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# *The Role of Proportionality in the Law of International Countermeasures*

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## **Abstract**

*It is not contended in legal literature and jurisprudence that proportionality constitutes a basic requirement of the unilateral response to wrongful conduct. Still, its role and content in the system of state responsibility remains unclear. In the prevailing opinion, proportionality is viewed as a quantitative link between the wrongful conduct and the response thereto. In a different theoretical perspective, the author suggests that the function of the response must rather be taken into account. However, the analysis of international practice proves the existence of a plurality of instruments and tools of self-redress, each of them having a proper nature and function. In the second part of the article, it is therefore argued that proportionality should be assessed on the basis of different standards, which correspond to the different functions pursued by countermeasures. A distinction is thus made between countermeasures having respectively normative, retributive, coercive and executive function. In determining the proper function of countermeasures, and, consequently, the standard to be adopted for assessing the proportionality of the response, due consideration must be given to the structure of the breached rule and to the consequences of the breach. The theoretical and practical consequences of this conclusion are dealt with accordingly.*

## **1 The Relevance of Proportionality in the System of State Responsibility**

Proportionality plays a prominent role in limiting the power of taking countermeasures in response to internationally wrongful acts. The requirement of proportionality, almost universally affirmed in international practice and literature,<sup>1</sup> also provides an important theoretical function. In a legal system in which the response to

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<sup>1</sup> In jurisprudence, see the *Case of Naulilaa*, 31 July 1928, 2 RIAA 1011; the *Case Concerning the Air Service Agreement of 27 March 1946 Between the United States of America and France*, 11 July 1978, 18 RIAA 414; the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, Merits, 27 June 1986, ICJ Reports (1986) 14; and the *Case Concerning the Gabčíkovo-Nagymaros Project*, 25 September 1997, ICJ

response to wrongful conduct is exercised on a decentralized basis, proportionality secures a certain predictability of the response and predetermines, albeit roughly, the social sanction against the wrongdoer. The concept of proportionality, while protecting the subjective interest of the wrongdoer against over-reaction, also expresses the need of the international legal order to establish a legal process regulating the nature and intensity of the response to wrongful conduct.

## 2 The Role and Content of Proportionality in the Contemporary Debate

On closer analysis, however, there is surprisingly little agreement on the role and content of proportionality in the system of state responsibility. While it may confidently be stated that contemporary international law requires the response to wrongful acts to conform to proportionality, it is much more difficult to determine the standard by which proportionality must be measured.

This difficulty derives primarily from the lack of a commonly accepted theoretical framework on the scope and nature of the response to international wrongful conduct. In the literature and practice of the nineteenth century, countermeasures were mainly conceived as instruments of self-help, aimed at giving the injured state the means to satisfy its claim, with or without the cooperation of the wrongdoer.<sup>2</sup> This conception has gradually changed during the first half of the twentieth century, mainly in consideration of the danger of abuse inherent in the acknowledgment of a unilateral power of enforcement for individual states.

The prevailing view in earlier judicial decisions saw countermeasures as wrongful acts equivalent in their effect to those to which they were meant to respond.<sup>3</sup> Some

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Reports (1997) 7. In the literature, among the most recent works, see Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984); Zemanek, 'The Unilateral Enforcement of International Obligations', in 47 *ZaöRV* (1987) 32; Sicilianos, *Les réactions décentralisées à l'illicite. Des contre-mesures à la légitime défense* (1990) 273; Boisson de Chazournes, *Les contre-mesures dans les relations internationales économiques* (1992) 56; and Alland, *Justice privée et ordre juridique international* (1994). The existence of a rule requiring the proportionality of countermeasures has been constantly affirmed during the works of codification of state responsibility. See Riphagen, 'Preliminary Report on the Content, Form and Degree of International Responsibility', A/CN.4/330, at 27; Arangio Ruiz, 'Third Report on State Responsibility', A/CN.4/440, and Add. 1; Crawford, 'Third Report on State Responsibility', A/CN.4/507 and Add. 1–4.

<sup>2</sup> On the nature and aim of countermeasures in the nineteenth century, see Bluntschili, *Droit international codifié* (1895) 283; and Fiore, *Diritto internazionale pubblico* (1888) 598.

<sup>3</sup> See the *Naulilaa* case, *supra* note 1, considered for decades as a sort of codification of the law in this matter.

authors explicitly endorsed the idea of reprisals as being retributive in nature.<sup>4</sup> Others apparently maintained the idea of reprisals as acts of constraint, the power of self-redress being however drastically curtailed by the requirement that the injurious consequences of the response be roughly equivalent with those of the wrongful act.<sup>5</sup>

The advantage of this conception consists in its establishing of an objective standard for measuring the intensity of the reaction. By imposing a link of equivalence between breach and response, proportionality would curtail the otherwise broad discretion of the reacting state in choosing the means of reaction, thus reducing the risk of abuse.

Under this view, however, reaction to wrongful conduct tends to coincide with private revenge and appears only indirectly, by means of dissuasion, to produce compliance.<sup>6</sup>

In many respects this construction is far from satisfactory. The notion of countermeasures as negative retribution is appropriate only to the legal system of a primitive community, which lacks the most rudimentary structures for ascertaining and administering the law and ensuring compliance therewith.

More sophisticated legal theories have therefore been developed in recent decades which regard the power to issue countermeasures as an instrumental one, conferred by international law with the aim of inducing the wrongdoer to resume compliance with the breached obligation or, should the breach have produced an irreversible situation, to provide for reparation.<sup>7</sup>

An instrumental conception of countermeasures may lead to the acknowledgment of a new role for proportionality. In a functional perspective, it may be presumed that proportionality should be measured not by its equivalence to the breach, but rather on the basis of its appropriateness and reasonableness to the aim pursued by the reacting state. Proportionality would then be conceived as a relation between aim and means of the action of self-redress.

Although the authoritativeness of this solution is upheld by recent trends in

<sup>4</sup> See the classic Jennings and Watts (eds), *Oppenheim's International Law*, vol. I (9th ed., 1992) 419. The conception of reprisals as a form of private retributive sanction was endorsed by Ago, 'Le delit international', 68 *RCADI* (1939) 415. Though Ago theorized a punitive conception of reprisals, he was reluctant to draw the conclusion that proportionality should be measured by reference to the exigency of punishment. The requirement of proportionality was rather conceived by Ago as a classic requirement of equivalence between breach and response. The opposite path would have brought about the necessity to frame the requirement of proportionality in a quasi-criminal legal system, endowed with procedural and substantial guarantees.

<sup>5</sup> See, among others, the classic works by Strupp, *Das völkerrechtliche Delikt* (1920) 195; Fauchille, *Traité de droit international public*, vol. I, 3 (1926) 689; de la Brière, 'Évolution de la doctrine et de la pratique en matière de représailles', 22 *RCADI* (1928) 237; on this evolution see Venezia, 'La notion de représailles en droit international public', 64 *RGDIP* (1960) 465.

<sup>6</sup> In keeping with this conception, the injured state would have a subjective right to inflict, on the wrongdoer, a damage roughly equivalent to that suffered in consequence of the breach.

<sup>7</sup> See Bleckmann, 'Gedanken zur Repressalie. Ein Versuch der Anwendung der Interessenjurisprudenz auf das Völkergewohnheitsrecht', in *Staatsrecht-Völkerrecht-Europarecht. Festschrift für Hans-Jürgen Schlochauer* (1981) 193; Zoller, *supra* note 1, at 46; Dominicé, 'Observations sur les droits de l'Etat victime d'un fait internationalment illicite', in *Droit international — Institut de hautes études internationales de Paris* (1980–1981) 40; De Guttry, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale* (1981); and Elagab, *The Legality of Non-Forcible Countermeasures* (1985).

international judicial practice, its logical coherence may be questioned. If we construe countermeasures as a means of implementing legal obligation, we should conclude that proportionality should be measured by the coercive aim of the response. It would follow that even responses greatly exceeding the magnitude of the original breach, and extrinsically unconnected therewith, could nevertheless be justified, if reasonably necessary to terminate it.

The main inconvenience of this line of reasoning lies in its absoluteness. By qualifying countermeasures by their coercive nature, and preventing states from pursuing a different aim, this solution has the effect of wiping out the richness and variety of the different forms in which reactions to wrongful acts may materialize.<sup>8</sup>

In the light of these difficulties, it is not surprising that even the authors who assert a purist view of countermeasures as a means of constraint refrain from accepting that proportionality be measured by reference to the aim pursued.

### 3 Proportionality and the Function of Countermeasures in the Works of Codification on State Responsibility

Analogous difficulties in linking proportionality with the nature and function of countermeasures were experienced by the ILC in the works on codification of the law of state responsibility.

The nature of the action in self-redress had occasionally been debated during the earlier stage of the works, primarily devoted to drawing up the first part of Draft Articles on the origin of state responsibility. While Special Rapporteur Ago clearly stated his preference for a definition of countermeasures as a form of sanction,<sup>9</sup> the ILC preferred to set aside the matter at that stage. Draft Article 30, approved on first reading, while mentioning countermeasures as a circumstance precluding wrongfulness, did not, however, list the conditions under which a measure may be considered as a legitimate form of self-redress.<sup>10</sup>

The question assumed a central role in the drawing up of the second part of the ILC

<sup>8</sup> Coercion in the strict sense is not so much the power to claim the enforcement of the law; rather it is the power to enforce it. It implies that the authority to which it is entrusted also possesses the power to determine the extent to which constraint may be exerted, in relation to what appears objectively necessary and reasonable to induce compliance. Understandably, the acknowledgment of this power in such a destructuralized system as international law constitutes more an exception than a rule. States may be more inclined to admit it in a more integrated legal system. The power to coerce states to abide by their obligations has been admitted in the legal system of the EC. See the decision of the European Court of Justice in its decision of 4 July 2000 in Case C-387/97, *Commission of the European Communities v. Greece* [2000] ECR I-5047.

