

COUNTERMEASURES AS MEANS OF ADDRESSING THE INTERNATIONAL DAMAGE OF SUBMARINE CRITICAL INFRASTRUCTURE WITHIN THE EEZ

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Abstract

The concept of countermeasures discussed by the International Law Commission (ILC) in the 2001 draft on State Responsibility for Prohibited Acts (ASR) derives from reprisals, a measure used by States as a form of self-help to facilitate the enforcement of international obligations. However, in the second place, the countermeasures are also mentioned as means facilitating the process of solving of international disputes.

Submarine critical infrastructure is an attractive target for 'grey zone operations' below the threshold of armed conflict where i.e. so-called shadow fleet is involved. Such incidents, which often take place within the EEZ form a breach of rights of coastal states and therefore the resort to countermeasures seems one of the legitimate ways to respond.

Countermeasures are supposed to fill the gap resulting out of the fact that non-flag states are allowed to board the ship on the basis of right of visit only in some, restrictively specified, and cases. For that reason, it is not easy to attribute the incident to the flag state on the basis of effective control.

Hence, injured states seem to be allowed to resort to countermeasures within the EEZ when the responsibility would be based on the omission of the flag state, providing that the measures would be applied according to the ASR. However, it has to be considered, whether those provisions reflect the current state of customary law in this respect.

Keywords: *law of the sea, countermeasures, submarine critical infrastructure, submarine cables and pipelines*

I. Reprisals according to international customary law

The concept of countermeasures discussed by the ILC in the 2001 draft on State Responsibility for Prohibited Acts (ASR) derives from reprisals, a measure used by States as a form of self-help to facilitate the enforcement of international obligations. ASR describes them as unilateral measures that would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation.

However, it is also worth noting the second function of reprisals and retorsions as a means facilitating the process of settling of international disputes. This way of perceiving of this institution of law of nations was already presented by E. de Vattel. He regarded reprisals as means of self-help '...used between nation and nation in order to do themselves justice when they cannot otherwise obtain it'¹. However, he discussed them in Chapter XVIII of Book II, entitled: 'Of the mode of terminating disputes between nations'. Therefore, it seems that he treated them as means of execution of the due obligations aimed towards solving the dispute between states. Means being a kind of last resort for preserving peace, as the next chapter of his monography deals with the law of war.

The institution of reprisals has been largely shaped by the jurisprudence of arbitral tribunals, in particular in arbitral decisions in the following cases adjudicated before the II World War: *Naulilaa* (1928) and 'Cysne' (1930). The Air Services Agreement Case (1978), on the other hand, had a significant influence on the development of the concept of 'countermeasures'. According to first two arbitrary awards, reprisals are regarded to be legitimate when they form a response to unlawful actions of another State, under the following conditions:

- 1) they can only take place against the perpetrator of the unlawful action ('Cysne'),
- 2) they should be proportionate ('Naulilla'),
- 3) the measure must be necessary, that is, it may be employed when it is impossible to obtain satisfaction by other means ('Naullila'),
- 4) all other attempts to eliminate the prejudice caused by the unlawful conduct of the other State proved unsuccessful ('Naullila').

On the basis on those arbitral awards rendered in the 1928 and 1930, it is now possible to define reprisals as retaliatory measures constituting a response by an aggrieved State to a previous violation of international law by a rule perpetrator and consisting of the temporary suspension of compliance with a certain rule of international law. It has to be stressed, that the temporary suspension in case does not necessarily consider the same rule that has been breached by the other party to the dispute. That's the basis upon which we distinguish the institution of reprisals

¹ E. de Vattel, *The Law Of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, transl. by J.Chitty, Philadelphia 1863 , Book 2, Chap. XVIII, p. 283.

from the possibility of termination or suspension of a bilateral treaty in the case of its material breach, i.e. from the so-called *inadimplenti non est inadimplendum* premise (Article 60.1.VCLT). Reprisals are therefore a broader concept, legitimising the retaliatory breach of other obligations towards the other party to the dispute, providing the proportionality of the conduct is applied².

