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Reactions to Non-Performance of Treaties in International Law

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Abstract

Identifying the range of lawful reactions to non-performance of treaties is still problematic, as shown by the case concerning the *Application of the Interim Accord of 13 September 1995 (FYROM/Greece)*. After reviewing the current understanding of the relationship between the law of treaties and the law of international responsibility, the author analyses the legal regime pertaining to suspension and termination of treaties on grounds of breach, on the one hand, and, on the other, to countermeasures, arguing that the *exceptio inadimpleti contractus* may still play an independent, albeit limited, role as a reaction to lawful non-performance of international treaties.

Key words

Article 60 VCLT; countermeasures; exception of non-performance (*exceptio inadimpleti contractus*); *Interim Accord (FYROM/Greece)*; relationship between the law of treaties and the law of international responsibility

1. Introductory remarks

The range of lawful reactions to non-performance of treaties has been the object of lively discussions;[1] many controversial issues were clarified with the adoption of the 1969 Vienna Convention on the Law of Treaties (henceforth, VCLT) and, later, by the 2001 ILC Draft Articles on State Responsibility for Internationally Wrongful Acts.[2] The latter codification effort, in particular, could benefit from some important developments in international practice, such as the *Rainbow Warrior*

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1 Amongst the extensive literature preceding the 2001 ILC Draft Articles on State Responsibility for Internationally Wrongful Acts, see B. P. Sinha, *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by the Other Party* (1966); B. Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law', (1970) 20 *Österreiche Zeitschrift für öffentliches Recht* 5, at 20–21, 83; M. L. Picchio Forlati, *La sanzione nel diritto internazionale* (1974), 71; C. Chinkin, 'Nonperformance of International Agreements', (1982) 17 Texas ILJ 387; R. Pisillo Mazzeschi, *Risoluzione e sospensione dei trattati per inadempimento* (1984), 343; S. Rosenne, *Breach of Treaty* (1985), 124; L. A. Sicilianos, *Les réactions décentralisées à l'illicite: Des contre-mesures à la légitime défence* (1990), 9 ff.; and L. A. Sicilianos, 'The Relationship between Reprisals and Denunciation or Suspension of a Treaty', 1993 EJIL 341; D. W. Bowett, 'Treaties and State Responsibility', *Le droit international au service de la paix, de la justice et du développement, Mélanges Michel Virally* (1991), 137; D. Alland, *Justice privée et ordre juridique international* (1994), 231; D. W. Grieg, 'Reciprocity, Proportionality and the Law of Treaties', (1994) 34 Virg. JIL 295; P. Weil, 'Droit des traités et droit de la responsabilité', in R. Montaldo (ed.), *El derecho internacional en un mundo en trasformacion: Liber amicorum en homenaje al profesor Eduardo Jiménez de Aréchaga* (1994), 522; P.-M. Dupuy, 'Droit des traités, codification et responsabilité internationale', (1997) 43 AFDI 7.

2 Cf. A. Gianelli, 'Aspects of the Relationship between the Law of Treaties and State Responsibility', in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, Vol. 2 (2004), 757, at 805.

arbitral award[3] and the ICJ judgment in *Gabčíkovo-Nagymaros*.[4] Nevertheless, not all doubts are dispelled, and a fresh look at the issue is warranted in light of the judgment concerning the *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, delivered by the International Court of Justice on 5 December 2011.

The case concerned the dispute over the constitutional denomination of the applicant, 'Republic of Macedonia', which is objected to by Greece, since it 'raises an issue of security and stability in the region'[5] by attempting 'to appropriate the Macedonian name' and 'draw[ing] attention to the irredentist ambitions which the use of the name implies'.[6] In the framework of the Interim Accord of 13 September 1995,[7] Greece accepted not to object 'to the application by or the membership of' Macedonia in international organizations and institutions to which it was a member, provided that, in the framework of those organizations or institutions, the latter state would be referred to by the name 'the former Yugoslav Republic of Macedonia' (FYROM).[8] FYROM alleged that this obligation was breached by Greece when it objected to its application to join NATO (notably at the Bucharest summit of 2–4 April 2008); this attitude precluded the applicant from joining the organization, since invitations are addressed to new members by consensus.[9]

Among other defences,[10] Greece maintained that its behaviour could not be deemed wrongful, since FYROM had itself failed to comply with the Interim Accord in the first place, in several ways: by refusing to negotiate in good faith over the 'name issue';[11] by intervening in Greece's internal affairs;[12] by organizing, or allowing, hostile activities and propaganda;[13] by not adequately protecting Greece's diplomatic premises and personnel;[14] and by continuing to make official use of the 'sun of Vergina' and other symbols deemed to be part of Greece's cultural and historical

3 *New Zealand v. France*, Award of 30 April 1990, XX UNRIAA 215 ff.