<sup>9</sup> Article 30 of the Draft Articles proposed by Ago reads: 'The international wrongfulness of an act not in conformity with what would otherwise be required of a State by virtue of an international obligation towards another state is precluded if the act was committed as the legitimate application of a sanction against that other state, in consequence of an internationally wrongful act committed by that other State.'

<sup>10</sup> 'The wrongfulness of an act of a state not in conformity with an obligation of that state is precluded if the act constitutes a measure legitimate under international law against the other state in consequence of an internationally wrongful act of that other state.'

Draft Articles on the content, forms and degree of international responsibility. Special Rapporteur Riphagen suggested distinguishing between measures of reciprocity, affecting the same norm as the one of the breach, and countermeasures, affecting different norms, un-correlated with the original breach. In the Commentary on the project, the Special Rapporteur concluded that the test of proportionality was 'inherent in measures by way of reciprocity'.<sup>11</sup>

This distinction, which constituted a first, although imprecise, endeavour to categorize different kinds of response according to their function, was subsequently expunged from the draft in consideration of the conceptual unity of the response to breach, advocated by the newly appointed Special Rapporteur Arangio Ruiz. Though devoting in his reports a certain amount of attention to the matter, and admitting the existence of various forms of reaction, characterized by a proper nature and aim,<sup>12</sup> the Special Rapporteur refused to draw from this assumption any conclusion on the concept of proportionality.<sup>13</sup> According to Draft Article 49, adopted by the Commission on first reading, 'countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effect thereof on the injured State'.

The subsequent revision undertaken by the ILC, while entailing major changes to the draft, did not touch upon the substance of this definition. According to the newly appointed Special Rapporteur, Crawford, there is a strong case for a legal restriction of the aim that can be pursued by a state reacting to a wrongful act.<sup>14</sup> Having found merit in this suggestion, the ILC agreed to qualify countermeasures as acts of a coercive nature, aimed at producing compliance with the breached rule, or to induce the wrongdoer to comply with international responsibility. Draft Articles adopted on second reading by the ILC thus endorse a strict coercive conception of countermeasures.<sup>15</sup> The adoption of countermeasures is permitted only insofar as they are necessary to ensure compliance with the legal consequences deriving from the breach. The legal regime of countermeasures is framed accordingly.

Quite remarkably, however, the change of perspective as to the nature of the action in self-redress has not produced major consequences for the rule of proportionality.

<sup>11</sup> *Yearbook of the International Law Commission*, vol. II (1985, 1) at 11.

<sup>12</sup> See Arangio Ruiz, 'Third Report on State Responsibility', *supra* note 1, para. 39; 'Fourth Report on State Responsibility', A/CN.4/444, paras 3 ff. See also the Report of the ILC, Doc. A/47/10\*, *Yearbook of the International Law Commission*, vol. II (1992, 1), paras 153–156.

<sup>13</sup> See 'Fourth Report on State Responsibility', A/CN.4/444, paras 53–56.

<sup>14</sup> See the third addendum to Crawford, 'Third Report on State Responsibility', *supra* note 1, paras 330–331.

<sup>15</sup> See Draft Article 49(1): 'An injured State may only take countermeasures against a State which is responsible for an international wrongful act in order to induce that State to comply with its obligations under Part Two.' This formula endorses the basic elements of the definition adopted by the International Court of Justice in the *Gabcikovo-Nagymaros Project*, ICJ Reports (1997) 7.

defined by Article 51 of the new draft, essentially as a relation of equivalence between breach and response.<sup>16</sup>

This result does not appear entirely consistent with the premise. If we admit that the essence of the action in self-redress is the search for compliance, the pursuit of such an aim may be seriously thwarted by the conditions laid down in Article 51.<sup>17</sup> The coercive nature of countermeasures would then represent little more than the indication of the subjective motive of the action.

The wording of Draft Article 51 clearly indicates that the ILC conceives proportionality as a factor mitigating the instrumental nature of countermeasures. Should the ILC have been willing to follow the opposite path, and strengthen the instrumental role of countermeasures, Draft Article 51 would have been worded differently. Framed in a conception regarding countermeasures as a coercive instrument, proportionality would require that the intensity of constraint be appropriate to the gravity of the breach.<sup>18</sup>

The reluctance of the ILC to follow this line of reasoning seems due basically to the danger of abuse inherent in the acknowledgment of a unilateral power of coercion entrusted to individual states in a destructuralized system such as the international legal order. Attractive though it is, the conception that identifies coercion as the essence of the response to wrongful conduct lacks in flexibility and fails to comprehensively establish a link between the aim and the means of action in self-redress.

#### 4 Proportionality and the Multifunctional Nature of Countermeasures

The attempt to conceive a unitary notion for action in self-redress fails to recognize that in international law various types of countermeasures exist, each of them having a different nature and accomplishing their own functions. The various conceptions of proportionality seem to reflect a partial truth about the functions of countermeasures. While none, singly, is able to satisfactorily explain all the manifestations of international practice, each of them may be appropriate in a particular context.

<sup>16</sup> 'Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.'

<sup>17</sup> While admitting that a certain connection between purpose and means should be maintained, the Special Rapporteur Crawford considered this inherent in the test of necessity endorsed by Draft Article 47. On the other hand, he considered proportionality as a link between the original wrong and the response thereto; that being 'a function partly independent of the question whether the countermeasure was necessary to achieve a particular result' (third addendum to Crawford, 'Third Report on State Responsibility', *supra* note 1, para. 346).

<sup>18</sup> In other words, it is one thing to measure proportionality by way of the equivalence between breach and response, and another thing to measure proportionality by reference to the exigency of constraint, and to regulate its intensity on the basis of the gravity of the breach and of the consequences thereof. The latter solution has been adopted by Articles 1 and 6(2) of the Resolution of the Institute of International Law of 1934, 'Régime de représailles en temps de paix', in *Résolutions de l'Institut de droit international — 1873–1956* (1957) 167.

We are induced then to ask if the different conceptions of the nature and function of countermeasures may not reflect the existence of a plurality of forms and content of proportionality. This line of reasoning seems the most promising. In fact, it may satisfactorily explain some apparent incongruities emerging from the practice: states adopting countermeasures do not, in fact, pursue one and the same objective; behind the facile formula of countermeasures a plurality of devices and instruments of self-redress is hidden. This consideration would put the analysis in quite a different methodological perspective: instead of researching the function of countermeasures, we are led to the conclusion that countermeasures are multifunctional in character. Correspondingly, the very content of proportionality may vary, even considerably, according to the function assigned to the response.

The idea of the multifunctional character of countermeasures corresponds to the need to distinguish, within the international legal order, among different instruments by which a state may protect its legal rights and interests.<sup>19</sup> However, in this new perspective the problem of determining the content of proportionality is not entirely solved; indeed, on the contrary, it becomes more entangled.

In particular, it is not easy to reconcile this premise with the liberty, acknowledged to the reacting state in the classical theory of state responsibility, to choose freely the aim and the means of redress. This unbounded freedom would have the unwarranted consequence of greatly reducing the usefulness of proportionality. By determining the aim of its action, the responding state would impose its own standard for assessing the proportionality of its action. A state might claim the lawfulness of a response exceeding the magnitude of the breach by simply stating that it is pursuing a punitive or a coercive aim. Far from consisting of an objective standard, proportionality would feature an inherent subjectivism and would be rendered practically meaningless.

If we accept that countermeasures may fulfil more than one function, and correspondingly, that there are a plurality of standards by which proportionality can be measured, we must consequently think of some devices capable of curtailing the discretion of the states in determining the objective of the action in self-redress.

## 5 Proportionality and the Function of Countermeasures: A Reappraisal

The failure to identify theoretically the nature and aim of actions of self-redress induces us to reverse the methodological approach of the analysis. Instead of furthering the discussion about the function of countermeasures, we propose focusing

<sup>19</sup> The idea of the multifunctional character of countermeasures is now prevalent in the literature, albeit the consequences drawn from these assumptions are very different from one another; see Zemanek, *supra* note 1, at 34; Bleckmann, *supra* note 7, at 194; Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (1997) 219; Boisson de Chazournes, *supra* note 1, at 130; Sicilianos, *supra* note 1, at 49; and Alland, *supra* note 1, at 201. The question is considered at length by Arangio Ruiz, 'Third Report on State Responsibility', *supra* note 1, at 22; and in the third addendum to Crawford, 'Third Report on State Responsibility', *supra* note 1.

the analysis on how proportionality is measured in international practice, by what standards, and in relation to which categories of international wrongful conducts.

In other words, we propose to scrutinize the different methods employed in international practice for assessing the appropriateness of the response. In this context, due attention must be paid to the structure of the breached rule, and the type of consequences deriving from the breach.