Furthermore, in its ruling in Air Services Agreement Case, the tribunal found that, as an exception, States may resort to countermeasures has been used even when the negotiations are underway, as “...their aim is to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution”³. It should be emphasised that in this case, the negotiations did not concern the merits of the dispute, but the terms of a bilateral agreement that was meant to establish the arbitrary tribunal ad hoc to settle the case.

II. Countermeasures and their application within the law of the sea

The introduction of restrictions on the use of reprisals as a consequence of the prohibition of aggression in international relations provided by the United Nations Charter has resulted in the withdrawal of armed reprisals, associated with the use of force, from the arsenal of legal measures available in peacetime. It seems that the consequence of this change was the abandonment of the term ‘reprisals’ in favour of ‘countermeasures’. These changes appeared in the case law of international courts, where the term countermeasure was used for the first time in the aforementioned decision of the arbitral tribunal in the 1978 Air Services Agreement case, and then also in the cases adjudged by the ICJ: *United States Diplomatic and Consular Staff in Tehran case* (1980)⁴, the *Military and Paramilitary Activities in and against Nicaragua case* (1986)⁵ and the *Gabcikovo-Nagymaros Project case* (1997)⁶.

There is no doubt, however, that ILC's use of term countermeasures in its 2001 draft articles on responsibility of States for internationally wrongful acts (ASR) was of crucial importance for its future application.

² “Countermeasures involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved”. ILC Yearbook 2001, Vol.II, Part.Two, 128-129 [4].

³ *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, decision of 9 December 1978*, UNRIIAA, vol. XVIII (Sales No. E/F.80.V.7), 415, Paragraph 90.

⁴ *United States Diplomatic and Consular Staff in Tehran, Judgment*, I.C.J. Reports 1980, 27 [53].

⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment*. I.C.J. Reports 1986, 106 [201].

⁶ *Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment*, I. C. J. Reports 1997, 55 [82].

It has to be emphasized that, according to art. 50.2.a. ASR, a State that employs countermeasures is not relieved from fulfilling its obligations deriving out of any dispute settlement procedure applicable in that case⁷. Such specific system on countermeasures is for example provided by the GATT and WTO law, where the retaliation has the form of suspension of concessions or other obligations, and their application required authorisation from the DSB (Dispute Settlement Body)⁸. Therefore, in the case in question, a threshold question is whether the LOSC excludes the possibility of resorting to countermeasures due to the existence of the dispute settlement procedures provided in Part XV⁹ of United Nations Convention on the Law of the Sea¹⁰. This possibility stems from the ICJ's decision in the *Tehran Hostages Case* whereby the ICJ held that the "the rules of diplomatic law...constitute a self-contained regime" and that that Iran did not avail itself of the remedies available under this regime, and consequently, "Iran did not have recourse to the normal and efficacious means at its disposal, but reported to coercive action against the United States Embassy and its staff."¹¹

In the context of the UNCLOS, in the 2007 Annex VII Arbitration in *Guyana/Suriname*, Suriname argued that if its use or threat of use of force was contrary to the international obligations owed by Suriname to Guyana, the measures "were nevertheless lawful countermeasures since they were taken in response to an internationally wrongful act by Guyana in order to achieve cessation of that act."¹² The Tribunal held that "[p]eaceful means of addressing Guyana's alleged breach of international law with respect to exploratory drilling were available to Suriname under the Convention" and "[a] State faced with such a dispute should resort to the compulsory procedures provided for in Section 2 of Part XV of the Convention, which provide among other things that, where the urgency of the situation so requires, a State may request that ITLOS prescribe provisional measures."¹³ Accordingly, and

⁷ The injured State has also to fulfil its obligations to respect the inviolability of diplomatic and consular agents, premises, archives and documents (art. 50.2.b. ASR). W.Czapliński and A.Wyrozumska are of the view that these conditions are also reflected in customary law. W.Czapliński, A.Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe [Public International Law. Systems issues]*, 3rd ed., Warsaw 2014, 840.