4 *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, [1997] ICJ Rep. 7; cf. also the *Air Services Agreement* award of 9 December 1978, XVIII UNRIAA 416, para. 81.

5 Thus, Greece, in its Countermemorial of 19 January 2010, 11, para. 2.1 (cf. also 15–16); see ibid., at 11 ff., for the historical background of the dispute. The Countermemorial, as well as the other written defences and the transcripts of the pleadings, is available at www.icj-cij.org.

6 Ibid., at 14, para. 2.14.

7 1891 UNTS 1–32193.

8 See Art. 11 of the Interim Agreement; the use of the provisional denomination within the United Nations was recommended by the Security Council in Res. 817 (1993) of 7 April 1993, para. 2. This denomination is used by the ICJ and will henceforth be referred to also in the present paper.

9 See the Application, filed on 17 November 2008, at 6, para. 5.

10 Those defences, which were all rejected, addressed the interpretation of Art. 11 of the Interim Accord (paras. 84 ff. of the judgment); they further challenged the jurisdiction of the Court *ratione materiae* (since the dispute would not fall within the scope of the compromissory clause set forth by Art. 21(2) of the Interim Accord, ibid., para. 38) and *ratione personae* (the disputed acts allegedly should be attributed to NATO, not to Greece; furthermore, NATO and its member states should be regarded as indispensable parties to the proceedings, ibid., para. 44); the admissibility of the claim (para. 54); and the propriety of a decision on the merits (para. 60). Cf. on these aspects, M. Metou, 'Application de l'accord intérimaire du 13 septembre 1995 (ex-République Yougoslave de Macédoine c. Grèce), Chronique de jurisprudence internationale' (edited by P. Weckel), (2012) 116 RGDIP 165.

11 Countermemorial, *supra* note 5, at 33 ff.

12 Ibid., at 37 ff.

13 Ibid., at 43 ff.

14 Ibid., at 52 ff.

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heritage,[15] together with using its constitutional name within the framework of the international organizations to which it was admitted and in signing international treaties.[16] Only the contention relating to the official use of the 'sun of Vergina' was upheld by the ICJ.[17]

Greece further argued that, given the prior breach of the Interim Accord by FYROM, non-performance on its part would be justified in light of the *exceptio inadimpleti contractus*[18] or, alternatively, as a countermeasure.[19] While the respondent did not rely on Article 60 VCLT, it maintained that the conditions for termination or suspension of the Interim Accord on grounds of breach were also met. However, the Court found that the above-mentioned violation by FYROM would not justify Greece's behaviour.[20]

The statements of the parties concerning the identification of lawful reactions to treaty breaches and the way in which the Court examined them are particularly interesting, and will be analysed in light of previous developments on the topic. Since this issue lies at the heart of the relationship between the law of treaties and the law of international responsibility,[21] it may be useful to discuss briefly how that relationship is currently understood.

2. The law of treaties and international responsibility: two complementary sets of rules

The main problem, in this regard, is whether the two sets of rules should be seen as mutually exclusive or, more specifically, whether the law of treaties constitutes a sort of 'self-contained regime', and is the only legal framework providing for lawful reactions to non-performance of treaty obligations. This position was argued, for instance, by New Zealand in the *Rainbow Warrior* arbitration[22] and by Slovakia in *Gabčíkovo/Nagymaros*.[23]

However, both the Arbitral Tribunal[24] and the International Court of Justice held that the law of treaties and the law of international responsibility can contextually apply to the same situations; the latter stated, in this regard, that:

15 Ibid., at 55 ff.
16 Ibid., at 60 ff.
17 *Interim Accord*, available at www.icj-cij.org, para. 153. The Court found only one instance of official use of the symbol in breach of the Accord to be proven.
18 This was actually the main defence raised in this regard by Greece: cf. the Countermemorial, *supra* note 5, at 163 ff.
19 In the Countermemorial, *supra* note 5, Greece expressly stated that it relied neither on its right to suspend the Interim Accord (at 163, para. 8.2) nor on countermeasures as circumstances precluding wrongfulness (at 164, para. 8.3), while, at the same time, maintaining that it would be entitled to do so (at 178, para. 8.29). This position was slightly modified in the Rejoinder, of 27 October 2010, where Greece relied on *both* the exception of non-performance and countermeasures as a justification for its behaviour (at 187, para. 8.3).
20 Para. 170 of the judgment; the Court refused to order 'that the Respondent henceforth refrain from any action that violates its obligations under Article 11, paragraph 1, of the Interim Accord', as requested by FYROM, since Greece's good faith in implementing the Court's judgment 'must be presumed' (ibid., paras. 167–168).
21 Dupuy, *supra* note 1, at 10.
22 XX *UNRIAA* 249–250, paras. 73 ff. Cf. Bowett, *supra* note 1, at 142; Grieg, *supra* note 1, at 379.
23 See Slovakia's Reply, 20 June 1995, at 85, para. 4.10 (available at www.icj-cij.org).
24 XX *UNRIAA* 251, para. 75.