This empirical method of analysis rests on the assumption that international law, not unlike internal legal orders, puts a comprehensive set of proceedings and instruments at the disposal of states seeking redress. In other words, it appears methodologically inaccurate to presume that the standard of proportionality must be one and the same in situations very different from one another. Quite on the contrary, it is not unreasonable to expect that in common *genus* of measures of self-redress, various forms of reaction exist, each of them having a proper nature and function. While the response must always abide by proportionality, the very content of this link could vary, even considerably. There is an intuitive difference in the reaction to the violation of a bilateral treaty posing reciprocal rights and the reaction to a serious breach of *erga omnes* obligations. It is reasonable to suppose that in the first case the response may be kept in a reciprocal withdrawal of rights, while in the second case the reaction may pursue the aim of imposing compliance with the breached rule. The nature and function of the two responses are greatly different. We could be inclined to accept that a coercive aim, although present in both cases, weighed in the latter situation more heavily than in the former.<sup>20</sup>

This methodological approach implies the need to split the response into a bundle of single measures of redress, in order to consider the aim pursued by each of them. A state may react to breach of a treaty by suspending its own counterpart obligations under the treaty and freezing goods and assets of the breaching state. The function of the two sets of measures is greatly different. While the suspension of performance is aimed at restoring the normative balance altered by the breach, measures of freezing or seizures are aimed at producing compliance or obtaining reparation. The first acts on the level of the primary norm; the second operates rather on the secondary level and is meant to implement the legal consequences deriving from the breach.

The assumption that each measure should be connected with its own function points to the adoption of an analytical method. Instead of globally considering the proportionality of the response, we should tend to isolate, in the context of a comprehensive reaction, the individual measures of redress and conduct the test of proportionality for each of them. In other words, this methodological approach implies a technique of deconstructing the response into a series of single measures, the proportionality of which must be determined autonomously in relation to the function accomplished by each.

<sup>20</sup> It may be worth adding that the concept of function relates not so much to the subjective aim that a state may pursue, which may vary even considerably from case to case, but to the legal objective and nature of the reaction. It would be misleading to conclude that proportionality must be measured by the subjective aim pursued by the reacting state.



This method is not entirely free of inconvenience. It is common experience that states adopt a different course. They take little care in pointing out the function assigned to individual measures of redress, and prefer rather to tailor a general response to the breach. However, the difficulty in assessment is overshadowed by the advantage expected on the theoretical plane, since it highlights on a case-by-case basis the relation of proportionality of single measures to the function of the action in self-redress.

## 6 Two Forms of Proportionality: External and Internal Proportionality

Moving now from the methodological to the normative field, we are presented with a preliminary question. We are mentally accustomed to thinking of proportionality as a link between the means and aims of the measures of self-redress. However, this assumption is not completely correct. Proportionality requires not only employing the means appropriate to the aim chosen, but implies, above all, an assessment of the appropriateness of the aim itself. The latter requirement fills a lacuna in the legal discipline of countermeasures. A state is free to determine the aim of its action in self-redress. However, international law curtails this otherwise unbounded discretion by requiring that the aim pursued is not manifestly inappropriate to the situation, considering the structure and content of the breached rule.

The requirement was implicitly referred to by the International Court of Justice in two recent cases. In the *Case Concerning the United States Diplomatic and Consular Staff in Tehran*,<sup>21</sup> the Court was called upon to ascertain, *inter alia*, if the seizure of diplomatic personnel and the occupation of the premises constituted a lawful response to abuses of the diplomatic immunities and interferences in internal affairs of Iran, allegedly committed by the United States. The Court dismissed the allegation, although informally submitted, and stated that the wrongful conduct attributed to the United States, even if proved, could not have justified the breach of diplomatic immunities.

It is not easy to identify the legal reasoning which led to this conclusion. Although the Court went on by referring to the diplomatic law as a self-contained regime, this reference is not fully persuasive. International practice admits that diplomatic immunities can be disregarded, albeit only specifically, by way of reciprocal conduct towards the same or analogous breach by the other party. Moreover, should proportionality have been assessed according to a test of equivalence, the Iranian response would not appear clearly disproportionate to the breach.<sup>22</sup>

The conclusion of the Court may be satisfactorily explained by a functional approach. Iran had at its disposal measures of self-help for directly putting an end to a breach taking place in Iranian territory. Iran had thus used the mildest means of

<sup>21</sup> Judgment of 24 May 1980, ICJ Reports (1980) 2.

<sup>22</sup> Cf. the remarks by Crawford in the third addendum to Crawford, 'Third Report on State Responsibility', *supra* note 1, paras 337–338.

self-redress for obtaining cessation, while the aim of securing reparation could have been attained by other measures not impairing the function of diplomatic law. On the other hand, the intrusion into the diplomatic premises and the seizure of the personnel revealed that Iran pursued a different aim, unconnected with the breach and thus disproportionate.

The idea that proportionality must be assessed in the light of the proper function of the response lies at the core of the assessment made by the Court in the *Gabcikovo-Nagymaros Project* case.<sup>23</sup> The Court considered that Hungary's failure to abide by its obligation under a bilateral treaty with Slovakia, and its refusal to carry out a joint project of diversion and exploitation of the waters of the Danube, could not justify the unilateral diversion of the river by Slovakia and the implementation of a project of exploitation carried out entirely on its territory. Such measures amounted to a breach of the principle of the equitable apportionment of resources between watercourse states and thus failed to comply with the proportionality required by international law.

Despite the overall terms in which it is worded, this conclusion must be contextualized in the light of the legal relation in force between the parties. Should proportionality be tested against the aim pursued by Slovakia, namely, that of wiping off the adverse effect of the breach and producing unilaterally for itself the benefits expected from the performance of the treaty, the measures taken would appear perfectly proportionate. They were necessary and reasonably connected to the aim. Moreover, Hungary was only nominally deprived of its right to an equitable apportionment of water resources. Hungary could have easily disposed of the apportionment agreed upon through the treaty simply by abiding by its provisions.

The conclusion of the Court may be explained in a different context, that gives due importance to the structure of the breached treaty. Each party expected mutual benefits from its implementation; however, the benefits could be derived from the realization of a system of joint exploitation to which each party should have contributed. In other words, the renunciation of both parties to their right to unilateral exploitation of water resources was agreed upon only in the framework of the joint system of exploitation to which they gave consent. The failure of one of the parties to perform its obligations could therefore entail only its legal responsibility for this, and would not give title to the other party to exploit unilaterally water resources.

The conclusion of the case illustrates the point that we are now exploring. Proportionality was not assessed by an executive test because the Court failed to accept the unilateral implementation of the treaty as the proper function of the response. The respondent state should have pursued a different aim: that of restoring the normative balance between the parties and asking for compensation.<sup>24</sup> Alterna-

<sup>23</sup> *Gabcikovo-Nagymaros Project*, ICJ Reports (1997) 7.

<sup>24</sup> In his dissenting opinion, but on this point rather concurring with the majority of the Court, Judge Fleischhauer asserted that 'recourse to Variant C was neither automatic nor the only possible reaction of Czechoslovakia to Hungary's violations of the 1977 Treaty. Czechoslovakia would have been entitled to terminate the Treaty. If it did not want to do this, it could, for example, have provided unilaterally for participation of Hungary in the realization of Variant C, possibly in combination with a third party

tively, it could breach an equivalent rule in force between the parties in order to compel Hungary to resume compliance.

These two cases show clearly that the assessment of proportionality must be split into two logical operations that must be kept conceptually distinct. The first regards not so much the content of the measures, but rather the appropriateness of the aim that the state wishes to attain by acting in self-redress. We propose to indicate this by the formula 'external proportionality'. This term is meant to convey the idea that proportionality requires not only that the means chosen are appropriate to the subjective aim of the respondent state, but also, and primarily, that the aim in itself be reasonable and appropriate in the context of the structure of the breached norm and of the legal consequences deriving from the breach. In other words, the essence of proportionality resides in comparing the measures adopted with the proper function of the action of self-redress.

A distinct operation consists in appraising the appropriateness of the content of the measures adopted in relation to the result that they seek to achieve. To this second logical operation we may reserve the term 'internal proportionality'.

## 7 The Channelling Effect of External Proportionality

The requirement of external proportionality basically has the role of channelling the response to internationally wrongful conduct by assessing the appropriateness of the pursued objective. It thus predetermines the general lines along which the response to illicit acts must be conducted. In the spectrum of permissible aims for the action of self-redress, the assessment of internal proportionality takes place, imposing the requirement that the measures taken in response must be appropriate to the particular purpose that they seek to achieve.

Once this conclusion has been reached, we propose to further the analysis of international practice and determine the standards by which international law assesses the appropriateness of countermeasures. This empirical analysis will enable us to categorize, according to their function, the different tools and instruments of self-redress that may be unilaterally employed in consequence of a breach.

The analysis of the practice shows that proportionality may be assessed by four different standards:

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settlement dispute . . . The principle that no state may profit from its own violation of a legal obligation does not condone excessive retaliation . . . A broader interpretation of the principle in question which would disregard the requirement of proportionality, would mean that the right to countermeasures would go further, in respect to disproportionate intersecting violations of a treaty, as it goes under general international law.' On the other hand, see the individual opinions of Judges Vereshchetin, Parra Aranguren and Skubiszewski, who seem to conclude that proportionality can be measured in executive terms. In these opinions, it is stressed that the measure adopted by Slovakia was the only one that could have produced the benefits for Slovakia expected from the breached rule.