⁸ P.Szwedo, *Środki odwetowe w prawie Światowej Organizacji Handlu [Countermeasures in WTO law]*, Warsaw 2008, 103.

⁹ For a general discussion of the relationship between dispute settlement provisions and countermeasures, see D.Azaria, *Treaties on the Transit of Energy via Pipelines*, Oxford 2015, Chapter 6.

¹⁰ Hereinafter referred to as UNCLOS (*United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982*, 1833 UNTS 3).

¹¹ *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran) (Judgment) [1980] ICJ Rep 3, para. 83. Ibid, para. 87.

¹² *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award of 17 September 2007, UNRIAA, Vol. XXX, 126, para. 446.

¹³ Ibid.

in my opinion mainly upon the reason, that it involved the threat of the use of force, Suriname's actions could not have been a lawful countermeasure.¹⁴

D.Azaria notes that the Tribunal used the more hortatory term “should” and that the Tribunal did not base its reasoning on the exclusion of countermeasures on the existence of LOSC dispute settlement procedures.¹⁵ N.Klein also observes that the fact that the LOSC frequently refers to other rules of international law and Article 304 of the LOSC “ensures that the provisions of UNCLOS do not preclude resort to the general rules on State responsibility, either as they existed at the time the Convention was adopted or as the rules developed subsequently.”¹⁶ On this basis, the existence of Part XV of the LOSC does not exclude resort to countermeasures.

Besides, the criteria for the application of reprisals, from which countermeasures have emerged, have been shaped i.a. by jurisprudence on disputes arising from the conduct of States at the sea, as in the ‘Cysne’ case. It would be therefore hard to assume that they should not be applied within contemporary issues of international law of the sea. It does not seem that the law of the sea is a self-contained regime within an international law, excluding the application of the general rules of responsibility of states including the rules on countermeasures.

III. Application of countermeasures according to ASR

The concept of countermeasures, which J. Crawford proposes to translate as a peaceful unilateral self-help measure¹⁷, is discussed in two places of ASR. It first appears in Article 22 as a factor excluding state responsibility for a breach of a norm of international law, and then becomes the main topic of the entire chapter defining the principles of the legal use of countermeasures.

Six articles of the Commission's draft, numbered 49 to 54¹⁸, are devoted to these principles. Although the vast majority of the rules set out are well known already from the principles established in doctrine and case law concerning the use of reprisals, the ILC stated that while during the 53rd session in 2001 the possibility of deleting the chapter on countermeasures was discussed, both groups of members no matter whether they spoke in favour of retaining it (as it “...provided a strict framework for taking countermeasures to avoid abuse” and “represented a fragile balance whose essential structure should be maintained”¹⁹) or against, consented that

¹⁴ *Ibid.*

¹⁵ D.Azaria, *op.cit.*, 162.

¹⁶ Article 304 states that “the provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.” See N.Klein, *Responding to Law of the Sea Violations*, (2021) UNSWLRS 75.

¹⁷ J. Crawford, *State Responsibility, The General Part*, Cambridge 2013, 685.

¹⁸ Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), ILC Yearbook 2001, Vol. II Part Two, 30.

¹⁹ *Ibid.*, 21 [51].

it introduced some changes as the existing rules on countermeasures were vague and indeterminate or that "...the regime of countermeasures under customary law was only partly developed"²⁰. It is also worth to be mentioned that, in a chapter forming part of a comprehensive study published on the tenth anniversary of the adoption of the ASR, co-edited by J. Crawford, H. Lesaffre did not state that The ASR rules on countermeasures are an expression of existing customary rules in this field. On the contrary, he emphasises that although the rules governing the use of countermeasures have developed in international practice, the legal regime regulating them cannot be considered stable, with the result that the work of the ILC in this field should rather be regarded as a progressive development of international law²¹.