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> those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of state responsibility.[25]

Support for this approach can be found, inter alia, in the 'without prejudice' clause of Article 73 VCLT.[26]

The International Law Commission further explained:

> as the relevant provisions of the 1969 Vienna Convention make clear, the mere fact of a breach and even of a repudiation of a treaty does not terminate the treaty. It is a matter for the injured State to react to the breach to the extent permitted by the Convention. The injured State may have no interest in terminating the treaty as distinct from calling for its continued performance.[27]

The same freedom of choice applies in the field of state responsibility: 'Countermeasures are a feature of a decentralized system by which injured States *may* seek to vindicate their rights.'[28] The two sets of rules may thus be invoked, jointly or alternatively, according to the choice of the injured party, as long as the conditions set forth by each of them are fulfilled.

Whereas it is true that that some rules pertaining to the law of treaties stipulate specific consequences for wrongful acts[29] and may be conceived of as 'sanctions' for such breaches,[30] this does not imply that they are their *only* consequences. Quite to the contrary, in many regards, these rules are functional to ensuring proper reparation, thus complementing the regime of international responsibility.[31] A derogation from the latter regime as regards non-performance of treaty obligations could take place only to the extent provided for by a *lex specialis* (e.g., by excluding resort to

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25 [1997] ICJ Rep. 38, para. 47. Without mentioning it expressly, the Court hints here at the distinction between 'secondary' and 'primary' international legal rules; according to the approach suggested by Special Rapporteur Ago (1970 YILC, Vol. II, at 306) and accepted by the ILC in the context of its work on international responsibility, the former set forth 'the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom', whereas the latter 'define the content of the international obligations, the breach of which gives rise to responsibility' (Report of the ILC on the Work of Its Fifty-Third Session, 2001 YILC Vol. II, Part 2, at 31; also Report of the ILC on the Work of Its Sixty-Third Session, UN Doc. A/66/10, at 69).

26 Art. 73 VCLT stipulates that its provisions 'shall not prejudge any question that may arise in regard to a treaty . . . from the international responsibility of a State' (cf. also Art. 74 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations: since the two texts do not display significant differences for the purposes of this paper, reference will hereinafter be made only to the 1969 Convention).

27 Commentary to Article 29 of the 2001 Draft, Report of the ILC on the Work of Its Fifty-Third Session, *supra* note 25, at 88.

28 Report of the ILC on the Work of Its Fifty-Third Session, *supra* note 25, at 128 (emphasis added).

29 Cf. Commentary to Article 56 of the 2001 Draft, ibid., at 141.

30 Cf., e.g., Commentary to Article 69 of the ILC Draft on the Law of Treaties Concluded between States and International Organizations or between International Organizations, 1982 YILC, Vol. II, Second Part, at 67.

31 P. Reuter, *Introduction au droit des traités* (1985), 172 ff.; Dupuy, *supra* note 1, at 14; S. Forlati, *Diritto dei trattati e responsabilità internazionale* (2005), 3, at 168, 175 ff., argues that, from this perspective, the two sets of rules are part of a coherent system.

countermeasures in reaction to breaches of a given treaty),[32] in light of Article 55 of the Draft Articles on State Responsibility.

In the *Interim Accord* case, neither Greece[33] nor, more significantly, FYROM cast doubts on these conclusions.[34] FYROM confined itself to denying that the respondent could rely on treaty suspension or countermeasures because the relevant substantive and procedural requirements were not met,[35] while also refuting the contention that the *exceptio inadimpleti contractus* does, as such, apply independently in international law.[36]

3. The conditions for resorting to suspension or termination of treaties on grounds of breach and to countermeasures

According to Article 60(1) VCLT, 'A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part'.[37] This provision reflects one of the main concerns expressed during the Vienna Conference, namely that the stability of treaty relationships should be preserved: it is thus only egregious breaches (amounting to either a 'repudiation of the treaty' or the 'violation of a provision essential to the accomplishment of the object or purpose of the treaty')[38] that may be relied upon in the context of Article 60. Furthermore, the procedural conditions set forth by Articles 65 and 66 of the Convention have to be respected; since suspension or termination on grounds of breach is subject to conciliation under Article 66, a favourable finding by the Conciliation Commission may have

