Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties

Frederic L. Kirgis Jr.
Frederic L. Kirgis, Jr.*

Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties

Introduction

There is a rich literature on the topic of material breach in the law of treaties. It is richer, however, in doctrine than in analysis useful to decisionmakers. Article 60 of the Vienna Convention on the Law of Treaties raises—or at least leaves unresolved—troublesome questions with respect to breaches. This essay aims to resolve these questions by taking account of doctrine without being constricted by it. The essay will use the facts of the 1981 Algiers accords between the United States (“U.S.”) and Iran to illustrate the analysis.

The questions are deceptively simple to pose: (1) Would a relatively minor violation of a provision essential to the accomplishment of a

* Professor of Law, Washington and Lee University.


3. See infra notes 8-11 and accompanying text.

treaty's object or purpose constitute a material breach? (2) If a material breach occurs, entitling a nonbreaching party to invoke it as a ground for terminating or suspending the operation of the treaty, and if that party wishes only to suspend the treaty's operation in part, may it immediately suspend any part or parts it wishes? (3) If a nonmaterial breach occurs, what countermeasures are available to the nonbreaching party and what limits apply to them? The Vienna Convention's material breach provision, Article 60, on its face supplies no comprehensive answers to these questions. Neither does any other article of the Vienna Convention.

This essay will address each question *seriatim*. It will follow the lead of the International Court of Justice by treating Article 60 as a reflection of custom. The goal will be to reach conclusions regarding substance rather than procedure. Because there is a close relationship between substantive rights and procedural duties, however, we will need to focus in some detail on the latter in order to answer some of the questions we have posed above.

I. Minor Violations of Essential Provisions

A. The Algiers Accords

On January 19, 1981, the Government of Algeria made two Declarations that settled the Iran hostages crisis. In substance, though not in

---

4. This question telescopes two related but analytically separate questions: May the nonbreaching party act immediately? May it suspend any part of the treaty it wishes? Because of the procedural provisions in the Vienna Convention governing the right to suspend or terminate treaty obligations, it is appropriate to discuss these questions together. For discussion of the procedural provisions in the Vienna Convention, see infra text accompanying note 46.

5. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 47 (June 21, 1971) (Advisory Opinion). Since the matter involved termination of a treaty (actually a League of Nations mandate), the Court said only that the rules in Article 60 on termination may be treated as custom. It also inserted the words "in many respects," leaving the reader to wonder in which respects the rules represent custom and in which they do not. For purposes of the Namibia case, the Court treated all relevant provisions in Article 60 as custom. In Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), 1972 I.C.J. 46, 67 (Aug. 18, 1972), a case involving a claim of right either to suspend or to terminate a treaty, the Court treated Article 60 as the source of the definition of material breach. The Vienna Convention was not yet in force at the time of these cases.

6. The Vienna Convention sets forth specific dispute-settlement procedures, with time limits, to be followed when a party claims a right of termination or suspension for (inter alia) material breach. See Vienna Convention, supra note 2, at arts. 65-68. It is unlikely that definite time limits represent custom, though the principle of peaceful dispute settlement reflected in those articles does. See Restatement (Third) of the Foreign Relations Law of the United States § 337 (1986) [hereinafter Restatement (Third)].

7. See infra text accompanying note 46.

form, they are bilateral treaties between Iran and the United States. They actually constitute one bilateral treaty, because their provisions are intimately interwoven constituting the overall settlement.9

The Algiers accords provide, inter alia, for the settlement of claims of nationals of one party against the other party (with some exceptions, such as claims of the hostages) by submission to the Iran-United States Claims Tribunal; the return to Iran of assets held by U.S. banks and their branches; the funding of a $1 billion security account for payment of U.S. claims against Iran, with a requirement that Iran maintain a $500 million balance in it; the nullification of U.S. trade sanctions against Iran; the eventual return of the Shah's assets to Iran; the withdrawal of U.S. claims against Iran from the International Court of Justice; and the termination of all legal proceedings in the United States involving claims of U.S. nationals against Iran.

In 1981, shortly after the Algiers accords entered into force, President Reagan "suspended" all U.S. claims in U.S. courts insofar as they could be presented to the Iran-U.S. Claims Tribunal.10 This was a breach of the provision in the Algiers accords requiring termination, not just suspension, of such claims.11

B. Introduction to the Problem

Vienna Convention Article 60(3) provides inter alia:

A material breach of a treaty, for the purposes of this article, consists in:

(b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.12

According to the International Law Commission's [hereinafter the Commission] commentary to the draft that became Article 60, such essential
provisions are not limited to those directly touching the central purposes of the treaty; "other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even [though] these provisions may be of an ancillary character." Surely the provision in the Algiers accords requiring termination of the claims in U.S. courts would meet this test.