The draft provides, inter alia, that the purpose of countermeasures should be to induce the state responsible for the internationally wrongful act to comply with its obligations (Article 49(1), ASR) by refraining for some time from performing certain international obligations which would otherwise be binding on that State against the responsible State (Article 49(2), ASR). That means that countermeasures may not be directed against third parties and that they are supposed to be temporary in character. Countermeasures must not involve i.a. the use of force and any departure from certain basic obligations in particular those under peremptory norms of general international law (Article 50 (1), ASR). Furthermore they must as far as possible be reversible in their effects in terms of future relations between the two States and therefore are supposed to be terminated as soon as the responsible state has complied with its previously breached obligations (Articles: 49 (3) and 53, ASR). Countermeasures must also be proportionate and hence must be "commensurate with the injury suffered taking into account the gravity of the prior unlawful act and of the right in question" (Article 51, ASR). Their introduction should be preceded by a call upon the other state to fulfil its obligations and notification of the decision to resort to countermeasures, connected with an offer to negotiate the case with that State (Article 52 (1), ASR)²². However, ASR also allows for the immediate adoption of countermeasures to the extent necessary to preserve the rights of the state (Article 52(2), ASR) and imposes an obligation (Article 52(3), ASR) not to resort to countermeasures or to suspend their application without undue delay if (a) the internationally wrongful act has ceased, or (b) the dispute has become pending before

²⁰ *Ibid.*, 22 [53].

²¹ H.Lesaffre, *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Countermeasures*, [in:] J.Crawford, A.Pellet, S.Olleson (ed.), *The Law of International Responsibility*, Oxford 2010, 470.

²² The position of the aggrieved State is usually conveyed in the form of a diplomatic protest, stating that the conduct of the other State constitutes a violation of the international law. The protest may also set out request as to the way in which the dispute should be resolved or declare that the state reserves the right to take further action in the future. See, T.Kamiński, *The status of straight baselines and the so-called creeping jurisdiction of coastal states*, [in:] T.Kamiński, K.Karski (ed.), *40 Years of the United Nations Convention on the Law of the Sea: Assessment and Prospects*, Routledge, London 2025, 57-60.

a court or international tribunal which has the authority to make decisions binding on the parties²³.

ILC emphasized that the countermeasures are not justified “...so long as the dispute settlement procedure is being implemented in good faith”²⁴. Therefore, if the dispute was to be tried by the court or tribunal, the injured party may request it to order provisional measures and “...such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures”²⁵. However the limitations on employing countermeasures under the paragraph 3 do not apply if the responsible State fails to implement the dispute settlement procedures in good faith (Article 52 (4), ASR). According to the ILC Commentary “...it comprehends various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order [...], through to refusal to accept the final decision of the court or tribunal. This paragraph also applies to situations where a State party fails to cooperate in the establishment of the relevant tribunal **or** fails to appear before the tribunal once it is established”²⁶. Therefore, it seems that on specific occasions, States may resume countermeasures, that has been previously suspended. Ch. J. Tams aptly notes that “countermeasures may come into play again as a means of enforcement” if ICJ Judgment is not complied with²⁷.

IV. Application of countermeasures in the case of intentional damage to submarine critical infrastructure within the Exclusive Economic Zone

In the case of the adoption of countermeasures in the cases of intentional damage to submarine critical infrastructure, that means not only submarine cables and pipelines but also artificial islands, installations and structures within the EEZ, first of all the injured state has to be determined²⁸. Then, States should adopt the

²³ ILC aptly recalled that, in case of ad hoc tribunal established pursuant to the treaty dispute is not pending “...until the tribunal is actually constituted, a process which will take some time even if both parties are cooperating in the appointment of the members of the tribunal”. ILC Yearbook 2001, Vol.II, Part.Two, 136 [8].

²⁴ *Ibid.*, [7].

