АКТУАЛЬНЫЕ ВОПРОСЫ МЕЖДУНАРОДНОГО ПРАВА

INTERNATIONAL RESPONSIBILITY OF STATES AND THE QUESTIONS OF COUNTERMEASURES

Mohsen Matour

The Department of International Law
Peoples' Friendship University of Russia
6, Miklukho-Maklaya st., Moscow, Russia, 117198

The Analyze of the following key questions dealing with International responsibility of states and the status of countermeasures in this article is the main connotation, such as: exceptions to the citation of countermeasure and termination of treaty, plurality of damaged government, plurality of responsive government, citation by non-damaged governments, responsibility resulted from violation of ergaomnes, appealing UN Mechanisms, countermeasures and execution guarantee in international law system, commitments resulted from international treaties, status of coordination and relationship between countermeasure and termination of treaty as a result of principal violation of the treaty, citation right of countermeasure and termination of treaty for misfeasor government, governments with citation rights of countermeasure and termination of treaty as a result of principal violation, time realm of countermeasure and termination of treaty as a result of principal violation, status of suitability principle in the citation of countermeasure and termination of treaty, citing international responsibility of government.

Key words: international law, international responsibility of states, international law commission, countermeasures.

In contemporary era, one of the significant issues of the international law is the states' responsibility; because the issue has close relationship with the other areas of international law and in particular the discussion of international security. Governments as the primary and conventional subordinates of international law own extensive authorities for each other and the other subordinates; classical international law provided most of the governments' interests. The situation led contemporary international law to enter the government into the international law era and expand it to make up for the losers [16. P. 12]. Indeed, the international accountability of the governments is a most emanated from the reality that — committing internationally wrongful acts and even via by doing its international duty — the government makes damages. In the forthcoming, we clarify the concept of government's responsibility and discuss how and why of assigning the government as responsible.

*1. Citing International Responsibility of Government:*Regarding the government's international responsibility, an important discussion is the matter of executing responsibility; namely, who or which entity can claim legal effects and — consequences of the government's responsibility and in case of non-realization of the ef-

fects — can resort countermeasures against the responsible government. In classical international law, since international commitments were just considered as mutual, responsibility relation was just made between damaged government and wrongdoer government and as a result the damaged government could claim the effects of the responsibility from the responsible government and resort countermeasures against it. Yet, considering the evolutions occurred in the international society and the effect of socialism on the international legal system including the emergence of *jus cognes* of general international law and *ergaomnes* [14. P. 7] this question is posed that which government will be responsible for implementing and administering the responsibility, in case of violating these commitments?

Plurality of Damaged Government: Article 46 of the government responsibility plan, the situation of plurality of the damaged government cited in article 42 is addressed. The article puts this principle that where there are different damaged governments each can separately cite the responsibility resulted from international wrongful act [21].

Plurality of Responsive Government: Article 47 of the government responsibility plan 2001 puts it that:Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. Article 47 states this general principle that in such cases each government is its own assignable responsible and responsibility will not be reduced by the plurality of responsible governments for one act.

Citation by Non-damaged Governments: In final text of government's responsibility of article 48, International Law Commission 2001 put that based on the article the governments can cite the responsibility related to breaching the commitments for international society in general or by a group of governments (even if they did not damage at all). Doing so, the Commission made an important innovation. Article 48 reflects new advances in international law and gradual expansion in international law [12. P. 90].

Citation of Non-damaged Governments regarding the Government's Responsibility resulted from Violation of ErgaOmnes: Based on paragraph 2 of article 42, a government which has responsibility citation right based on paragraph 1 can claim from the responsible government. Although international law has developed the concept of public interests, it has to resolve the resulting issue: who is qualified to pursue the claims based on public interests and what kind of damages can be claimed in this regard? Edition of the text was very clear in this regard. Accordingly, the payoff had to be made in accordance with damaged government. Only damaged government had the right to plea the restoration of the situation, damage and satisfaction from the wrongdoer government [15. P. 30]. On the other hand, the concept of damaged government was also developed; yet in plan 2001 while citation is similar based on articles 42 and 48, the results are not the same. Paying off the damages and countermeasures about governments which take action based on article 48 are different from damaged governments doing based on article 42. Paragraph 2 of article 48 specifies a set of claims that non-damaged governments can make. The list provided in this paragraph is complete and responsibility citation based on article 48 creates a limited degree of rights comparing to damaged governments rights based on article 42. Specially, the focus of action by a government (based on article 48) is probably this that