32 This conclusion was reached, as regards the EC Treaty, by the ECJ in Case 232/78, *Commission/France*, [1979] ECR 2730, at 2739. Some limitations to countermeasures as between international organizations and their members are set forth by Arts. 22(2)(3) and 52 of the ILC Draft on Responsibility of International Organizations (Report of the ILC on the Work of Its Sixty-Third Session, *supra* note 25, at 58, 65; since the solutions adopted in this text reflect, in many instances, those set forth by the 2001 Draft, hereafter reference will be made only to the latter as long as no significant differences arise). More frequently, treaty provisions specifically address situations related to necessity, at times precluding a contracting party from relying on the customary rule codified in Art. 25 of the Draft Articles on State Responsibility. The issue was addressed by the ICJ in the advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Judgment of 9 July 2004, [2004] ICJ Rep. 136, para. 140. Cf. C. Binder, 'Non-Performance of Treaty Obligations in Cases of Necessity', (2008) 13 ARIEL 3; L. Salvadego, 'Il ruolo della necessità nel diritto internazionale umanitario', (2012) PhD thesis, University of Padova, on file with the author.

33 Cf. the Countermemorial, *supra* note 5, at 166.

34 See FYROM's Reply of 9 June 2010, at 158.

35 Memorial of 20 July 2009, at 94 ff.

36 Reply, *supra* note 34, at 147 ff.

37 Art. 60 VCLT reflects customary international law (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*, Judgment of 21 June 1971, [1971] ICJ Rep. 16, at 47; *Gabčíkovo-Nagymaros*, *supra* note 4, at 38), but the issue was not relevant to the case, since both FYROM and Greece are parties to the Vienna Convention. While the conclusion of the Interim Accord pre-dates FYROM's declaration of succession (made on 8 July 1999, cf. http://treaties.un.org), the latter has retroactive effect. Furthermore, the Interim Accord being a bilateral treaty, the complex rules set forth as regards material breaches of multilateral treaties did not come into play. For an appraisal of those rules, see, among many others, B. Simma and C. Tams, 'Article 60', in O. Corten and P. Klein (eds.), *Commentary to the Vienna Conventions on the Law of Treaties*, Vol. 2 (2011), 1351.

38 Cf. Art. 60(3) VCLT. This notion enshrines a degree of discretion; the ICJ has, however, made it clear that a breach of a treaty, no matter how serious, does not allow for termination by the other party if it was caused by its own prior breach (*Gabčíkovo-Nagymaros*, *supra* note 4, at 67).

to be accepted by the other party in order to allow for the actual denunciation or suspension of the treaty.[39] The Court did not address these issues, and confined itself to finding that the breach of Article 7 of the Interim Accord (an 'incident' in the Court's words) 'cannot be regarded as a material breach within the meaning of Article 60 of the 1969 Vienna Convention'.[40]

Moreover, the defence relied upon by Greece would require showing 'that its objection to the Applicant's admission to NATO was made in response to the alleged breach or breaches by the Applicant',[41] whereas such a connection was not established. Therefore, the Court did 'not accept that the Respondent's action was capable of falling within Article 60 of the 1969 Vienna Convention'.[42]

Countermeasures, on the other hand, may be adopted in response to any wrongful act, irrespective of its gravity, provided that they are proportionate: the notion of 'material breach' has been sometimes referred to by international tribunals discussing issues of state responsibility, but only as a way of stressing the particularly egregious nature of a given wrongful act and as a form of satisfaction.[43] Furthermore, the procedural requirements set forth by Article 52 of the 2001 Draft are much less stringent than those applying under the Vienna Convention. Nevertheless, according to Article 49(1), countermeasures may only be taken 'in order to induce [the responsible] state to comply with its obligations under Part Two' (i.e., to cease the wrongful act, to offer assurances and guarantees of non-repetition, if the circumstances so require, and to provide reparation).[44] It was precisely this condition that was deemed not to be fulfilled in the *Interim Accord* case, since:

> the Court is not persuaded that the Respondent's objection to the Applicant's admission [to NATO] was taken for the purpose of achieving the cessation of the Applicant's use of the symbol prohibited by Article 7, paragraph 2. As the Court noted above, the use of the symbol that supports the finding of a breach of Article 7, paragraph 2, by the Applicant had ceased as of 2004[45]

– that is, well before the Bucharest summit.

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39 The VCLT does not set out the consequences of non-acceptance of the findings of the Conciliation Commission, and it is not altogether clear whether only acceptance by all the parties to the procedure could pave the way to actual denunciation or suspension (cf. G. Gaja, 'Trattati internazionali', in *Digesto delle discipline pubblicistiche*, Vol. 15 (1999), 344, at 367). Subsequent practice does not shed any light on the issue, since the procedure set forth by Arts. 65–66 has never been relied upon so far.

40 *Interim Accord*, *supra* note 17, para. 163.