²⁵ *Ibid.*, [8].

²⁶ *Ibid.*, 137 [9].

²⁷ He also stresses that “...the continuing importance of countermeasures under international law is largely a consequence of the relative lack of compulsory jurisdiction” and that they may be excluded “...where recourse to binding judicial dispute settlement (including before the ICJ) is available”. Ch. J. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge 2005, 24-25.

²⁸ E.Papastavridis considers the admissibility of the use of countermeasures in the case of drug trafficking at sea, stressing however that in this case it would be difficult to identify the injured State, which would be entitled to take them. *The IMLI Manual of International*

regulations providing the proper competence for the organs of state in the case of the aforementioned breach, as states in exercising their rights within the EEZ are obliged to comply with the laws and regulations adopted by the coastal states in accordance with UNCLOS and other rules of international law²⁹. R.Beckman proposes the following steps in this regard³⁰. First, "...to adopt national legislation making it an offence to damage submarine cables (and related infrastructure) within territorial waters". Second, implement Article 113 of UNCLOS³¹. Third, "... to adopt national legislation for acts of intentional damage to cables in the EEZ or high seas, provided that such cables land in their territory or service their telecommunications system" on the basis "...that such damage committed outside the territory of the State has effects within the territory of that State (based on the effects doctrine) or that it prejudices the vital interests of the State (pursuant to the protective principle)³²". It seems that same regulations should also be adopted in the case of the acts of intentional damage of cables transmitting power from offshore platforms (established by the coastal state on the basis of art.60 UNCLOS) on the basis of Article 56.1.a UNCLOS or pipelines, on the basis of the protection of environment (i.a. Article 56.1.b.iii UNCLOS).

Similarly, D.Guilfoyle seems to be in favour of the use of countermeasures in EEZ by the injured state as he approves "...the use of reasonable force within the EEZ for EEZ-related purposes" as deriving out of sovereign rights of the littoral state. He also stresses that interdiction of foreign vessels in international waters is prohibited, as a use of force, unless there is a flag-state consent given in advance "...or a specific exception allowing the interdiction" which may encompass countermeasures³³. However, in the case of interdiction of the ship only the action below the threshold of force seem to be justified. R.Pedrozo presents the view in kind stating that "...states could use weapons (e.g warning shots and disabling fire) or non

Maritime Law (ed. D.J. Attard), *Marine Environmental Law and Maritime Security Law* (ed. M.Fitzmaurice, N.A. Martínez Gutiérrez, R.Hamza), Volume III, E.Papastavridis, *The Illicit Trafficking of Drugs*, Oxford University Press 2016, 487.

²⁹ J.A.Roach, *Excessive Maritime Claims*, 4 'th ed., Leiden – Boston 2021, 545-546.

³⁰ R.Beckman, *Protecting Submarine Cables from Intentional Damage - The Security Gap* [in:] *Submarine Cables The Handbook of Law and Policy* (ed.) D.R. Burnett, R.C. Beckman, T.M. Davenport, Leiden – Boston 2014, 290.

³¹ D.R.Burnett also supports the view that "...instead of a new submarine cable treaty, provisions, or centralized marine spatial planning by a new or existing entity, greater compliance by States with their existing, but largely unfulfilled obligations under Article 113, would strengthen and enhance the reliability of the world's critical ocean infrastructure". He stresses that that point is underscored by United Nations GA resolutions on law of the sea (UNGA Res. 70/235 (23 December 2015). D.R. Burnett, *OSPAR and Coastal State Encroachment on High Seas Submarine Cable Freedoms* [in:] *Sustainable Ocean Resource Governance Deep Sea Mining, Marine Energy and Submarine Cables*, M.Kotzur, N.Matz-Lück, A.Proelss, R.Verheyen, J.Sanden (eds), Leiden – Boston 2018, 255-256.

³² R.Beckman, *op.cit.*, 290.

³³ D.Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press 2009, p. 276-277.