such governments cannot claim damages for themselves because they had no material loss. For example, in Wimbledon issue (P.C.I.J, 1923, Series A, No.1.), Japan which had no economic interest in marine journey just claimed a notice but France which was damaged claimed damage and took a payoff injunction. In Southwest Africa issue, Ethiopia and Liberia just claimed notices regarding legal enactment of the claim.In that issue, the ICJ (in 1971) implied that the damaged was the people, that is, the people of Southwest Africa. Based on paragraph 2(a), each government implied in article 48 has the right to plea the stoppage of unlawful act and claim for the provision and guaranteeing the non-repetition based on article 33, if necessary [6]. In cases where a beneficiary government cites the responsibility based on article 48, but just claims the stoppage or non-repetition, it is not easy to distinguish it from objection. In other words, in case of the absence of any type of demand or extra action, is it possible to consider what is done as a claim? Regarding the definition of citation in article 42, the response might be negative, because citation requires special claims from the part of the government like payoff for violation, or special action like registering the bill in an authorized international court. Claiming damage based on paragraph 2(b) is not for good of the non-damaged government or the beneficiaries of the violated commitment. It is not clear that who beneficiaries are and the commission interpretation do not also explain any in this regard. For instance, the beneficiary can include individuals interesting from human rights treaties. According to the commission itself, paragraph 2(b) is a progressive expansion and justified this way that it provides protective policies (considering society's interests or public interests) which are at risk.The citing government claiming something more than declared order and stoppage is asked to clarify if it does for the damaged party's good or not. Where the damaged party is the government, its governance can validly give representativeness of those interests.The possibility that a beneficiary government claims payoff from the behalf of a damaged government which has not cited the responsibility has faced different responses by the governments. England has put it that the damaged government's avoidance must be considered as ignorance which removes the responsibility citation rights of the other governments [10. P. 64]. On the other hand, Netherland and Korea both have argued that where respective commitment has generally been made for international society, any type of ignorance by the damaged government just removes the claim of this government, but — based on article 48 — it has not effect on the other governments' right.

2. Organized Response to Intensive Violation of International law Principle Rules; Appealing UN Mechanisms: Roberto Ago special reporter of the UN,insisted on this conclusion that committing such crimes results in attacking international society and response to such violation must be under control of the basis of this international society. Implying the dangers might be resulted from individual responsiveness right by the government to ergaomnes, he believed that: «a society like international society trying for a more regulated organization even if it is a primary organization, it must move to a system where exclusive responsibility is assigned to international organs other than the governments; first, determining the existence of a commitment breach with major importance for international society in general, and second, deci-

sion making regarding policies must be taken and the way to implement them. Based on UN Charter, these responsibilities are assigned to authorized pillars of the organization»[1.P.43].Separation of Roberto Ago from International Law Commission prevented him from drawing more accurate picture of the major points of international crimes responsibility system. It was Willem Riphagenwho took the responsibility for the first time. Very quickly, he made a connection between intensive responsibility system considered by International Law Commission and some mechanisms created by UN charter for maintaining international peace and security. The connection was crystal clear in the issue of violation. He believed that regarding the first example of such crimes (article 19(3) of Roberto Ago's draft) namely sever reversion of violation ban, the international society must pay attention to UN Charter including the authorities and functions of authorized pillars of UN and recognized right authority in article 51 of the Charter.But according to Willem Riphagen it does not mean that intervention of the UN pillars is limited to this set of crimes. Other international crimes can create a situation where UN Charter regulations related to international peace and security can be implemented in one way of another. In all cited cases of international crimes in article 19(paragraph3) of draft, UN is involved in the other way. The initiative seems at least a bit supported by UN pillars process and in particular Security Council. Several intellectuals have implied the responses of Security Council to past conditions where nations' rights in determining the fate by racist regimes (in South Rhodesia and South Africa) were jeopardized [11. P. 64]. Policies has taken in recent years by Security Council in encountering land occupation (in the issue of Iraq attack to Kuwait) in response to massacre (in ex-Yugoslavia and Ruanda) and in response to international terrorism acts (Lacorbi bombing) has also been considered.In Persian Gulf War, Security Council paid special attention to issues resulted from Iraq actions through creating advanced payoff mechanism in form of payoff bank and committee [13. P. 287–292].