- 1 A normative standard takes into account the equivalence in law between breach and response and is employed in the context of measures having the function of re-establishing the normative balance altered by the breach.
- 2 A retributive standard, that takes into account the effect respectively of the breach and the response thereto, is employed in the context of measures aimed at inflicting on the wrongdoer a cost for the injury suffered.
- 3 A coercive standard, that takes primarily into account the exigency to produce compliance, may be employed in the context of measures having the function of inducing the wrongdoer to cease the breach and abide by its obligation.
- 4 Finally, the proportionality of countermeasures can be assessed by an executive standard when the function of countermeasures is to wipe out the adverse effect produced by the breach and to produce unilaterally the benefits expected from the breached rule.

It may be worthwhile to stress that the idea of a well-cut distinction among different tools and forms of self-redress, according to their function, is far-fetched. Beyond a certain level, the different categories of self-redress tend inevitably to overlap. This is a consequence of the negative way in which the rule of proportionality is fashioned. It precludes, rather than imposes, the pursuit of certain objectives for the state that seeks redress. The rule of proportionality can be expected at best to afford a general predetermination of the lines of conduct that states must follow in choosing forms and aims of self-redress.

## 8 Proportionality and Normative Countermeasures

Leaving now the field of generalities, and intruding into the single forms of self-redress, we should start with the concept of normative countermeasures. Normative countermeasures are those aimed at reproducing, at a different level, the legal balance altered by the breach. In this context, proportionality is assessed by the capacity of the response to attain a legal equivalence between breach and response. This function may be properly pursued if the breached rule presents a bilateral structure, such as when the obligations of one party are counterbalanced by the performance of reciprocal or related obligations by the other party. The concept of proportionality tends thus to overlap with that of reciprocity.<sup>25</sup>

<sup>25</sup> Reciprocity as expression of normative proportionality is mentioned in the opinion of the Political Department of the Swiss Confederation of 1928 (partially reproduced in 3 *Répertoire de la pratique suisse de droit international public* (1975) 1785), concerning the lawfulness of the adoption of reciprocity measures notwithstanding the existence of a conventional prohibition to adopt reprisals. The relations between reciprocity and proportionality have been discussed at length in the course of the works of the ILC on codification of state responsibility. It is worth recalling that, at an earlier stage, the ILC agreed to distinguish among reciprocity measures and countermeasures in the strict sense. In the former, reciprocity absorbed the requirement of proportionality. See Articles 8 and 9 of the project on 'The Content, Forms and Degree of International Responsibility; and Implementation (Mise en Oeuvre) of International Responsibility and the Settlement of Disputes', A/CN.4/389, presented by Riphagen, and the commentary thereto, in *Yearbook of the International Law Commission*, vol. II (1994, 1), at 10. See Pisillo Mazzeschi, 'Termination and Suspension of Treaties for Breach in the ILC Works on State

Though the legal nature of reciprocity has been discussed at length in literature, a definite solution has not been reached. Reciprocal response may be adopted with the aim of inducing compliance with the breached obligation and restoring the pre-existing situation, or, as well, with the aim of reproducing at a different level the legal balance between the parties and creating definitively a new normative asset.<sup>26</sup>

Be that as it may, for our aims it is sufficient to show that breach of a bilateral norm may legitimately justify a reciprocal response, irrespective of the subjective aim pursued by the target state. Normative measures have the function of creating a legal balance normatively equivalent to that breach. The situation may thereafter stabilize or evolve and return to the pre-existing legal balance.<sup>27</sup>

In the context of normative measures, the equivalence in law between the wrongful conduct and the response exhausts the assessment of proportionality.<sup>28</sup>

A test of the legal equivalence between breach and response was put forward by India during a dispute concerning a hijacking incident in 1971. Having attributed to Pakistan the hijacking of a civil aircraft, India denied clearance to Pakistani civil aircraft to fly over Indian territory.<sup>29</sup> The damages produced by the response exceeded by far those caused by the alleged breach, since at that time India divided Pakistani territory into two parts. However, India considered that the breach amounted to a general exclusion of Indian aircraft from Pakistani airspace. The response should consequently be considered as a reciprocal withdrawal of rights and privileges, irrespective of the injuries respectively suffered.<sup>30</sup>

The problem with the adoption of a normative standard arose in the *Air Service Agreement* case.<sup>31</sup> In response to an alleged breach by France of the bilateral air service

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Responsibility', in Spinedi and Simma (eds), *The United Nations Codification of State Responsibility* (1987) 794; Malanczuk, 'Zur Repressalie im Entwurf der International Law Commission zur Staatenverantwortlichkeit', 45 *ZaōRV* (1985) 315. This distinction was then deleted by the ILC on consideration of the conceptual unitariness of the legal regime of state responsibility. See Arangio Ruiz, *supra* note 1, para. 31; and 'Fourth Report on State Responsibility', A/CN.4/444/Add. 1, para. 54.

<sup>26</sup> On this question, see Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law', in *ÖZöR* (1970) 5, at 28. On the relation between reciprocity and countermeasures, see Zoller, *supra* note 1, at 19; and Forlati Picchio, *La sanzione nel diritto internazionale* (1974) 71.

<sup>27</sup> The twofold nature of normative proportionality emerges clearly from a diplomatic note issued by Italy in relation to a dispute with Turkey, concerning the interpretation and application of a bilateral convention. In response to an alleged breach of the treaty, presented by the other party as a permissible interpretation of its provisions, Italy reserved the right to adopt provisionally the same conduct, as a form of coercive reprisal, or to accept the interpretation of the other party and change definitely the content of the obligation in force between them. In 1 *La prassi italiana* (1st series, 1970) 158.

<sup>28</sup> For a different conclusion, see Sicilianos, 'The Relationship between Reprisals and Denunciation or Suspension of a Treaty', in 4 *EJIL* (1993) 341.

<sup>29</sup> See ICJ Reports (1972) 45.

<sup>30</sup> See the Memorial submitted by India, ICJ Pleadings, *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* at 36.

<sup>31</sup> See the Memorial submitted by United States, in 6 *Digest of the United States in International Law* (1978) 769: 'a violation of a treaty obligation may give rise to a right in the other party to take nonforcible reprisals, and these reprisals may properly relate to the defaulting party's rights under the treaty. This generally recognized principle serves as one of the most important sanctions behind international law — namely reciprocity.'

agreement in force between the parties, the United States adopted a strictly reciprocal conduct and affirmed that the equivalence in law of the norms respectively involved exhausted the evaluation of proportionality.<sup>32</sup> In response to the objection raised by France, who claimed that the losses entailed by the response exceeded those effectuated by the breach, the United States went on to state that '[t]he services were equivalent in law and hence proportional, though France apparently attaches a subjectively higher degree of importance to its own services'.<sup>33</sup>

The adoption of a normative standard of proportionality is not infrequently present in diplomatic intercourse. It was claimed in disputes concerning air service,<sup>34</sup> taxation,<sup>35</sup> fishing rights,<sup>36</sup> establishment,<sup>37</sup> and transport agreements.<sup>38</sup> The same standard is widely employed in the law of diplomatic relations; in the context of bilateral obligations, a proportional response to a breach is almost indistinguishable from a process of mutual adjustment of the content of the norm between the parties.<sup>39</sup>

A normative standard of proportionality is characteristically applied in the law of international trade, in which it assumes first of all a compensatory feature. Breach of commercial treaties may give rise to suspension of those rights and privileges

<sup>32</sup> '[W]here the sanction to be invoked is a simple reciprocal withdrawal of rights, the rule of proportionality provides an adequate safeguard'; *ibid.*, at 772.

<sup>33</sup> *Ibid.*, at 669. Although affirming that the assessment of proportionality implied an evaluation of quantitative equivalence, the Arbitral Tribunal did not conduct this evaluation. It considered rather that the importance in principle of the breached provision for the United States could compensate the eventual lack of correspondence between the losses respectively suffered (see para. 83 of the decision). In the part devoted to ascertaining the lawfulness of provisional countermeasures, pending a judicial dispute settlement, the Tribunal affirmed that the function of the countermeasures was to 'restore in a negative way the symmetry of the initial position' (see para. 90).

<sup>34</sup> See the measures adopted by the United Kingdom in 1979 in response to an alleged breach by the United States, and the general clause introduced in its legislation in 1990 empowering the Secretary of State to deny access to UK airspace to aircraft belonging to states that have banned UK-registered aircraft from their airspace, in breach of an international agreement (in 61 *BYIL* (1990) 609). According to the Minister for Public Transport: 'When a foreign country, in defiance of international convention, has decided to exclude our aircraft from its air space, it is naturally assumed that that country's aircraft will be excluded from entering our air space.'

<sup>35</sup> On the dispute occurring in 1981 between the United States and United Kingdom, see 53 *BYIL* (1982) 487.

<sup>36</sup> For a case of the less recent practice, see J.B. Moore, *A Digest of International Law*, vol. 1 (1906) 865.

<sup>37</sup> See Simma, 'Termination and Suspension of Treaties: Two Recent Austrian Cases', in 21 *GYIL* (1978) 74; and Pisillo Mazzeschi, *Risoluzione e sospensione dei trattati per inadempimento* (1984) 261.