– lethal technologies (e.g. net / boat traps)” for the purpose of nonconsensual boarding³⁴.

Taking into account that none of the exemptions from the exclusive enforcement jurisdiction of the flag State rule seem to cover the intentional damage of submarine cables and pipelines, except as in the case of boarding of foreign flag ships established by the treaty³⁵ (Article X of 1884 Convention for the Protection of Submarine Telegraph Cables), non-contracting party flag state boarding as a countermeasure may be considered. R.G.Rayfuse, speaking about unlawful fishing on the high seas, presents the view, that in the case of lack of consent of the flag state the injured state may resort to countermeasures including boarding, inspection and arrest³⁶. In fact, it does not seem to differ much from the situation in case.

It is also worth to notice that boarding by the non-flag state is also allowed according to the article 110 UNCLOS when the ship does not possess the nationality. There supposed to be, according to the Article 91.1 UNCLOS the genuine link by the ship and its flag state. However, although the concept of genuine link seem to be imprecise and as ILC has noted the grant of the nationality to the ship cannot just be just mere administrative formality³⁷ and although as D.Guilfoyle aptly noticed, it might be “...desirable that States could refuse to recognise a vessel’s claim to their nationality in cases where ships apparently flying flags of convenience are engaged in undesirable activities”³⁸, unfortunately in the M/V Saiga case (No. 2) ITLOS has reached the conclusion that “there is nothing in article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag state over a ship to refuse to recognize the right of the ship to fly the flag of the flag State”³⁹. However, if non-flag state boarding is not allowed on the basis of challenging of the genuine link, still on such occasions injured states should be even more determined to resort to applicable circumstances precluding the wrongfulness of that act, listed in ASR Chapter V, including state of necessity and countermeasures.

³⁴ R.(P).Pedrozo, *Safeguarding Submarine Cables and Pipelines in Times of Peace and War*, International Law Studies, Vol. 106, 2025, 64.

³⁵ R.Beckman, *op.cit.*, 285.

³⁶ R.G. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries*, Leiden-Boston 2004, 347.

³⁷ See, R.Warner, *The High Seas Regime: a Model of Self-regulation?* [in:] Routledge Handbook of Maritime Regulation and Enforcement (ed.) R.Warner and S.Kaye, London and New York, 2016, 21.

³⁸ D.Guilfoyle, *Article 91. Nationality of Ships* [in:] United Nations Convention on the Law of the Sea. A Commentary, ed. Alexander Proelss (Munich/Oxford/ Baden-Baden: C.H. Beck/Hart/Nomos, 2017), 694.

³⁹ As an explanation the tribunal Stated that the purpose of that provision was to “...secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States”. *M/V Saiga (No.2) (Saint Vincent and the Grenadines v. Guinea, 1 July 1999, Judgment*, ITLOS Reports 1999, 41 [82], 42 [83].

R.(P). Pedrozo points out that in the case when perpetrator state does not fulfil not only its obligations that stem from the UNCLOS Article 113⁴⁰ but also 94.6⁴¹ and 94.7⁴², it will also mean the breach of Article 300 underlining that parties are supposed to exercise their rights, jurisdiction and freedoms in a way that would not constitute an abuse of right⁴³. Such a conduct would definitely form another justification for resorting to countermeasures.

Moreover it has also to be emphasised that International Law Association (ILA) Committee on Submarine Cables and Pipelines under International Law established in 2018, in the draft of its Fourth Report presenting conclusions on monitoring, prevention and response at sea in respect of intentional damage to submarine cables and pipelines, also shares the view that all states, not only coastal ones, are allowed to resort to “...any applicable circumstances precluding wrongfulness, under existing customary international law, such as state of necessity” in case of intentional acts of damage against a cable or pipeline in the EEZ or continental shelf⁴⁴. However it has to be stressed that in that case according to Article 25 ASR four stringent conditions have to be met cumulatively to preclude the wrongfulness of breach of the obligation to abstain from interference with freedom of navigation. Firstly, it is the essential interest of State that would be at stake. The threat to that interest soars to the level of grave and imminent peril while the state has no other means to safeguard it. And last but not least the action of the state does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. Furthermore, the Committee noticed that state of necessity rule may be applied only in exceptional

⁴⁰ Article 113 provides i.a. that every State shall adopt the laws and regulations necessary to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable, shall be a punishable offence. This provision shall apply also to conduct calculated or likely to result in such breaking or injury.

