

Article 54. Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Commentary

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. However, “injured” States, as defined in article 42, are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group. By virtue of article 48, paragraph 2, such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus, with respect to the obligations referred to in article 48, such States are recognized as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches.^{[2115] 792}

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organizations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the Charter of the United Nations, is not covered by the articles.^{[2116] 793} More generally, the articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.^{[2117] 794}

(3) Practice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (*e.g.* breaking off air links or other contacts). Examples include the following:

– *United States–Uganda (1978)*. In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.^{[2118] 795} The legislation recited that “[t]he Government of Uganda ... has committed geno-

^{[2115] 792} See, *e.g.*, M. Akehurst, “Reprisals by third States”, *BYBIL*, 1970, vol. 44, p. 1; J. I. Charney, “Third State remedies in international law”, *Michigan Journal of International Law*, vol. 10, No. 1 (1989), p. 57; Hutchinson, *loc. cit.* (footnote [1923] 672 above); Sicilianos, *op. cit.* (footnote [2022] 735 above), pp. 110–175; B. Simma, “From bilateralism to community interest in international law”, *Collected Courses ... , 1994–VI* (The Hague, Martinus Nijhoff, 1997), vol. 250, p. 217; and J. A. Frowein, “Reactions by not directly affected States to breaches of public international law”, *Collected Courses ... , 1994–IV* (Dordrecht, Martinus Nijhoff, 1995), vol. 248, p. 345.

^{[2116] 793} See article 59 and commentary.

^{[2117] 794} See article 57 and commentary.

^{[2118] 795} Uganda Embargo Act, Public Law 95–435 of 10 October 1978, *United States Statutes at Large* 1978, vol. 92, part 1 (Washington D. C., United States Government Printing Office, 1980), pp. 1051–1053.

cide against Ugandans” and that the “United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide”.^{[2119] 796}

– *Certain Western countries–Poland and the Soviet Union (1981)*. On 13 December 1981, the Polish Government imposed martial law and subsequently suppressed demonstrations and detained many dissidents.^{[2120] 797} The United States and other Western countries took action against both Poland and the Soviet Union. The measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, Great Britain, France, the Netherlands, Switzerland and Austria.^{[2121] 798} The suspension procedures provided for in the respective treaties were disregarded.^{[2122] 799}

– *Collective measures against Argentina (1982)*. In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.^{[2123] 800} Following a request by the United Kingdom, European Community members, Australia, Canada and New Zealand adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to article XI:1 and possibly article III of the General Agreement on Tariffs and Trade. It was disputed whether the measures could be justified under the national security exception provided for in article XXI (b) (iii) of the Agreement.^{[2124] 801} The embargo adopted by the European countries also constituted a suspension of Argentina’s rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,^{[2125] 802} for which security exceptions of the Agreement did not apply.

– *United States–South Africa (1986)*. When in 1985, the Government of South Africa declared a state of emergency in large parts of the country, the Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.^{[2126] 803} Subsequently, some countries introduced measures which went beyond those recommended by the Security Council. The United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended landing rights of South African

^{[2119] 796} *Ibid.*, sects. 5(a) and (b).

^{[2120] 797} RGDIP, vol. 86 (1982), pp. 603–604.

^{[2121] 798} *Ibid.*, p. 606.

^{[2122] 799} See, e.g., article 15 of the Air Transport Agreement between the Government of the United States of America and the Government of the Polish People’s Republic of 1972 (*United States Treaties and Other International Agreements*, vol. 23, part 4 (1972), p. 4269); and article 17 of the United States–Union of Soviet Socialist Republics Civil Air Transport Agreement of 1966, ILM, vol. 6, No. 1 (January 1967), p. 82 and vol. 7, No. 3 (May 1968), p. 571.

^{[2123] 800} Security Council resolution 502 (1982) of 3 April 1982.

^{[2124] 801} Western States’ reliance on this provision was disputed by other GATT members; cf. communiqué of Western countries, GATT document L. 5319/Rev.1 and the statements by Spain and Brazil, GATT document C/M/157, pp. 5–6. For an analysis, see M. J. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Unilateral Suspension of GATT Obligations as Reprisal (English summary)) (Berlin, Springer, 1996), pp. 328–334.

^{[2125] 802} The treaties are reproduced in *Official Journal of the European Communities*, No. L 298 of 26 November 1979, p. 2; and No. L 275 of 18 October 1980, p. 14.

^{[2126] 803} Security Council resolution 569 (1985) of 26 July 1985. For further references, see Sicilianos, *op. cit.* (footnote [2022] 735 above), p. 165.

Airlines on United States territory.^{[2127] 804} This immediate suspension was contrary to the terms of the 1947 United States of America and Union of South Africa Agreement relating to air services between their respective territories^{[2128] 805} and was justified as a measure which should encourage the Government of South Africa “to adopt reforms leading to the establishment of a non-racial democracy”.^{[2129] 806}

– *Collective measures against Iraq (1990)*. On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion. European Community member States and the United States adopted trade embargoes and decided to freeze Iraqi assets.^{[2130] 807} This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait.