<sup>38</sup> See 'Chronique des faits internationaux', 74 *RGDIP* (1970) 179; 95 *RGDIP* (1991) 129 and 924.

<sup>39</sup> See Perrenoud, 'Les restrictions à la liberté de déplacement des diplomates', in 24 *RGDIP* (1953) 444; Malintoppi, 'L'elemento della reciprocità nel trattamento delle missioni diplomatiche', in 39 *RDI* (1956) 534; and Barnhoorn, 'Diplomatic Law and Unilateral Remedies', 25 *NYIL* (1994) 39. For a recent case, see 'Chronique des faits internationaux', 96 *RGDIP* (1992) 644. For the interpretation of Article 47(2)(a) of the Vienna Convention, see Briggs, 'Codification Treaties and Provisions on Reciprocity, Non-Discrimination or Retaliation', 56 *AJIL* (1962) 475; and Tanzi, *L'immunità dalla giurisdizione degli agenti diplomatici* (1991) 156.

necessary to impair the economic advantages deriving from the breach.<sup>40</sup> Obligations deriving from instruments of commercial trade are normally not unconditional, but rather are based on the principle of mutual convenience. An assessment of quantitative character, in other words, is necessarily part of the synallagma and hence constitutes a necessary test for gauging the normative equivalence between breach and response.<sup>41</sup>

## 9 Normative Proportionality and *Exceptio Inadimplenti Contractus*

As breach and response concern provisions of the same treaty, the question arises of how to determine the relations between countermeasures and measures affecting the efficacy of the treaty. International customary law, as well as the Vienna Convention on the Law of Treaties, empowers each party to a bilateral treaty to terminate it, in whole or in part, or suspend the efficacy of its provisions in case of breach. Much uncertainty, however, reigns over the legal nature of these measures. The *inadimplenti non est adimplendum* principle may in fact be considered as a rule of the law of treaties as well as a rule embodied in the power to take countermeasures.<sup>42</sup>

Irrespective of its nature, however, we can assume that the principle has the effect of enlarging the sphere of measures at the disposal of the reacting state, that can not only deny the respect owed to reciprocal provisions of a treaty in case of breach, but also take normative measures in strict terms, affecting the legal force of its provisions.

Measures of suspension or termination have the following characteristic effect, that subsequent conduct inconsistent with the treaty can no longer be considered a countermeasure. Once the legal force of the treaty is affected, indeed, this conduct must be considered perfectly lawful. The response to the breach consists properly in terminating or suspending the legal force of the treaty. On the other hand, if the respondent state adopts reciprocal countermeasures, without previously issuing a

<sup>40</sup> In the context of the GATT, this conclusion presupposes, however, that the obligations deriving from the General Agreement are perfectly bilateral, that, in other words, they produce a bundle of reciprocal legal positions. However, recent practice seems to indicate a possible evolution. See *European Communities — Regime for the importation, Sale and Distribution of Bananas*, Report of the Appellate Body, 6 September 1997, AB-1997-3, WT/DS27/AB/R, para. 132, which recognized the power of each party to the agreement to act in order to ascertain its violation. This solution, based on the integrated character of the legal system created by the WTO, does not necessarily warrant the power of each party to adopt countermeasures.

<sup>41</sup> Boisson de Chazournes, *supra* note 1, at 94. In the WTO system, this solution is now explicitly affirmed by Article 22(3) and (4) of the Understanding on Rules and Procedures Governing the Settlement of Disputes. See *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, Decision by the Arbitrators of 9 April 1999, WT/DS/ARB, at para. 6. See the remarks by Rosas, 'Comment to the Decision of the Court of Justice of the EC in Case C-149/96, Portugal v. Council', 37 *CMLR* (2000) 797, at 809.

<sup>42</sup> See Simma, *supra* note 26, at 5; Pisillo Mazzeschi, *supra* note 25; Sicilianos, *supra* note 28, at 341; and Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* (1996).

measure of suspension or termination, its conduct could not affect on its own the legal force of the treaty, but has the effect of conforming the behaviour of the respondent state to the course adopted by the breaching state, in respect of the treaty.

In other words, the existence of a rule on termination or suspension of a treaty in consequence of a breach has the effect of preventing that the adoption of reciprocal countermeasures may automatically alter the legal efficacy of the treaty. This conclusion emerges from the decision of the International Court of Justice in the above-mentioned *Gabcikovo-Nagymaros Project* case.<sup>43</sup>

## 10 Proportionality and Retributive Countermeasures

Proportionality is measured by a test of equivalence between the injurious effect, respectively, of the breach and the response, if the function of countermeasures is that of seeking retribution for the violation that gave rise to them, and inflicting on the wrongdoer a cost for its wrongful conduct.

Countermeasures are likely to assume a retributive nature if the breach concerns unilateral obligations, whose performance is owed irrespective of the existence of a correspondent counter-performance by other parties.<sup>44</sup> Typical unilaterally structured obligations are those concerning the treatment of aliens.

The different structure of the norm brings about a different function of measures of self-redress. The response may not aim at restoring the pre-existing legal balance, since there may possibly be no legal balance to restore. Breach of unilateral obligations calls rather for a retributive action, aimed at putting the cost of the action on the wrongdoer and preventing it from benefiting from its own conduct. Speaking in abstract terms, the function of the response is nonetheless the search for a new balance. However, it is rather factual and negative, since it consists in equating the injurious consequence of the response with that of the breach. The negative consequence of the breach then constitutes the standard for determining the cost that the wrongdoer is called upon to bear as a consequence of its course of action.

The test of proportionality does not take into account the subjective aim pursued by the reacting state. The response may aim at inducing the wrongdoer to comply with its obligation, accept the responsibility and offer reparation. Retribution will then assume a coercive aim. That aim is better pursued through reversible measures, that can be withdrawn if the wrongdoer reverts its course of action and endorses

<sup>43</sup> *Gabcikovo-Nagymaros Project*, ICJ Reports (1997) 7, para. 133. This requirement is reflected, albeit in a one-way direction, in the provisions of the Vienna Convention, which prohibit suspending or terminating the efficacy of a treaty for non-substantial breaches. The concept of substantial breach implies that the normative balance, on which the treaty rests, must have been radically altered in consequence of the breach. A minor breach of a treaty does not entitle the target state to adopt measures affecting the efficacy of the whole treaty. The question remains open as to the existence, in general international law, of a unilateral power to adopt measures having the effect of formally terminating or suspending the legal efficacy of some provisions of the treaty only, in response to a breach concerning separable parts of the same treaty, that is to adopt measures affecting the efficacy of proportionately minor parts of the treaty in consequence of a breach.

<sup>44</sup> See Elagab, *supra* note 7, at 89.



international responsibility. On the other hand, if the response aims uniquely at sanctioning the wrongful conduct, it assumes a purely retributive character.

In the following paragraphs, we will see that, in relation to a special category of breach, the coercive aim may be assumed to be the legal function of the reaction. In general, however, this does not happen. Whatever the subjective aim pursued by the reacting state, proportionality requires that the response be limited to its retributive function.

The opposition between the retributive function of countermeasures and the coercive aim pursued by the reacting state is well expressed in a definition of proportionality contained in the United States Army Pamphlet, issued in 1962:<sup>45</sup> 'This rule of proportionality is not one of strict proportionality because the reprisal will usually be somewhat greater than the initial violation that gave rise to it. However, care must be taken that the extent of the reprisal be measured by some degree of proportionality and not by effectiveness. Disproportionality cannot be justified on the ground that only disproportionality could stop the violations of the other belligerent.'<sup>46</sup> We could hardly find a more precise definition of retributive proportionality.

## 11 The Applicable Standard of Retributive Proportionality

The equivalence between the wrongful conduct and the response implies that two distinct elements must be present; the response must not exceed the normative level of the breach; furthermore, it must produce damages roughly equivalent to those caused by it.<sup>47</sup> The relation of equivalence must then be appreciated on a qualitative as well as on a quantitative level.

The reciprocal character of the response would automatically cope with the need for qualitative equivalence. However, by no means must the relation of equivalence be intended to result in identity as between the response and the breach. This conclusion would have preposterous consequences, since the respondent state would be bound to follow the trespasser in the same course of unlawfulness. There can be good reasons for not doing this. A state may be unwilling to pollute in response to pollution, or to expel aliens in response to unlawful expulsions, and so on.<sup>48</sup> What international law requires is that proportionality be measured by some sort of equivalence to the wrong suffered, and not by the exigency to ensure compliance with the law.

<sup>45</sup> Endorsing a definition in the Decision of the War Crimes Court in the 'Trial of General von Mackensen and General Maelger', in 10 *Whitman Digest* (1968) 320.

<sup>46</sup> Cf. the definition of countermeasures contained in the Manual of the US Army of War on Land (1940, restated in 1956): 'a reprisal . . . need not be identical with the offence which provoked it, although the two acts are generally of a similar nature in order to bring the matter forcibly to the attention of the offender. However, a reprisal must not be excessive nor exceed the degree of violation committed by the enemy.' 10 *Whitman Digest* (1968) 338.

<sup>47</sup> See Article 49 of the Draft Articles approved on the first reading by the ILC and Article 51 of the Draft Articles adopted on second reading by the ILC.

<sup>48</sup> See the third addendum to Crawford, 'Third Report on State Responsibility', *supra* note 1, paras 328–329.