⁴¹ Article 94.6: A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

⁴² Article 94.7: Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

⁴³ R.(P). Pedrozo, *op.cit.*, 63.

⁴⁴ International Law Association, Submarine Cables and Pipelines under International Law, Final Report: Conclusions on Monitoring, Prevention and Response at Sea in Respect of Intentional Damage to Submarine Cables and Pipelines, June 2026, not published, Conclusion 17.3., 28..

cases “...where a coastal State’s energy supply or communications are almost entirely dependent on the integrity of a particular cable or pipeline due to the State’s geographical circumstances or conditions of its infrastructure connection”⁴⁵. It also stressed, that “under customary international law, the condition of a state of necessity will not be met for response measures, such as boarding, arresting and/or instituting proceedings against a vessel and its crew, where the threat of grave and imminent peril no longer exists”⁴⁶. Given that we can see that both exceptions of wrongfulness that is countermeasures and state of necessity are tailored for different reactions of the state threatened by the incoming damage to its maritime infrastructure, while it is the second one that may better fit as preventive measure.

V. Conclusions

Getting down to conclusion, it seems, that injured states are allowed to resort to countermeasures within the EEZ providing that they would be applied according to the rules developed in ASR, so far as they reflect the rules of customary law. However, even though, a quarter of a century ago, some of the solutions adopted by the ILC in this draft might seem rather a manifestation of the progressive development of international law than its codification, the passage of time should favour their consolidation into customary rules.

We should bear in mind that the countermeasures are supposed to be aimed against the state responsible for the breach of international law. It has to be admitted that it will definitely not be easy to attribute the incident to the flag state on the basis of effective control as it would not be easy to obtain the proof without boarding and inspecting the ship. However, it may be the lack of action on the part of flag state that may be treated as a breach of the UNCLOS Article 94.6, therefore forming justification for resorting to countermeasures. Moreover, the fact that that particular state has not implemented UNCLOS Article 113 in its internal law might be an additional proof that it does not take such incidents seriously and does not intend to fulfil its punitive obligations against the perpetrator. Both seems to be a proof of abuse of rights by the flag state according to the Article 300 of UNCLOS. That in turn may be treated as a justified basis for resorting to instant countermeasures, still preceded by an offer to negotiate, as according to Article 52(2) of ASR states are allowed for immediate adoption of countermeasures to the extent necessary to preserve the rights of the state.

Apparently, states would be entitled to resort to countermeasures when vessels flying the flag of a particular State are consistently engaged in acts against submarine marine infrastructure, as such acts seem to prove the breach on the side of

⁴⁵ ILA, Submarine Cables and Pipelines under International Law, Final Report, *op.cit.*, 27 [11].

⁴⁶ *Ibid.* 27 [12].

flag State of its obligation to exercise effective control over its vessels. However, when rapid action would be needed to safeguard the submarine infrastructure of the coastal state within its EEZ, it will probably be rested on one of the other circumstances precluding wrongfulness of the act of a state, that is the state of necessity.

After all, it would be hard to regard as a mere coincidence, that it was precisely this circumstance precluding the wrongfulness of an act that was explicitly identified by the ILA Committee on Submarine Cables and Pipelines under International Law. This does not alter the fact that countermeasures could also be resorted to at a later stage of such a dispute, inter alia with a view to obtain (impose) another state's consent for this dispute to be referred for consideration by an impartial international body.

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