Countermeasures and Execution Guarantee in International law System: In decentralized international law system principally different from domestic law systems regarding implementation guarantee this question is posed that can the countermeasure be considered as implementation guarantee in such system? but there is a criticism of countermeasures that it is more accessible to powerful governments which is in conflict with equity principle. It has a judgment of remote issue countermeasures. Target government can judge that the victim is a wrong act of countermeasure and takes action. So, the conflict gets worse with the expansion of the actions. An example of this issue occurred in 1980s when small islands of Pacific Ocean detained USA fishing ship for illegal fishing. The detention was done for previous violation. The USA believed that her citizens had the right to fish and took countermeasures and implemented economic execution guarantees against the islands [3. P. 33]. To solve the issue, the problem can be viewed from two discussions of direct and indirect control. All the arguments in this regard are resulted from the emergence of proponents and opponents for countermeasures for general interests. Proponents generally state that no doubt countermeasures are taken in response to the violation affecting the interests of directly damaged governments [23]. However, despite caution words of the oppo-

nents, some agreeable arguments can be mentioned regarding countermeasures for general interests; first, the effects of international law violation are not limited to a government, second, in an interdependent world the interests do not always follow political lines. Although no government is directly damaged, it is possible that it gains no direct interests from the wellbeing of the affected government. Opponents of countermeasures have criticized them in some points among which it is argued that regarding the disinclination of the governments to get obligated to accurate definitions of concepts like ergaomnes, sever violations, or basic interests of the international society which themselves might lead to such action in future and the inclination of these governments to flexible terminology allowing them to suggest about their national interests, there is a risk of the governments' abuse of these countermeasures. To sum up the discussion, we address International Court of Justice legal process:

Barcelona Traction case: many proponents of countermeasure right suppose that Barcelona traction not only supports their position but also resolve the problem peremptory. Since all governments have legal interest regarding meeting general interests, based on the right they resort countermeasure in response to violations. For example, GerhardErasmus puts it that: «public right of resorting countermeasure is a logical result of ICJ Barcelona traction order arrangements» [16. P. 133–134].

Namibia Issue and Diplomatic and Consulate Staff of America in Tehran: about Namibia case, sometimes the emphasis is on this finding of the ICJ that: «supervision of Southwest Africa was done with the effect for everyone and non-member countries of the organization had to act based on respective resolution». Considering different effects of for everyone the interpretation is rejected. The term for everyone is used in Namibia consultation issue in its conventional concept and implies that objective effects of legal acts (except credit for everyone) are implemented for treaty parties. So, declaring the effect for everyone by ICJ, they tried to implement relevant resolutions toward third (non-member) governments. There is little evidence that the ICJ intends to give any rights to these governments and the interpretation of the ICJ idea in the issue as the encouragement of countermeasures against South Africa seems impossible. Also, ICJ order in the issue of Diplomatic and Consulate Staff of America in Tehran provides little reason — unlike what was imagined. In fact, in that order, the ICJ drew the attention of the whole international society to the considerable loss which can be resulted from the events like this and emphasized that Iran behavior has threatened the basis of the rights made throughout the centuries by human. In Namibia case, Nicaragua government and in its bill to International Court of Justice claimed that US had formed a group of armed hireling as «contras» in Nicaragua and financed, trained, armed, equipped and organized and led them in war operation. Nicaragua government in fact claimed that contra forces had fought Nicaragua governance as US organ and as a result USA was in charge of their committed acts. The ICJ faced with conditions that contra forces were not considered US organ *de jure* and then examined the issue whether it is possible to consider contra rebels as the US organ *de facto* and so their responsibility in violating philanthropic international law in US charge. To respond the question, ICJ reviewed the existing cases and concluded that it was and the forces depended on the USA for general control to great extent but it