– *Collective measures against the Federal Republic of Yugoslavia (1998)*. In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.^{[2131] 808} For a number of countries, such as France, Germany and the United Kingdom, the latter measure implied the non-performance of bilateral aviation agreements.^{[2132] 809} Because of doubts about the legitimacy of the action, the British Government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that “President Milosevic’s ... worsening record on human rights, means that, on moral and political grounds, he has forfeited the right of his Government to insist upon the 12 months notice which would normally apply.”^{[2133] 810} The Federal Republic of Yugoslavia protested these measures as “unlawful, unilateral and an example of the policy of discrimination”.^{[2134] 811}

(4) In some other cases, certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures, but asserted a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

– *Netherlands–Suriname (1982)*. In 1980, a military Government seized power in Suriname. In response to a crackdown by the new Government on opposition movements in December 1982, the Dutch Government suspended a bilateral treaty on development

^{[2127] 804} For the text of this provision, see ILM, vol. 26, No. 1 (January 1987), p. 79 (sect. 306).

^{[2128] 805} United Nations, *Treaty Series*, vol. 66, p. 239 (art. VI).

^{[2129] 806} For the implementation order, see ILM (footnote [2127] 804 above), p. 105.

^{[2130] 807} See, e.g., President Bush’s Executive Orders of 2 August 1990, reproduced in AJIL, vol. 84, No. 4 (October 1990), pp. 903–905.

^{[2131] 808} Common positions of 7 May and 29 June 1998, *Official Journal of the European Communities*, No. L 143 of 14 May 1998, p. 1 and No. L 190 of 4 July 1998, p. 3; implemented through Council Regulations 1295/98, *ibid.*, No. L 178 of 23 June 1998, p. 33 and 1901/98, *ibid.*, No. L 248 of 8 September 1998, p. 1.

^{[2132] 809} See, e.g., United Kingdom, *Treaty Series* No. 10 (1960) (London, H. M. Stationery Office, 1960); and *Recueil des Traités et Accords de la France*, 1967, No. 69.

^{[2133] 810} BYBIL, 1998, vol. 69, p. 581; see also BYBIL, 1999, vol. 70, pp. 555–556.

^{[2134] 811} Statement of the Government of the Federal Republic of Yugoslavia on the suspension of flights of Yugoslav Airlines of 10 October 1999.

assistance under which Suriname was entitled to financial subsidies.^[2135]⁸¹² While the treaty itself did not contain any suspension or termination clauses, the Dutch Government stated that the human rights violations in Suriname constituted a fundamental change of circumstances which gave rise to a right of suspension.^[2136]⁸¹³

– *European Community member States—the Federal Republic of Yugoslavia (1991)*. In the autumn of 1991, in response to resumption of fighting within the Federal Republic of Yugoslavia, European Community members suspended and later denounced the 1983 Cooperation Agreement with Yugoslavia.^[2137]⁸¹⁴ This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in resolution 713 (1991) of 25 September 1991. The reaction was incompatible with the terms of the Cooperation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice. Justifying the suspension, European Community member States explicitly mentioned the threat to peace and security in the region. But as in the case of Suriname, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.^[2138]⁸¹⁵

(5) In some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those States could not be considered “injured States” in the sense of article 42. It should be noted that in those cases where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State.^[2139]⁸¹⁶

(6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently, it is not appropriate to include in the present articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead, chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.

(7) Article 54 accordingly provides that the chapter on countermeasures does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessa-

^[2135] ⁸¹² *Tractatenblad van het Koninkrijk der Nederlanden*, No. 140 (1975). See H.-H. Lindemann, “The repercussions resulting from the violation of human rights in Surinam on the contractual relations between the Netherlands and Surinam”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 44 (1984), p. 64, at pp. 68–69.

^[2136] ⁸¹³ R. C. R. Siekmann, “Netherlands State practice for the parliamentary year 1982–1983”, *NYIL*, 1984, vol. 15, p. 321.

^[2137] ⁸¹⁴ *Official Journal of the European Communities*, No. L 41 of 14 February 1983, p. 1; No. L 315 of 15 November 1991, p. 1, for the suspension; and No. L 325 of 27 November 1991, p. 23, for the denunciation.

^[2138] ⁸¹⁵ See also the decision of the European Court of Justice in *A. Racke GmbH and Co. v. Hauptzollamt Mainz*, case C-162/96, *Reports of cases before the Court of Justice and the Court of First Instance*, 1998–6, p. I–3655, at pp. 3706–3708, paras. 53–59.

^[2139] ⁸¹⁶ Cf. *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above) where ICJ noted that action by way of collective self-defence could not be taken by a third State except at the request of the State subjected to the armed attack (p. 105, para. 199).

tion of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached. The article speaks of “lawful measures” rather than “countermeasures” so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.