41 Ibid., para. 123. This functional connection with a previous unlawful act is also the element distinguishing retorsions from other unfriendly acts. Retorsions may, of course, be adopted in response to treaty breaches; however, they do not raise any doubts as to their lawfulness. Therefore, they are not specifically considered here.

42 Ibid., para. 163.

43 A formulation clearly inspired by Art. 60(3) VCLT is used in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment of 27 June 1986, [1986] ICJ Rep. 148, para. 10, of the operative clause, and in *Rainbow Warrior*, *supra* note 3, at 222.

44 Cf. Arts. 30–31 of the Draft. Cf. also the Commentary to Art. 49, Report of the ILC on the Work of Its Fifty-Third Session, *supra* note 25, at 130.

45 *Interim Accord*, *supra* note 17, para. 164.

4. THE *EXCEPTIO INADIMPLETI CONTRACTUS*

For the same reasons, Greece's main 'additional defence' based on the *exceptio inadimpleti contractus* was also dismissed:

> the Respondent has failed to show a connection between the Applicant's use of the symbol in 2004 and the Respondent's objection in 2008 – that is, evidence that when the Respondent raised its objection to the Applicant's admission to NATO, it did so in response to the apparent violation of Article 7, paragraph 2, or, more broadly, on the basis of any belief that the *exceptio* precluded the wrongfulness of its objection.[46]

Since no functional connection between the prior breach and Greece's behaviour was assessed, and the *exceptio* could not be invoked anyway, the Court deemed it 'unnecessary . . . to determine whether that doctrine forms part of contemporary international law'.[47]

It is certainly not unusual for the Court to avoid examining all the legal aspects of a case if they are seen as having no influence on the final decision; as a matter of principle, 'the Court is free to base its decision on the ground which in its judgment is more direct and conclusive'.[48] As well as for reasons of judicial economy, this may avoid addressing highly controversial issues or taking decisions (e.g., those concerning the validity of multilateral treaties) that could affect third parties;[49] however, none of those reasons seems to come into play in the *Interim Accord* case. The Court's restraint was criticized by judges Bennouna[50] and Simma[51] in that it failed to clarify some of the few points that still raise doubts over the range of possible reactions to non-performance of treaties. Those doubts regard the relationship between the *exceptio inadimpleti contractus* and the rule concerning termination of treaties on grounds of breach on the one hand and countermeasures on the other, and the possibility to invoke the *exceptio* as a separate ground justifying non-performance of treaty obligations. The Court even avoided providing its own definition of the concept, by referring to 'the *exceptio*, as defined by the Respondent'.[52] Greece, in turn, relied upon the definition given by J. Salmon, who describes it as 'Exception que peut invoquer la ou les partie(s) lésées(s) en raison de la non-exécution d'un engagement conventionnel par une autre partie contractante et qui l'autorise à ne pas appliquer à son tour tout ou partie de cet engagement conventionnel'.[53]

The exception of non-performance is often assimilated to termination or suspension of treaties on grounds of breach:[54] this position is shared by Judge Simma, who

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46 Ibid., para. 161.
47 Ibid.
48 *Certain Norwegian Loans*, Judgment of 6 July 1957, [1957] ICJ Rep. 25. Cf. A. Orakhelashvili, 'The International Court and "Its Freedom to Select the Ground upon Which It Will Base Its Judgment"', (2007) 56 ICLQ 171.
49 Cf. e.g., *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment of 19 December 1978, [1978] ICJ Rep. 3, at 17–18, paras. 39–40, as regards the continuing operation of the 1928 General Act for the Pacific Settlement of International Disputes.
50 Cf. his declaration appended to the judgment.
51 His separate opinion, para. 6, argues for 'a decision a little less "transactional" in a matter in which the Court could have afforded to speak out'.
52 *Interim Accord*, *supra* note 17, para. 161.
53 *Dictionnaire de droit international public* (2001), 471. Cf. the Countermemorial, *supra* note 5, at 165, note 417.
54 See, e.g., C. Focarelli, *Le contromisure nel diritto internazionale* (1994), at 282; Grieg, *supra* note 1, at 400.