does not mean that USA has also been involved in violating human right and philanthropic rights by contra forces: on the other hand, according to ICJ, contra forces could take such actions without the USA control, as well. Then, the ICJ implies and cites «*effective control*» which legal responsibility of the US can be addressed only when it is proved that the country has had effective control on operation resulting in violation of human rights and philanthropic law and since no reason was given to show that Americans have participated in the operation with contra forces or led them, the ICJ did not assign the violations to the US. Of course, the ICJ implies the participation of America in organizing, financing, and providing the needs of contras and that the aids have been very important and useful, but the ICJ believes that even if America has aided the contra group in selecting the military and paramilitary targets and also designed all their operations, again it does not mean the effective control of contras' operation by the US. Based on the ICJ, to prove the responsibility of America, we must be able to prove that the US has imposed committing the act so as to reach the extent of control to an effective degree [13. P. 88].

General Criterion in Tadić: The ICJ held its case on May 7 1997 and considering effective control criterion used in Nicaragua issue declared that there is not persuasive reason to show that Yugoslavian Federal Republic effectively controlled Bosnia Serbs military operation and then they cannot be accounted as practical elements of Yugoslavia. The result was that the ICJ could not prove the obvious breach of Geneva conventions cause of non-international nature of the fight and so faced intensive objection and criticism of the lawyers.

3. Status of the Government's International Responsibility in Violation of the Commitments resulted from International Treaties; Relationship between Countermeasure and Article 60 of Vienna Treaty 1969: Based what is said in theoretic discussions about the relation between actions and expiring or suspending the execution of an international treaty as a result of violating that (article 60 of Vienna treaty), it seems that the two categories are somehow different. This leads to posing important questions regarding legal nature of the two different reactions by governments toward an international infraction. This duality reflected in the reports submitted to international law commission by special reporter William Ribakhen (1980-86) about international responsibility was so important that next reporter Gaetano Arangio-Ruiz in his third report about international responsibility emphasized on the necessity of further investigations [19. P. 341]. For instance, one of the existing views is that treaties law and responsibility law had no conflict in this regard and each had its own realm, yet other view believes that the relation between countermeasure and expiration or suspension of treaty is very simple; namely, it is a form of mutual action; countermeasure is Genus and expiration and suspension are its species.

The status of coordination and relationship between countermeasure and termination of treaty as a result of principal violation of the treaty: Infraction both for countermeasure and expiration or suspension of executing the treaty based on article 60 of Vienna treaty 1969 is the legal argument basis. A common and evident criterion in these two types of reaction is that in case of the lack of an international infraction, these reactions will be against international law rules. Countermeasure and expiration

and suspension of implementation of the treaty as a result of violating it will be legitimate and legal only when they are done regarding an infraction to prevent from its continuance. On the other hand, basic infraction is the reason for removing unlawful description of the act [6. P. 281]. Expiration and suspension of the treaty in general or sum gives the damaged government the possibility of making a new balance between its rights and commitments for wrongdoing government.In countermeasures also damaged government is looking for retrieving its right and continuing its legal relations with the government in charge. International Court of Justice (in its case 1997 in Gapchiku and Nagimarus issue) puts it that: countermeasure is justifiable when taken in response to another government's international infraction and against that government.

Citation right of countermeasure and termination of treaty for misfeasor government: Based on article 1 of paragraph 60, Vienna treaty 1969, government damaged from basic violation of a mutual treaty can cites this as a criterion for expiration or suspension of executing treaty against violating government. This right which is based on treaty law aside from revengeful action right puts it that if one party fails to do its commitments, it is not possible to ask the other party to do the commitments. Of course, the right does not blemish the right of making a claim about the wrongdoing government and also compensating the damage.It is completely clear that after taking against the acts of international wrongdoers these two reactions will finally be justifiable only when done against the responsible government and the third governments do not damage. In mutual action, the second element is that must be taken against the government committed international infraction and not done based on its commitments in stoppage and compensation of the damage based on the second part of the governments' international responsibility plan, namely, the effect of countermeasure in removing unlawful description is relative ad includes just legal relations between damaged government and the government in charge [18. P. 79]. So, if the third government undergoes any damages, the unlawfulness of the action is not removed for the third one.It must be said that the right given in these treaties to the other parties to be able to execute the whole or part of the treaty even between themselves and all parties and not only suspend the wrongdoer party is more protective and does not embellish the principle that the reaction must be taken against the government that committed the infraction. As a result, it must be noted that: general principle in all areas of international law where action and reaction are stated is that the reaction must be taken only against the wrongdoer government and the governments can suspend the execution of commitments or expire or take countermeasure in the other terms based on the citation of the treaty commitments violation or other international infraction basically done by the government [8. P. 19].