Not infrequently, however, the response concerns the same norm originally breached, a correlative norm, or affects the same goods and values injured by the breach. This pattern evidences the importance acquired by a *prima facie* qualitative correspondence between wrong and response.

The need for qualitative equivalence implies a sort of functional interconnection between the norms respectively involved.<sup>49</sup> It goes without saying that a breach of a commercial treaty may not justify the taking of hostages in response. Through the relation of legal equivalence the international legal order seems to satisfy the need to keep disputes at a manageable level and avoid escalations.

This requirement pervaded the evolutionary process that initially brought about the prohibition of forcible reprisals against 'ordinary' illicit acts, and ultimately the absolute prohibition of use of force.<sup>50</sup> The analysis of this process illustrates the point that we are now exploring. The international community has gradually matured into the idea that the need to avoid threats to peace and security, and maintain conflict at a manageable level, is of such a nature as to impose the banishment of the unilateral recourse to armed force. In a functional analysis, the need to maintain peace and security assumes a structural value, and may not be disposed of by individual states acting for individual purposes.

Proportionality is implied in other norms specifically prohibiting certain measures to be taken in response to internationally wrongful acts. A relation of qualitative proportionality has been codified in the prohibition against disregarding diplomatic immunities in response to 'ordinary' breach,<sup>51</sup> as well as in the prohibition of countermeasures affecting humanitarian interests. In other words, the requirement of proportionality may be expressed once and for all, in the existence of a norm that prohibits taking a certain kind of response against a certain kind of offence. Beyond the existence of general prohibitions, the assessment of functional equivalence between breach and response is quite a complex operation, that may not be conducted in static terms. It is rather an evolutionary process of appreciation, to be conducted on a case-by-case basis, with due consideration for the legal sensitivities of the international community.

Functional equivalence, nevertheless, does not exhaust the assessment of proportionality. International law firmly requires that retributive countermeasures be also quantitatively equivalent with the original breach, as to the injuries respectively suffered. Diplomatic practice affords valuable examples of the care that states

<sup>49</sup> An assessment of qualitative equivalence was conducted in the *Gabcikovo-Nagymaros Project*, ICJ Reports (1997) 7. See para. 85 of the decision.

<sup>50</sup> The prohibition of use of force is expressly reconnected with the exigency of proportionality by Arangio-Ruiz, *supra* note 1, at 32. On the evolution of the legal discipline, see Brownlie, *International Law and the Use of Force by States* (1963) 29; Lamberti Zanardi, *La legittima difesa nel diritto internazionale* (1972) 93; and Grewe, *Epochen der Völkerrechtsgeschichte* (2nd ed., 1988) 733. The importance of the existence of an objective system of ascertainment of the breach is evidenced by the Drago-Porter Convention, under which the use of force by individual states was permitted for implementing a judicial decision. On this point, see the considerations by Alland, *supra* note 1, at 85; Leben, 'Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale', in 28 *AFDI* (1982) 9.

<sup>51</sup> See Tanzi, *supra* note 39, at 155; and Barnhoorn, *supra* note 39, at 43.

normally take in determining the effect of countermeasures in order to offset quantitatively the injurious effect of the breach.<sup>52</sup>

The need for quantitative equivalence was affirmed in the *Air Service Agreement* case of 9 December 1978,<sup>53</sup> as well as in the *Gabcikovo-Nagymaros Project* case,<sup>54</sup> albeit in both cases no rigorous estimation of the respective damages was undertaken.

The need for quantitative equivalence assumes a key role in the practice of forcible reprisals. In the *Naulilaa* case, the Arbitral Tribunal affirmed that '*le mal causé par le second des actes doit être proportionné au mal causé par le premier*'.<sup>55</sup>

The existence of a norm specifically prohibiting the threat or use of force has not completely deprived the assessment of quantitative proportionality of its *raison d'être*. The existence of a certain parallelism between breach and forcible reprisal, as to the means employed or the injuries suffered, does not condone the unlawfulness of the response. Indeed, lack of quantitative proportionality constitutes an additional motive of unlawfulness.<sup>56</sup>

## 12 Some Overall Considerations of the Role of Proportionality in Normative and Retributive Measures

The outcome of the analysis may appear surprising. We have been led to the conclusion that, whatever the aim pursued by the responding state, the legal function of countermeasures is, in general, the search for a balance equivalent, on the

<sup>52</sup> See, for example, the dispute which arose in 1941 between the United States and Italy concerning the lawfulness of a measure of confiscation of some Italian merchant ships. Italy affirmed that 'if the vessels were confiscated Italy might confiscate American property of equivalent value' (in 11 *Whitman Digest* 324).

<sup>53</sup> *Case Concerning the Air Service Agreement of 27 March 1946 Between the United States of America and France*, 11 July 1978, 18 RIAA 414, para. 83 of the decision.

<sup>54</sup> *Gabcikovo-Nagymaros Project*, ICJ Reports (1997) 7, para. 85 of the decision. It is worth mentioning that this formula is employed in Article 51 of the Draft Articles on State Responsibility adopted on second reading by the ILC.

<sup>55</sup> *Case of Naulilaa*, 31 July 1928, 2 RIAA 1011, at 1028.

<sup>56</sup> A particularly clear example comes from the appreciation by France of the lawfulness of the action undertaken by Israel in Gaza in 1955: 'Il n'y a pas de commune mesure, ni en droit ni en fait, entre les actes de maraudage, de pillage, ou d'attaque armée, commis par quelques individus isolés, au travers de la ligne de démarcation — même si ces actes bénéficient d'une complicité tacite de la part d'autorités égyptiennes subalternes — et une action collective de représailles, telle que celle qui a été déclenchée dans la nuit du 28 février 1955 . . . Il n'y a pas de commune mesure entre le quatre Israéliens tués au cours de ces incidents de frontière, du novembre 1954 à février 1955, et les 38 victimes égyptiennes faites par l'attaque israélienne sur Gaza' (in *Security Council Official Records* 749). See the position of the United States regarding the Israeli attack on Tiberiade in 1955: 'Israel's deed is so out of proportion to the provocation that it cannot be accurately described as a retaliatory raid' (*Security Council Official Records* 710, para. 58). And on the Beirut Airport in 1968: 'In magnitude it is entirely disproportionate to the act that preceded it. It is disproportionate in two ways: first, on the degree of destruction involved; and secondly, in a more fundamental way, in the difference between the acts of two individual terrorists and those of a sizeable military force operating openly and directly under governmental orders' (*Security Council Official Records* 1460, para. 73). The response was qualified as fully proportional by Israel, in consideration of the risk involved and of the dissuasive aim of the action (in *Security Council Official Records* 1461, para. 121).

normative or factual plane, with that altered by the breach. Although conferring on individual states the power to adopt countermeasures, the international legal order does not give states an unconditional power of enforcement.

We are thus presented with a situation worthy of being considered also in a theoretical perspective. While entrusting to a state the power to protect its legal rights and interests by individually responding to an international breach, the exercise of that power contains inherent limitations in its nature and content.

This conclusion stresses the imperfections of and gaps in the system of implementation put at the disposal of individual states by international law.<sup>57</sup> The right of the victimized state to secure respect for its legal rights and interests is seriously thwarted if the response to the wrongful conduct is limited on the basis of its needing to be equivalent to the wrong.

On the other hand, this solution is more in accordance with the decentralized structure of the international legal order, in which the assessment of a breach and the administering of the response is entrusted to each injured state. By referring to objective standards for assessing the lawfulness of the response, proportionality also has the role of strengthening the rule of law in the system of state responsibility.

The effect on the theoretical plane is by no means negligible. The assumption that the response to a breach cannot be commensurate to the need to secure the implementation of the breached obligation implies a certain loss of effectiveness (normativity) of the international legal system. This conclusion leads us towards a relativistic perspective, in which countermeasures are not considered statically, as an instrumental tool having the purpose of securing the implementation of the law. Rather, they constitute part of a dynamic legal relation, a zero-sum game, whose outcome may be the re-establishment of the situation *quo ante*, as well the achievement of a balance of rights and interests equivalent to that altered by the breach.<sup>58</sup>

<sup>57</sup> The question is well expressed by the opinion appended by Judge Ad Hoc Skubiszewski to the decision of the ICJ in the case concerning the *Gabcikovo-Nagymaros Project*: 'A State that concluded a treaty with another State providing for the execution of a project like Gabcikovo-Nagymaros cannot, when the project is near completion, simply say that all should be cancelled and the other remaining problem is compensation.'

<sup>58</sup> In the context of regimes that exactly predetermine the negative consequences that the wrongdoer is called upon to bear as a consequence of its action, the question arises of how to determine the legal nature of the reaction to wrongful acts. The conceptualization of responsibility as a secondary legal system, aimed at producing compliance with the primary rules, is seriously impaired if the response is rather aimed at determining the conditions under which a certain subject may maintain a deviating conduct. In other words, if the wrong, instead of being considered as a deviating act, is considered and regulated by the law as a normal course of conduct, it seems unavoidable to conclude that wrongful conduct and response thereto constitute elements of a legal process that may contribute to the determination of the content of the primary rule.

### 13 Proportionality in the Context of Coercive Countermeasures

The test of proportionality can be conducted by reference to a coercive standard in the exceptional cases in which the function of the response is that of inducing the wrongdoer to reverse the course of its action and abide by its obligation.