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holds that 'reciprocity has been crystallized into international law's sanctioning mechanisms, among them reprisals (nowadays politically correctly called "countermeasures") and non-performance of treaties due to breach. . . . It is to that second category that the *exceptio* belongs'.[55] Indeed, both the rule enshrined in Article 60 and the exception of non-performance stem from a general principle of law, namely that *inadimplenti non est adimplendum*.[56] However, when Article 60 VCLT or the corresponding customary rule is invoked with regard to a given treaty, the latter is thus deprived of its legal effects (albeit only temporarily in the case of suspension). The exception, on the other hand, if understood in its traditional sense of defence or justification, would not seem per se capable of affecting the operation of the treaty; it would simply justify temporary non-performance of obligations that remain in force and, in principle, applicable between the parties. Implementation of the agreement would have to be resumed as soon as the other party complies (or is ready to comply) with its own obligations.[57]

This element would militate in favour of construing it as a form of countermeasure, which 'operate[s] as a shield rather than a sword',[58] or, at any rate, as a rule belonging to the realm of international responsibility, as suggested by Greece.[59] The International Law Commission actually took this view when discussing the draft Articles on State Responsibility on first reading. At that time, the Commission concluded that reciprocal measures did not 'deserve a special treatment'[60] and would be subject to the general regime of countermeasures. This solution was ultimately

55 *Supra* note 51, paras. 10–11; cf. also para. 20.

56 Greece construed the exception of non-performance as a general principle of law (cf. the Rejoinder, *supra* note 19, at 189). The rule is drawn from national legal systems but this does not automatically imply its transposability in the international legal order under Art. 38(1)(c) of the ICJ Statute (cf. G. Gaja, 'General Principles of Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Vol. 4 (2012), 370, at 373–4). Furthermore, as argued in the text, its independent scope in international law is very limited, whereas precisely the 'general' nature of principles is often stressed as one of the elements identifying this source of international law (cf. e.g., ibid., at 376; R. Kolb, 'Principles as Sources of International Law', (2006) 53 NILR 1, at 9). The exception might therefore be best seen as *expressing* a general principle (*inadimplenti non est adimplendum*) rather than a general principle in itself.

57 E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984), 15, at 27 ff.; J. Crawford and S. Olleson, 'The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility', (2001) 21 *Australian Yearbook of International Law* 65; Gianelli, *supra* note 2, at 797; C. Laly-Chevalier, *La violation du traité* (2005), 417–18. Cf. the Countermemorial, *supra* note 5, at 166.

58 Cf. Commentary to Part I, Chapter V, of the 2001 ILC Draft, Report of the ILC on the Work of Its Fifty-Third Session, *supra* note 25, at 71, as regards circumstances precluding wrongfulness in general. Cf. also Commentary to Part III, Chapter II, ibid., at 128: 'Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the 1969 Vienna Convention. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.' Cf. already Special Rapporteur Fitzmaurice, Fourth Report on the Law of Treaties, 1959 YILC, Vol. II, at 41, para. 8; A. D. McNair, *The Law of Treaties* (1961), 573. However, the ILC's approach to the topic was not always consistent, as noted by A. Gianelli, 'L'incerto destino dell'eccezione di non adempimento dell'accordo', (2012) 95 *Rivista di diritto internazionale* 151, at 153.

59 Cf. the Rejoinder, *supra* note 19, at 188 ff.; Greece maintained that 'insofar as the *exceptio* is to be applied as a separate principle, with a special regime and a scope different from that of countermeasures, it falls within the ambit of Article 56' (ibid., at 190, para. 8.10). Crawford and Olleson, *supra* note 57, at 55, emphasize another point of contact between the *exceptio* and countermeasures, namely the fact that both may be triggered by any breach of treaty, not only by material breaches.

60 1992 YILC, Vol II, 2, at 23.

retained in the final text, notwithstanding Special Rapporteur Crawford's suggestion that a 'narrow' formulation of the *exceptio* (allowing the withholding of performance 'if the State has been prevented from acting in conformity with the obligation as a direct result of a prior breach of the same or a related international obligation by another State') should be dealt with in a specific provision of the Draft Articles.[61] His proposal was ultimately set aside, since 'the exception of non-performance . . . is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness'.[62]

5. Is there any independent role for the *exceptio inadimpleti contractus* in present-day international law?

In light of this picture, Judge Simma convincingly asserts that 'on the plane of international law's primary rules, Article 60 regulates the legal consequences of treaty breach in an exhaustive way';[63] this conclusion is supported, inter alia, by Article 42(2) VCLT, according to which 'The termination of a treaty . . . may take place only as a result of the application of the provisions of the treaty or of the present Convention'. As regards secondary norms, and taking into account the debate within the ILC mentioned above, it may also safely be held that any refusal to perform a treaty on grounds of a previous *breach* is a form of countermeasure and must fulfil all the requirements set forth by Articles 49 ff. of the 2001 Draft, without the possibility of relying on the 'without prejudice' clause included in its Article 56, as suggested by Greece.[64]

Nevertheless, non-performance of treaty obligations may also be *lawful* (i.e., may not amount to a breach of treaty) if, for instance, it is justified by necessity or *force majeure*. It would appear that exception of non-performance, in the broader sense relied upon by Greece, may still have an independent, albeit limited, role to play in this context. The issue is seldom addressed, since the *exceptio* is usually seen or relied upon as a response to treaty breaches; however, this would seem to depend on the specific circumstances of each case rather than on the belief that the defence could not apply as a reaction to lawful non-compliance.