Taken literally, Article 60(3)(b) says that any violation of a provision essential to the accomplishment of the object or purpose of a treaty is a material breach. Does this mean that the U.S. decision to suspend rather than terminate U.S. claims would have authorized Iran to terminate the Algiers accords, and thus to decline to arbitrate or to pay U.S. claims covered by the accords? If the accords are properly considered as one treaty, and if Article 60 is taken at face value, the answer would be yes. Common sense suggests that the answer should be otherwise. If it is permissible to look beyond the seemingly plain language of Article 60(3)(b), we may gain insights as to the real meaning. This, of course, is a question of interpretation, a matter covered by Articles 31 and 32 of the Vienna Convention. These articles adopt the "plain meaning rule," which directs the interpreter to look first to the ordinary meaning of treaty provisions in their context and in light of the treaty's object and purpose, and then to turn to any relevant subsequent agreement or practice of the parties and applicable rules of international law. Only if this process leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, may the interpreter resort to the preparatory work of the treaty.

It is doubtful that decisionmakers actually put on the blinders that the plain meaning rule contemplates. In fact, they normally seem to consider all arguably-relevant indicators of the parties' intent, including any relevant preparatory work, more or less simultaneously. Decisionmakers consider these indicators in light of the values and goals they perceive to be relevant under the circumstances. Let us then emulate the decisionmakers and consider history, context and preparatory work, in light of the prevailing goal of a stable international order.

14. Some commentators would accept this result as inescapable, given the wording of Article 60(3)(b), even though they would not necessarily think it wise as a matter of policy. See O. Elagab, supra note 1, at 157; Schwelb, supra note 1, at 314-15; Simma, Article 60, supra note 1, at 61.
15. See Vienna Convention, supra note 2, at art. 31.
16. See id. at art. 32.
C. Interpretation of Article 60(3)(b)

1. Historical Rules Governing Material Breach

One of the classics of international law, Oppenheim's treatise, subscribed in its first four editions to the proposition that any breach of a treaty would entitle the nonbreaching party to terminate it. In addition, the influential Harvard Research in International Law codification of the law of treaties had adopted the Oppenheim proposition, subject to a duty imposed on the nonbreaching party to seek from an international tribunal a declaration that the treaty was no longer binding on it. The Oppenheim position was consistent with the views of most early twentieth century writers. Nevertheless, the fifth edition of Oppenheim, under a new editor, dropped this proposition only two years after publication of the Harvard codification.

2. Work of the International Law Commission

Given this history, when the Commission undertook to codify the law of treaties, it was not self-evident that only a violation of an important provision justified termination or suspension of a treaty. It was even less clear that only a significant violation of an important provision would have that effect. Since the final product, Vienna Convention Article 60(3)(b), clarified the former of these points without saying anything about the latter, one could indeed infer an intent to make any violation of an important provision a ground for termination or suspension of a bilateral treaty.

22. Article 60 necessarily is less flexible regarding permissible responses to material breach of a multilateral treaty than to material breach of a bilateral treaty. Thus,
The context and preparatory work, however, cast doubt on that inference. The Commission was concerned that its articles on material breach and on fundamental change of circumstances might create loopholes for states to avoid their treaty obligations. The rapporteur, Sir Humphrey Waldock, whose draft articles became the basis for these provisions in the Vienna Convention, consistently tried to prevent overexpansion of the notion of material breach and carefully referred to state practice supporting the material breach doctrine as involving “substantial” or “serious” breaches.

Waldock’s original draft more clearly limited the notion of material breach than did either the Commission’s final draft or the Vienna Convention. His draft defined material breach as a repudiation of the treaty or “a breach so substantial as to be tantamount to setting aside any provision” as to which no reservation would be permitted or which would have to be performed to fulfill the treaty’s object and purpose. Obviously, a minor breach of a major provision would not “be tantamount to setting [the provision] aside.”

The Commission’s revision of Waldock’s draft and formulation of what is presently Article 60(3)(b) might suggest that the Commission intended to dilute Waldock’s limitation. However, the Commission’s records, though sparse on this point, indicate otherwise. Waldock’s draft was submitted to the Commission’s drafting committee in 1963, and emerged in nearly its current form. There was no indication that a change in meaning was intended. The Commission’s commentary on this point was essentially the same as its commentary on its final draft article. One sentence, in particular, of the commentary seems to indicate that the breach, not just the breached provision, must be significant if it is to constitute a material breach: “The Commission, however, was unanimous that the right to terminate or suspend must be limited to cases where the breach is of a serious character.”

On the other hand, elsewhere in the same commentary the Commission focused solely on the importance of the breached provision, and not on the character of the breach itself. That emphasis, though, is not

---

Article 60(2) permits only suspension, rather than termination, of a multilateral treaty unless the nonbreaching parties unanimously agree to terminate it between themselves and the breaching state or between all parties. See Vienna Convention, supra note 2, at art. 60(2). In most cases, even suspension (“in whole or in part”) may be only between the breaching and a specially affected state. See id.

23. See the Commission’s commentaries to the articles that became Vienna Convention articles 60, 62 and 65, in Report, Eighteenth Session, supra note 13, at 253-55, 257-60, 262-63. See also Waldock’s Second Report, supra note 21, at 87.


25. Waldock’s Second Report, supra note 21, at 73.


necessarily inconsistent with the more specific reference to the character of the breach in the previous paragraph. The Commission was struggling with the problem of breach of a provision that materially induced a party to enter into the treaty, but that was not central to the treaty as a whole. The Commission's failure to reiterate that the breach itself must be serious does not detract from the point it had already made.