Differences with the cases examined above are at hand. Proportionality requires nonetheless that a relation be established between the breach and the response. However, it is not a relation of equivalence, but rather a relation of appropriateness between the wrongful conduct and the need to restore the pre-existing legal balance.

We are thus induced to ask in which cases international law allows for individual states to undertake coercive actions. The analysis of the practice allows us to conclude that this may be done in order to enforce legal obligations owed to the international community and established for the protection of an essential interest. In other words, while the protection of individual interests is limited by the retributive function of countermeasures, the respect of norms protecting essential interests of the international community may be enforced through measures objectively aimed at imposing cessation from the breach and reinstating performance.<sup>59</sup>

Serious breaches of interests of the community as a whole are commonly referred to as international crimes. Although this traditional formula may echo the existence of a punitive intent, in the practice of individual responses to serious breaches of collective interests, such as genocide, apartheid, aggression, massive violations of human rights, countermeasures have been mainly inspired by a coercive aim. Proportionality has therefore been intended as a relation of appropriateness of the measures to attain the aim of inducing the wrongdoer to cease the wrongful conduct and resume compliance with its obligation.<sup>60</sup>

Over the decades, coercive measures have been taken, albeit in distinct situations, by the main components of the international community. This observation is methodologically important, since it permits us to conclude that the international community, in its entirety, admits the lawfulness of unilateral measures inspired by

<sup>59</sup> See Gaja, 'Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts', in Weiler, Cassese and Spinedi (eds), *International Crimes of States* (1989) 151; Frowein, 'Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung', in *Völkerrecht als Rechtsordnung — Internationale Gerichtsbarkeit — Menschenrechte. Festschrift für Hermann Mosler* (1983) 246; Picone, 'Obblighi reciproci ed obblighi erga omnes degli Stati nel campo della protezione internazionale dell'ambiente marino dall'inquinamento', in V. Starace (ed.), *Diritto internazionale e protezione dell'ambiente marino* (1983) 15; Combacau, 'Aspects nouveaux de la responsabilité: deux approches contradictoires?', in *RDILC* (1986) 187, at 202; Charney, 'Third State Remedies in International Law', in *10 MJIL* (1989) 57; and Simma, 'Bilateralism and Community Interest in the Law of International Responsibility', in Dinstein and Tabory (eds), *International Law in a Time of Perplexity. Essays in Honour of Shabtai Rosenne* (1989) 821.

<sup>60</sup> International practice is well described by Sicilianos, *supra* note 1, at 155; and Gianelli, *supra* note 19, at 730.

the aim of imposing the cessation of conduct that disregards principles and values considered as fundamental by the community as a whole.<sup>61</sup>

## 14 Content and Standards of Coercive Proportionality

In the context of coercive measures, the assessment of proportionality is not connected with the extrinsic elements of the breach. The response may entail damages exceeding those produced by the breach. The interest of the international legal order in securing compliance is such that it admits that proportionality of the response is tested by what appears reasonably necessary to induce the wrongdoer to cease its course of action.

Approaching the topic more closely, we may note that coercive forms of self-redress are characteristically asymmetrical. The response is disproportionate to the quantitative element, since it exceeds by far the magnitude of the damages entailed by the breach. On the other hand, it is disproportionate to the qualitative element, since it concerns obligations ranking at an objectively lower level of importance than those breached. The coercive reaction has the effect of downgrading the qualitative, and upgrading the quantitative level of the response.

This feature derives from the particular structure and character of the interests protected by the breached rule. The response does not aim at creating a balance between counterpart obligations, but rather is aimed at producing compliance with the law.

The wrongdoer is nevertheless entitled to legal protection as far as the response, though aimed at protecting certain fundamental interests, produces consequences inconsistent with that aim. It goes without saying that the reaction to a gross violation of human rights may not justify economic sanctions to such an extent as to deprive the people of the necessary means of survival.<sup>62</sup> The response to the breach, far from producing compliance, would in its turn worsen the situation of the people entitled to legal protection.

In relation to serious breaches of essential collective interests, the relevance of the pursued aim is such that it justifies a purist approach to coercion. However, in this line of reasoning, there is a case for admitting milder forms of coercion for the protection of correlatively minor offences. While the response is tailored to the need for constraint,

<sup>61</sup> See the decision of the International Court of Justice in the *Nicaragua* case, ICJ Reports (1986) 13, paras 210 and 211; on this question, see Simma, *supra* note 59, at 821. This conclusion is without prejudice to the existence of subsystems established by treaties for the protection of goods or values of collective interests that determine a special regime of responsibility. See Simma, 'Fragen des zwischenstaatlichen Durchsetzung vertraglich vereinbarter Menschenrechte', in *Staatsrecht-Völkerrecht-Europarecht. Festschrift für Hans-Jürgen-Schlochauer* (1981) 635; and Frowein, *supra* note 59, at 254.

<sup>62</sup> See the Advisory Opinion of the ICJ in the *Legal Consequences for States of the Continuing Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 21 June 1971, ICJ Reports (1971) 16, paras 125 and 127. See moreover para. 268 of the decision of the ICJ in the *Nicaragua* case, ICJ Reports (1986) 13.

the necessity nonetheless arises of keeping the intensity or the effect of the response to a correlatively lesser level.

## 15 Proportionality and Executive Countermeasures

Finally, attention must be paid to executive countermeasures. This metaphorical term is employed to allude to measures of self-help, aimed at directly securing the implementation of the breached obligation, without the cooperation of the wrongdoer. To this end, the respondent state may substitute the wrongdoer in the performance of the breached obligation, or produce by itself, through the breach of a different rule, the beneficial effect expected from its performance.

In the context of executive countermeasures, the assessment of proportionality implies that the means employed are necessary for securing the protection afforded by the breached rule, and their injurious effects do not overwhelm the benefits expected. This conclusion is tantamount to saying that the respect owed to a certain obligation may be obtained through a process of legal substitution. We are thus at the extreme border of the instrumental conception of countermeasures. Understandably, international law looks at this hypothesis with caution.

Executive responses implying the use of force are ruled out by the prohibition of forcible reprisals. As seen above, at the origin of the prohibition of the use of force there is the consideration that the interest of preserving international peace and security impinges on the interest of the victimized state to obtain the performance of its rights, a consideration implying a balance between competing interests.<sup>63</sup> This lesson can be drawn from the conclusion of the *Corfu Channel* case. In this case, the need to maintain the unimpeded use of sea-lanes was not considered by the International Court of Justice as sufficient to justify forcible intervention in the territorial water of another state.<sup>64</sup>

More generally, international law rules out measures of self-help which imply a violation of the territorial sovereignty of other states.<sup>65</sup>

Disputes about the legitimacy of forcible intervention not infrequently concern the choice of the standard for assessing proportionality. The practice of humanitarian intervention affords valuable examples. Claim of lawfulness may rest on two grounds: the necessity of the action to avoid major damage to humanitarian interests, such as the life and personal integrity of individuals; and the objectively minor character of

<sup>63</sup> For the practice of intervention in the nineteenth century, cf. 6 *Répertoire de la pratique française en matière de droit international public* (1969) 23.

<sup>64</sup> The Court affirmed that '[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations'. An analogous question arises as to the employment of an executive standard for measuring the proportionality of responses implying use of force on ships or aircraft in international spaces. See Borkowski, 'Use of Force: Interception of Aircraft', in 26 *HILJ* (1986) 761.

<sup>65</sup> See the Explanatory Report presented by Argentina to the Security Council (Doc. S/4336) in relation to the forcible abduction of Eichmann in 1960. An interesting case, in which extraterritorial action was undertaken for remedying the failure of the rule that requires that a neutral state may not permit their territorial waters to be used by belligerents, is the *Altmark* case. See 11 *Whitman Digest* 273.

the breach to the territorial sovereignty, entailed by the response. Some authors share the idea that the right to territorial sovereignty must bow to overwhelming humanitarian needs, if the action, though conducted without the consent of the territorial state, does not constitute a threat to its integrity and independence.<sup>66</sup>

This assumption may be opposed on the grounds that international law does not confer upon individual states authority for imposing the cessation of wrongful conduct through measures of self-help carried out abroad.<sup>67</sup> The argument that those measures constituted the mildest means of preventing humanitarian damages, without seriously jeopardizing the territorial sovereignty of the receiving state, does not appear conclusive. It fails to demonstrate what appears to be a logical pre-condition: that in the balance of interests underlying the principle of proportionality, the need for cessation is impinged on by the need to avoid interference in the territorial sovereignty of other states and to maintain conflicts at a manageable level. In other words, the high value given today to the principle of sovereignty excludes the possibility that a state may assess the proportionality of its action in the light of what appears reasonably necessary for securing, extraterritorially, the performance of the law.<sup>68</sup>

On the other hand, measures of self-help can constitute a legitimate form of redress if carried out on the territory of the respondent state. A state is bound to take executive, rather than retributive or coercive, measures, if it is able to produce directly cessation through a measure only having effect on its own territory. The adoption of an executive standard thus serves the aim of narrowing the power of the reacting state in choosing the means of redress.