The position taken by Greece in the *Interim Accord* case is a good example in this regard: Greece stated that suspension or termination of treaties on grounds of breach, countermeasures, and the *exceptio* 'all are lawful responses to *unlawful*

61 Cf. Draft Article 30 *bis*, in J. Crawford, Second Report on State Responsibility, 1999 YILC, Vol. II (Part One), paras. 316–329. Cf. also *Chorzów Factory*, PCIJ Rep. (26 July 1927), PCIJ Series A No. 9, at 31. In this perspective, the exception finds its basis not so much on reciprocity, but rather on other principles such as *ex injuria jus non oritur*: for an analysis of the two possible meanings of the exception, see Crawford and Olleson, *supra* note 57. An account 'from the inside' of the debate within the ILC may be found ibid., at 62, and, from a different point of view, in the separate opinion of Judge Simma (who was a member of the ILC at the time), paras. 26 ff.

62 Commentary to Part I, Chapter V, of the ILC Draft Articles on State Responsibility, Report of the ILC on the Work of Its Fifty-Third Session, *supra* note 25, at 72.

63 Cf. again his separate opinion, para. 29. Judge Simma thus argues forcefully that 'the . . . *exceptio* is to be declared dead' (ibid., para. 26). For the reasons set out in the text, the present author respectfully disagrees.

64 Rejoinder, *supra* note 19, at 190.

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conduct by another State'.[65] At the same time, it maintained that the exception of non-performance is 'merely a defence against a claim of non-performance of a conventional obligation',[66] which, unlike countermeasures, is based on:

> the more general principle of reciprocity according to which *non adimpleti* [*sic*] *non est adimplendum*, which means that as long as the FYROM does not comply with its obligations under the 1995 Accord, Greece is entitled not to comply with its own obligations under the same instrument.[67]

This kind of broad language, which could well encompass responses to justified non-compliance with international treaties, is often used in discussing the exception of non-performance. For instance, Judge Hudson, in his well-known dissenting opinion in *Waters of the River Meuse*, asserts the existence of:

> an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of similar non-performance of that obligation by the other party.[68]

In national legal orders, too, the exception is usually framed in broad terms, which can include reactions to justified non-performance of contractual obligations.[69]

A number of grounds may, on the other hand, explain the absence of international practice specifically supporting this reading of the exception. First of all, many treaty regimes regulate situations of necessity or other possible justifications for non-compliance; in this case, *lex specialis* would prevail over general rules, including the *exceptio*. Even when customary law applies, the existence of circumstances precluding wrongfulness, while admitted in principle, is very seldom acknowledged in specific cases, thus favouring a discussion of the issue only in relation to unlawful non-compliance with treaty obligations. Furthermore, since the exception of non-performance is based on reciprocity, its scope is particularly restricted. It can be invoked only for as long as the other party is not ready to comply[70] (as opposed to countermeasures, which are aimed at ensuring not only cessation of the breach, but also reparation and guarantees and assurances of non-repetition[71]). While the procedural rules stipulated by the VCLT would certainly not apply to the *exceptio*

65 Countermemorial, *supra* note 5, at 164, para. 8.6 (emphasis added).
66 Ibid.
67 Ibid., para. 8.3.
68 *Diversion of the Waters from the River Meuse (Belgium v. Netherlands)*, Judgment of 28 June 1937, PCIJ Rep., Series A/B No. 70, Dissenting Opinion, at 77. Cf. also the dissenting opinion of Judge Anzilotti, ibid., at 50, and the ICSID arbitral award of 21 October 1983 in *Klöckner Industrie v. Cameroon*, 114 ILR 211. See also J. Nisot, 'L'exception "*non adimpleti contractus*" en droit international', (1970) 74 RGDIP 668, and the definition by J. Salmon quoted *supra* in the text, para. 4.
69 For the approach to the issue in France, Germany, and the United Kingdom, cf. Crawford and Olleson, *supra* note 57; for Italian law, see F. Realmonte, 'Eccezione di inadempimento', *Enciclopedia del diritto*, Vol. 14 (1965), 222, at 227; cf. further J. Karton, 'Contract Law in International Commercial Arbitration: The Case of Suspension of Performance', (2009) 58 ICLQ 863.
70 Cf. Greece's Countermemorial, *supra* note 5, at 164, para. 8.3; see C. Campiglio, *Il principio di reciprocità nel diritto dei trattati* (1995), at 288.
71 Cf. Art. 49(1) of the 2001 ILC Draft Articles, Report of the ILC on the Work of Its Fifty-Third Session, *supra* note 25. See, however, Art. 52(3)(a) of the Draft, according to which countermeasures 'may not be taken, and if already taken must be suspended without undue delay if . . . the internationally wrongful act has ceased'.

