 83.

[2083] 777 *Ibid*., p. 40, para. 86. Cf. article 45, subparagraph (*a*), of the Vienna Convention on Diplomatic Relations; article 27, paragraph 1 (*a*), of the Vienna Convention on Consular Relations (premises, property and archives to be protected "even in case of armed conflict").

[2084] 778 See articles 9, 11, 26, 36, paragraph 2, 43 (*b*) and 47, paragraph 2 (*a*), of the Vienna Convention on Diplomatic Relations; and articles 10, paragraph 2, 12, 23, 25 (*b*), subparagraph (*c*) and article 35,

in article 50, paragraph 2 (*b*), to multilateral diplomacy. The representatives of States to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations themselves, no retaliatory step taken by a host State to their detriment could qualify as a countermeasure since it would involve non-compliance not with an obligation owed to the responsible State but with an obligation owed to a third party, *i.e.* the international organization concerned.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Tribunal for the Former Yugoslavia

Prosecutor v. *Zoran Kupreškić, Mirjian Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić ("Lasva Valley")*

In its 2000 judgement in the *Kupreškić et al. ("Lasva Valley")* case, the Trial Chamber invoked draft article 50(*d*) adopted on first reading[2085] [229] to confirm its finding that there existed a rule in international law that prohibited belligerent reprisals against civilians and fundamental rights of human beings. It stated that:

> … the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts. This trend towards the humanization of armed conflict is among other things confirmed by the works of the United Nations International Law Commission on State responsibility. Article 50(*d*) of the draft articles on State responsibility, adopted on first reading in 1996, prohibits as countermeasures any "conduct derogating from basic human rights".[2086] [230]

In the same context, the Trial Chamber again relied on draft article 50(*d*) adopted on first reading, which it considered authoritative, to confirm its interpretation of the relevant rules of international law. It observed that:

> The existence of this rule was authoritatively confirmed, albeit indirectly, by the International Law Commission. In commenting on subparagraph d of article 14 (now article 50) of the draft articles on State responsibility, which excludes from the regime of lawful countermeasures any conduct derogating from basic human rights, the Commission noted that article 3 common to the four 1949 Geneva Conventions "prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts as well as any other reprisal incompatible with the absolute requirement of humane treatment". It follows that, in the opinion of the Commission, reprisals against civilians in the combat zone are also prohibited. This view, according to the Trial Chamber, is correct. However, it must be supplemented by two propositions. First, common article 3 has by now become customary international law. Secondly, as the International Court of Justice rightly held

---

paragraph (3), of the Vienna Convention on Consular Relations.

[2085] [229] The relevant subparagraph was amended and incorporated in article 50, paragraph 1 (*b*), finally adopted by the International Law Commission in 2001.

[2086] [230] International Tribunal for the Former Yugoslavia, Trial Chamber, *Prosecutor* v. *Zoran Kupreškić, Mirjian Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić ("Lasva Valley"), Judgement,* Case No. IT-95–16-T, 14 January 2000, para. 529 (footnote omitted).

in *Nicaragua*, it encapsulates fundamental legal standards of overarching value applicable both in international and internal armed conflicts. Indeed, it would be absurd to hold that while reprisals against civilians entailing a threat to life and physical safety are prohibited in civil wars, they are allowed in international armed conflicts as long as the civilians are in the combat zone.[2087] 231

[A/62/62, para. 129]

ERITREA-ETHIOPIA CLAIMS COMMISSION

Prisoners of War—Eritrea's Claim 17, Partial Award

In its 2003 partial award on *Prisoners of War—Eritrea's Claim 17*, the Eritrea-Ethiopia Claims Commission noted that Eritrea had claimed *inter alia* that:

Ethiopia's suspension of prisoner of war exchanges cannot be justified as a non-forcible countermeasure under the law of state responsibility because, as article 50 of the International Law Commission's articles on responsibility of States for internationally wrongful acts emphasizes, such measures may not affect "obligations for the protection of fundamental human rights", or "obligations of a humanitarian character prohibiting reprisals".[2088] 232

The Claims Commission did not refer explicitly to the International Law Commission articles in its subsequent reasoning, but it considered that Eritrea's arguments were "well founded in law", although they were considered insufficient to establish that Ethiopia had violated its repatriation obligation.[2089] 233

[A/62/62, para. 130]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA)

In the matter of an Arbitration Between Guyana and Suriname

In its 2007 award in the *Guyana* v. *Suriname* case, the arbitral tribunal constituted to hear the case, after holding that certain military action taken by Suriname constituted a threat of the use of force in contravention of the United Nations Convention on the Law of the Sea of 1982, the Charter of the United Nations and general international law, was faced with a claim by Suriname that the measures were nevertheless lawful countermeasures since they were taken in response to an internationally wrongful act by Guyana. The tribunal held that "[i]t is a well established principle of international law that countermeasures may not involve the use of force" and continued:

This is reflected in the ILC Draft Articles on State Responsibility at Article 50(1)(*a*), which states that countermeasures shall not affect 'the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations'. As the commentary to the ILC Draft Articles mentions, this principle is consistent with the jurisprudence emanating from international judicial bodies. It is also contained in the Declaration on Principles of International Law concerning Friendly Relations

[2087] 231 *Ibid*., para. 534 (footnotes omitted).

[2088] 232 Eritrea-Ethiopia Claims Commission, *Prisoners of War—Eritrea's Claim 17*, Partial Award, 1 July 2003, para. 159.

[2089] 233 *Ibid*., para. 160.

and Cooperation among States in accordance with the Charter of the United Nations, the adoption of which, according to the ICJ, is an indication of State's *opinio juris* as to customary international law on the question.[2090] 79

[A/65/76, para. 48]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Corn Products International Inc., v. *The United Mexican States*

The tribunal established to hear the case of *Corn Products International Inc.,* v. *Mexico*, in its 2008 Decision on Responsibility, relied on article 50 of the State responsibility articles to draw the inference that adverse rulings by a WTO panel and Appellate Body did not preclude the respondent from raising the defence of countermeasures in the case of alleged violations of obligations under NAFTA.[2091] 80

[A/65/76, para. 49]

[2090] 79 *Guyana* v. *Suriname* (footnote [967] 19 above), para. 446 (footnote omitted).

[2091] 80 *Corn Products International Inc.* (footnote [4] 5 above), para. 158. See article 22 above.