This conclusion is upheld by different patterns in state practice. In the context of forcible measures employed against unauthorized intrusion into areas under state jurisdiction proportionality requires that the action is necessary to put an end to the intrusion and appropriate to the threat posed thereby. In the context of unilateral remedies against abuses of diplomatic law, proportionality requires that the remedy is necessary for terminating the abuse and results in balancing the need to safeguard the sovereignty of the receiving state with the need to preserve the function of the diplomatic mission.<sup>69</sup>

A test of executive proportionality applies to the measures aimed at providing the

<sup>66</sup> This idea was expressed clearly by the United States in relation to the Israeli raid in Entebbe: 'the right . . . is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury' (see the 'Memorandum of the State Department Legal', in 73 *AJIL* (1979) 122). Analogously, the United States claimed the legitimacy of the intervention in Iran in 1979 to rescue the diplomatic and consular staff detained by or with the complicity of Iranian authorities (see *Department of State Bulletin*, June 1980, at 38).

<sup>67</sup> Western countries affirmed the unlawfulness of the Vietnamese intervention in Cambodia in 1978, aimed at putting an end to gross violations of human rights probably amounting to genocide (see *Security Council Official Records* 2108–2111). See the criticism expressed by many states of the Israeli raid in Entebbe in 1976 (see *Security Council Official Records* 1942).

<sup>68</sup> For a different conclusion, see Dinstein, *War, Aggression and Self-Defence* (2nd ed., 1995) 244.

<sup>69</sup> Cf. the text above under the heading: 'Proportionality and the Function of Countermeasures: A Reappraisal'.



means for obtaining the compensation owed in consequence of a breach. The state, to which an obligation of compensation is owed, may take executive measures aimed at directly securing the means for attaining monetary compensation for the injuries suffered,<sup>70</sup> provided that the manner in which the response materializes is proportionate to the initial violation from which the claim is derived.

## 16 Proportionality and Individual Responses to Serious Offences Against Collective Interests

The methodological approach adopted for our analysis, consisting of assessing proportionality in relation to the function fulfilled by the response, may shed some light on the problem of determining the legitimacy of unilateral reactions to serious breaches of obligations protecting an essential collective interest. We have given some attention to this topic, albeit only in passing. It may be worth considering it in more general terms.

The problem of the unilateral response to wrongful conduct that affects essential interests of the international community appears to be a ‘Gordian knot’ in the discipline of state responsibility. It is well known that international law has gradually accepted the idea that collective values and interests exist, respect for them being owed to the international community as a whole. Serious uncertainties, however, reign over the consequences of their breach. Although it is accepted that international responsibility may not assume a criminal character, it is still open to debate whether states may react individually, and what the function of their response should be. On the one hand, the collective nature of the interests and values concerned does not seem entirely consistent with the aim of individual response to ‘ordinary’ breaches, conceived as a means of protection of rights and interests of the target state only. In modern legal thought, the task of protecting collective interests falls within the competence of institutional actors, and is kept strictly separate from that of individual subjects. Entrusting the protection of collective interests to individual actors would be tantamount to affirming that individual states exercise, on a decentralized basis, an institutional function.

On the other hand, it is well known that international law has not developed institutional machinery capable of ascertaining and repressing, efficaciously and impartially, offences to collective values. Institutional responses to serious breaches to essential collective interests may be filtered through the competence of the Security Council of the UN, whose task is, however, not so much to ascertain and repress international breaches as to maintain international peace and security.

<sup>70</sup> See, for example, the above-mentioned Memorandum of the Department of State Legal Adviser of 13 October 1983, 22 ILM (1983) 1406, and the Declaration of the President of the United States, in *Weekly Compendium of Presidential Documents*, 14 April 1980, at 611–612. For the lawfulness of measures of seizures, see *Attorney-General of the United States v. NV Bank voor Handel en Scheepvaart*, Supreme Court of the Netherlands, 17 October 1969, 74 ILR 150; *Sardino v. Federal Reserve Bank of New York, United States* (US Court of Appeals, 2nd Cir.), 22 April 1966, 42 ILR 198; *Digest of US Practice* (1980) 722.

The distinction, drawn in the previous paragraphs, between countermeasures having respectively coercive and executive functions may, however, contribute significantly to clarifying where the line lies that divides individual and institutional competence in protecting international collective interests. There are reasons to conclude that individual states may react to breaches of this kind through responses having a coercive function. On the other hand, responses having executive character fall into the area of the exclusive competence of institutional actors.

The analysis in the previous paragraphs allows us to conclude that international law, as it stands today, has not developed a centralized function for the protection of collective interests. Yet, it is reasonable to affirm that the attribution to the UN organs of the exclusive power to use force in international relations has brought about a centralization of the executive function. The UN organs have, in this perspective, the exclusive competence to forcibly put an end to serious breaches of essential collective interests that offend the legal conscience of the international community and thus constitute a threat to peaceful coexistence.

On the other hand, international law has not yet centralized the competence to adopt coercive means of response to grave breaches of collective interests. Individual states retain their competence, shared with the competence attributed to institutional actors and, in particular, to the UN. They can therefore ascertain, *vis-à-vis* other states, the existence of a grave breach of collective interests, and act individually with measures aimed at inducing the wrongdoer to fulfil its obligations. The legal basis of this competence could rest on two different principles: the first emphasizes the *erga omnes* structure of the obligation with the consequence that each state, while reacting, pursues its private interest. In a different conceptual perspective, individual responses constitute the decentralized forms of protection of a structurally collective interest. States are thus acting as organs of the international community, entrusted with the exercise of a function of public character. While the second option appears preferable, since it presupposes a more organic vision of the international legal order, we should admit that international law does not afford sufficient evidence for definitively settling the matter.<sup>71</sup>

We may conclude that the question of identifying the actors entitled to ascertain and repress international crimes as such is conceptually meaningless, since inter-

<sup>71</sup> This methodological approach corresponds to the systemic features of the international legal order, in which actors and proceedings for the fulfilment of collective interests are generally lacking. Moreover, the attribution of the power of public concern to institutional actors has not necessarily brought about the loss of a concurring power by individual states. See, on these questions, Frowein, 'Collective Enforcement of International Obligations', in 47 *ZaöRV* (1987) 67; Simma, 'Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations Erga Omnes', in Delbruck (ed.), *The Future of International Law Enforcement: New Scenarios — New Law?* (1993) 125; Gaja, 'Réflexions sur le rôle du Conseil de Sécurité dans le nouveau ordre mondial. A propos des rapports entre maintien de la paix et crimes internationaux des États', in 97 *RGDIP* (1993) 297; Picone, 'Interventi delle Nazioni Unite e obblighi erga omnes', in Picone (ed.), *Interventi delle Nazioni Unite e diritto internazionale* (1995) 517; Conforti, *Diritto internazionale* (5th ed., 1997) 404; Annacker, 'The Legal Regime of Erga Omnes Obligations in International Law', in 46 *AJPIL* (1994) 156; De Hoogh, *Obligations Erga Omnes and International Crimes* (1996) 212.

national law has not as yet developed the function of repression of international crimes. Rather, the question is one of substance, and concerns the identification of the measures to be adopted in response to a serious breach of essential collective interests; while individual states may activate a coercive function, the executive function remains in the hands of institutional actors.

This conclusion is fully consistent with the practice of individual coercive responses referred to above. Moreover, it is consistent with the logic of the international system and is also practically efficient. Should international law rule out an individual response of a coercive character, the practical consequence would be that serious offences to collective interests could remain unprocessed.<sup>72</sup>

On the other hand, the executive function calls, by its very nature, for an exclusive competence of centralized organs, due to the grave danger of abuses inherent in the international use of force.<sup>73</sup> Although a danger of abuse is inherent even in the exercise of coercive power, a form of control of the exercise of that power, by the international community, is not completely lacking. Since coercion, to be effective, needs to be agreed upon and applied by the main components of the international community, the abuse of coercive power by individual states, unsupported by the international community, may not have irreparable consequences. On the theoretical plane, this means that the international community has not, in its entirety, ascertained the existence of a serious breach of an essential interest or has preferred to have recourse to milder means of constraint.

## 17 Conclusion

Originally conceived as a primitive tool for limiting the right to private revenge, proportionality acquired, in the course of the twentieth century, the role of establishing a functional connection between the aims and the means of action of self-redress. The control of proportionality may thus be considered conceptually analogous to other forms of functional control, limiting the exercise of powers and competences conferred by international law to individual states for the pursuit of specified ends.<sup>74</sup>

In the specific context of the law of state responsibility, proportionality accomplishes a twofold function. On the one hand, it allows the distinguishing among various forms and tools of reaction to wrongful acts, and limits the power of the

<sup>72</sup> The co-existence of centralized and decentralized competence for adopting non-forcible measures of constraint poses the question of their coordination. See Combacau, *Le pouvoir de sanction de l'ONU* (1974).

<sup>73</sup> It is certainly improper to qualify the competence of the Security Council under Chapter VII of the UN Charter as a form of centralization of the executive function. As is well known, the exercise of the powers of the Security Council presupposes the existence of a threat to international peace and security. However, the enlargement of this premise rests on the consideration that grave breaches of collective interests put into danger the foundations of peaceful co-existence and amount, in every case, to a threat to international peace.

<sup>74</sup> See Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (2000).

reacting state to determine the objective of the response. On the other hand, it limits the power to choose the measures of redress, and requires that the response be appropriate to the particular aim sought and not disproportionate to the offence that provoked it.

In spite of its inherent indeterminacy, the rule of proportionality has thus acquired, in the context of state responsibility, a particularly high degree of sophistication. It represents a key element for controlling the exercise of the decentralized power conferred on states to react individually to internationally wrongful acts.