inadimpleti contractus, a notification at least of the intention to rely on it, in analogy with the rule set forth by Article 52(1)(b) of the 2001 ILC Draft, may be an appropriate requirement.[72]

Moreover, it should be recalled that neither the rule enshrined in Article 60 VCLT nor countermeasures can affect *erga omnes* obligations: this is made clear by Article 60(2)(ii) VCLT, stipulating that a 'party specially affected by the breach' may invoke it as a ground of suspension 'in the relations between itself and the defaulting State'; using similar language, Article 49(2) of the 2001 Draft sets forth: 'Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.' Whenever obligations *erga omnes* are at stake, non-performance in reaction to a prior breach (be it under Article 60 or in the form of a countermeasure) would affect the relations not only with the defaulting state, but with all the parties to which respect for the legal obligation is owed. This principle is reaffirmed, as regards some specific obligations *erga omnes*, both in Article 60(5) VCLT and in Article 50 of the 2001 Draft Articles.

Whereas the exception of non-performance would certainly not apply to obligations *erga omnes partes*, it is subject to broader limitations, as it can only cover mutual obligations stipulated in a given treaty in exchange for the inclusion of the non-respected provision(s). The extent to which reciprocity permeates a treaty instrument is essentially an issue of treaty interpretation[73] (and, notwithstanding FYROM's objections in this regard, the Interim Accord may be an apt example of this kind of agreement[74]). When such a situation arises, the analogy with national contract law would seem to hold true in international law as well. Imposing compliance on one party as long as the other party is not able to reciprocate would unduly shift the burden of protecting the latter's 'own interests or concerns'[75] to the former – a result that appears to be incompatible with the principle of good faith.

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72 For the contention that no prior notification is required in order to invoke the exception, see the Rejoinder of Greece, *supra* note 19, at 163.

73 According to Special Rapporteur Crawford, 'in its broader form the exception of non-performance should be regarded as based upon treaty or contract interpretation, performance of the same or related obligations being treated as conditional' ('Third Report on State Responsibility: Addendum', UN Doc A/CN.4/507/Add.1, 363–366). Cf. F. Capotorti, *L'extinction et la suspension des traités*, (1971/III) 134 RCADI 417, at 548; Grieg, *supra* note 1, at 399; Crawford and Olleson, *supra* note 57, at 74. More generally on the role of reciprocity in the law of international treaties, see M. Virally, 'Le principe de réciprocité dans le droit international contemporain', 122 (1967) RdC 1; B. Simma, 'Reciprocity', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Vol. 8 (2012), 651; E. Decaux, *La réciprocité en droit international* (1980), 257 ff.; Campiglio, *supra* note 70; A. Pietrobon, *Il sinallagma negli accordi internazionali* (1999).

74 As Greece put it, the Accord 'constitutes a single transaction registering an exchange of considerations. No single article or provision, even if it imposes an obligation on one party only, can be treated as self-standing, in isolation from the rest. This is because such an obligation is part and parcel of a bundle of rights and obligations, accepted by one party in exchange for a corresponding bundle assumed by the other'. Countermemorial, *supra* note 5, at 31–2; ibid., at 28–9, for a more general discussion of the nature of the Accord. Cf. however the declaration of Judge Bennouna, *supra* note 50, at 1. On the difficulties of assessing conditionality, see Gianelli, *supra* note 58, at 156.

75 Cf. the ILC's Commentary to Art. 27(b) of the 2001 Draft Articles (Report of the ILC on the Work of Its Fifty-Third Session, *supra* note 25, at 86), a provision that fulfils a function similar to that of the *exceptio* in the context we are dealing with here.

6. Conclusions

The *Interim Accord* case confirms that, as a matter of principle, Article 60 VCLT (or the corresponding customary rule) and countermeasures may both be invoked, simultaneously or alternatively, as a reaction to a breach of treaty, as long as the relevant requirements are met. Notably, termination or suspension of a treaty is possible only in the case of material breach, whereas the procedure set forth by Articles 65–66 VCLT should be respected when the Convention applies. While not taking a specific stance on the issue, the judgment also gives us the opportunity to reflect on the role of the exception of non-performance in international law. The function of the *exceptio inadimpleti contractus* as a reaction to treaty breaches is fully absorbed by Article 60 VCLT as far as primary norms are concerned, and by countermeasures in the field of international responsibility; nevertheless, the exception (which is an expression of the general principle of law according to which *inadimplenti non est adimplendum*) may still play an independent, if limited, role in counterbalancing lawful non-compliance with treaties whenever reciprocal obligations are at stake.