Governments with citation rights of countermeasure and termination of treaty as a result of principal violation: In article 60, Vienna treaty 1969 regarding mutual treaties, the matter that damaged government can expire or suspend treaty execution based on the basic violation is not so complicated but regarding multiparty treaties, commission requires the followings: rights of the other parties to show a common reaction for violation and right of the specially damaged government, based on individual reaction [22. P. 42]. So, the commission — by distinguishing between different

states of the multiparty treaty — has provided essential solution. As a result, article 60, Vienna treaty 1969, jus damaged government can expire or suspend the treaty and in multiparty treaties doing so is based on the matter that they themselves have undergone damage as a result of the violation; namely, these governments are also among the governments damaged directly, in one way or another. But considering countermeasure based on governments' international responsibility plan, the situation is a bit different; despite accepting the matter that only damaged government can react, there are cases where the governments other than the damaged one can take action. Indeed, when commitment violation like violation ban brings about an international crime, the third governments will react; not for the violation itself, but for violating an international rule with the highest legal value like the ban of forcefully resorting article 48 of international responsibility plan of the governments to any government about violating a commitment to an international society in general, or a member of a group of governments toward any commitments for protecting collective interest of a group allows for such citation [9. P. 55]. So, regarding the terms of article 48, such governments are recognized as governments with legal interest in the issue. Then, new advances in international law resulting in globalization of legal capability for the reaction do not include expiration or suspension but just implies special countermeasures.

Time realm of countermeasure and termination of treaty as a result of principal violation: Based on paragraph 2 of article 48 of the governments' international responsibility plan: countermeasures are limited to non-execution of the international commitmentsof the reacting government for the government in charge temporarily. Term «till» shows the temporary aspect of mutual action. The actions are targeted at retrieving a legitimate situation and a law between damaged and responsible governments [4. P. 41]. Countermeasures are a form of forcing the responsible government to implement the commitment, not punishment or sentencing it. As a result, if it effectively acts for forcing the responsible government to stop the infraction and payoff, the reaction must not be went on any more and in implementing article 60 it must be said that: damaged country expiring or suspending the treaty in reacting to it, if the responsible government stops the commitment violation, has no commitment or obligation to do the commitment. On the other hand, based on treaty 1969 regime, expiration has definite effect and legal relation between two parties are removed temporarily or permanently; whereas in countermeasure regime, expiration does not essential remove the relation between two parties. In addition, in suspension case, it must be mentioned that the commitment cited in paragraph 3 of article 49 puts it that: countermeasures must be taken in a way to remain the repetition of the treaty as much as possible puts the statement in paragraph 2 of article 72 of Vienna treaty 1969 based on which the government suspending a treaty must not take any action in suspension time to prevent from restarting the treaty. As a result, generally, the governments must take actions that there is a possibility of retrieving the commitment for them [17. P. 67].

The status of suitability principle in the citation of countermeasure and termination of treaty: Appropriateness principle based on which countermeasures regarding the international infraction and violated rights must be compatible with the loss emerged (article 51of the governments' international responsibility) is very important

in taking the reaction by the countries. In the line of taking countermeasures, the point that reaction must not lead to unfair results must be guaranteed and the principle must be evaluated based on both quantitative and qualitative elements like the importance of protected interests and violation intensity. Article 51 indicates that the principle is basically related to the damage based on two criteria of infraction and the rights [2. P. 11]. Implying the rights which has a wide meaning not only includes the effect of an infraction on the damaged government but also the rights of responsible government. Additionally, status of the other governments might be affected which must be considered.International Court of Justice (in the case 1997 regarding GabchikoNagimarus project) says: what considerably matters is that the effects of countermeasures must be compatible to the damages.Despite the absence of the principle in article 60 of Vienna treaty, the issue is easily perceived that the extensive area of the principle in countermeasure defense can be generalized as a general principle and to all international law areas dealing with reaction. Of course, what is slightly different is that damaged government from article 60 has just the right to expire or suspend the commitment resulted from the treaty between itself and responsible government? But in countermeasure defense, regarding the difference between the governments' tolerance threshold, it is possible that the damaged government ignores the violation. On the other hand, meeting the principle, the damaged government can expire the commitment between itself and the responsible government [7. P. 4].

Exceptions to the citation of countermeasure and termination of treaty: Among the other cases is the ban of generalizing article 60 of treaty 1969 regulations and ban of taking countermeasures for some international commitments having an absolute infrangible aspect. Paragraph 5 of article 60 of the treaty 1969, and article 50 of the governments' international responsibility plan state commitments depending on international regulation and security and their consistency and cannot be embellished at all. Of course the article 50 phraseology is more extensive than paragraph 5 of article 60 of Vienna treaty, and has considered more commitments. Among the commitments which cannot be violated based on article 50 are: a) commitment to the ban of threat using force in a way mentioned in paragraph 4 of article 2 of UN Charter, b) commitments regarding human rights protection c) revengeful actions banned toward commitments with philanthropic aspect d) commitments based on infrangible rules of general international law: damaged government is required to go on respecting the commitments in its relations with responsible government and cannot cite the violation of the commitments by responsible government for justifying its own unlawful behavior. Commitment cited in section c of paragraph 1 of article 50 of the responsibility plan (wrongful actions banned regarding philanthropic commitments) is an exact reflection of what is mentioned in paragraph 5 of article 60 of the treaty [20. P. 74]. Also, governments can agree on other rules of international law which are not in form of mutual action, either these cases of infrangible rules are based on general international law or not. The possibility of the agreement called as *lexspecialis* and anticipated in article 55 of the governments' international responsibility plan indicate an exception more than the exceptions cited in paragraph 1 of article 50. In general, the bans cited in the countermeasures responsibility plan (comparing to what is men-

tioned in Vienna treaty) has very extensive range.Also, since the implementation of this part of the terms plays an important role in international stability and regulation and it can be considered sort of a manifestation of international common law, it seems that accepting the generalization of these limitations and adding them to the limitation cited in article 60 do not create any problem [5. P. 34].

Conclusion: In sum, despite the draft 1996 not distinguishing between damaged and non-damaged governments, the commission has taken action to make the distinction in final draft 2001. Written and unwritten international rules each of which is created in a special area are most of the times able to be viewed through a unified opening. In the meantime, the fine relation between the rules of international treaties rules and responsibility law is among the cases helping the subordinates of the international law in proving and or denying the international claims. Citation to the excuses removing unlawful description of an international act as given in the International Law Commission's draft regarding the international responsibility of the governments — to the extent showing unwritten rules and in the line with ignoring and not doing the rules emanated from an international treaty — is of the most significant aspects of relation and interrelation of these two international law areas which in the end demonstrates the complementary role of the international rules. That the governments to which extent can ignore doing commitments resulted from an international treaty citing to excuses removing unlawful description of an international act in the framework of terms cited in the governments' international responsibility plan is the subject that will clearly be addressed in a comparative and all-purpose study of excuses and causes as cited in respective document and in Vienna treaty 1969 of treaties law.

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МЕЖДУНАРОДНО-ПРАВОВАЯ ОТВЕТСТВЕННОСТЬ ГОСУДАРСТВ И МЕРЫ ПРОТИВОДЕЙСТВИЯ

Мохсен Матур

Кафедра международного права
Российский университет дружбы народов
ул. Миклухо-Маклая, 6, Москва, Россия, 117198

В рамках анализа данной проблемы рассматриваются такие проблемы международно-правовой ответственности государств и применимых контрмер, как: прекращение действия международного договора, ответственность за нарушение обязательств *ergaomnes*, механизмы, существующие в рамках ООН, контрмеры, существующие в рамках международного права и их исполнение, обязательства, происходящие из международных договоров, соотношение контрамер и прекращения договора вследствие существенного нарушения договора, право на применение контрмер по отношению к государству-нарушителю, временные рамки применения контрмер и прекращения договора при существенном его нарушении, соответствие применяемых мер при применении контрмер и прекращении договора, международно-правовая ответственность государств.

Ключевые слова: международное право, международно-правровая ответственность государств, контрмеры.