3. Position of the Restatements

Both the Restatement (Second) and Restatement (Third) of the Foreign Relations Law of the United States focus more sharply on the character of the breach than does Vienna Convention Article 60(3)(b). The Restatement (Second) limited the nonbreaching party's right of termination to a violation that "has the effect of depriving the aggrieved party of an essential benefit of the agreement."[28] The black letter of the Restatement (Third) is not so clear, but a Comment says that "[n]ot every breach of an agreement is material. This section applies only to a significant violation of a provision essential to the agreement."[29]

This Comment may be considered the American Law Institute's interpretation of Vienna Convention Article 60(3)(b), since the Restatement (Third) accepts the Convention as the foreign relations law of the United States, except in a few instances not relevant here.[30]

D. Conclusion: Minor Violations of Essential Provisions

The policy of engendering stability in consensual international relations embodied in the principle pacta sunt servanda, and reflected in the Commission's desire to avoid loopholes that might allow states to escape treaty obligations, supports the Restatements' position. The commentary to the Vienna Convention is not inconsistent with this view. One must conclude that both Restatements have correctly stated the law on this point, that is, that minor violations of a treaty provision do not constitute material breach, even if the provision is essential to the treaty. Therefore, because the U.S. decision to suspend rather than terminate U.S. claims in U.S. courts was not a significant violation, Iran would not have been justified in terminating its obligations under the Algiers accords in response to this breach.

II. Unilateral Suspension in Part

A. Introduction to the Problem

Let us remain with the Algiers accords, and assume that the U.S. had not nullified the pre-January 1981 attachments ordered by U.S. courts

29. Restatement (Third), supra note 6, at § 335, comment b.
30. Id. at Part III, Introductory Note.
against Iranian property. The removal of attachments in American courts was an indispensable step toward the freeing of Iranian assets from American control, which in turn was one of Iran's primary aims in entering into the accords. Therefore, a failure to nullify the attachments probably would have been a material breach. We shall assume so. Could Iran have responded immediately by suspending part of its own performance under the treaty, without having to wait for dispute-settlement proceedings? If so, could Iran have suspended any of its unperformed obligations under the accords, without limitation? For example, could it have suspended unilaterally its duty to replenish the security account if and when it fell below $500 million?

These questions concerning the timing and manner of a State's response to a material breach by a treaty partner involve complicated issues of interpretation. In examining these issues we must consider the interaction of several substantive and procedural provisions of the Vienna Convention, the juncture between the law of treaties and the law of state responsibility, and the scope of the treaty law doctrine of separability.

B. The Relevant Vienna Convention Provisions

Five Vienna Convention articles may affect when and in what manner a state may respond to a material breach. This Section will examine the meaning and interactive dynamics of each article. Article 60 authorizes the nonbreaching party to a bilateral treaty, and a party specially affected by the material breach of a multilateral treaty, to invoke the breach as a ground for suspending the treaty "in whole or in part" between itself and the breaching party. The question arising from Article 60, however, is what part or parts of a treaty may be suspended.

Article 42(2) says, inter alia, that "suspension of the operation of a treaty" may take place only as a result of the application of the provisions of the treaty or of the Vienna Convention itself. The question here is whether this language precludes the suspension of a treaty governed by non-Vienna Convention law, and thus, not held to the Convention's procedural requirements.

Article 44(2) posits that a ground recognized in the Convention for suspending the operation of a treaty "may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in Article 60." The following paragraphs of Article 44 deal with separa-

32. See infra text following note 108.
33. We shall assume that Iran took such action in a timely fashion, avoiding a loss of the right through acquiescence. See Vienna Convention, supra note 2, at art. 45(b).
34. See id. at arts. 60(1)-(2).
35. Id. at art. 42(2).
36. Id. at art. 44(2).
ble clauses, and provide that if the ground for suspension relates solely to separable clauses, it may be invoked only with respect to those clauses. Article 44 thus raises the question of whether the quoted language renders the doctrine of separability irrelevant to suspensions of a part of the treaty for material breach.

Article 65(1) states, in part, that when a party invokes a ground recognized by the Vienna Convention for invalidating, terminating, withdrawing from, or suspending the operation of a treaty, it must notify the other parties of its claim. Article 65(2) states, "If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, [the notifying party may carry out] the measure which it has proposed." Article 65(3) says that if an objection has been raised, the parties must seek a solution through peaceful means. The question here is whether these procedural provisions preclude partial or temporary suspension until the period for objections has expired, or perhaps even until the parties have exhausted the procedures.

Article 72 says that with certain exceptions, suspension of the operation of a treaty releases the affected parties from the obligation to perform the treaty while it is suspended, but does not otherwise affect the legal relations that the treaty establishes between the parties. The parties must refrain from acts that tend to obstruct the resumption of the operation of the treaty. The question is whether this sheds any light on the preceding questions.

Before we examine the ambiguities with respect to partial suspension of a treaty, it is important to point out what is not ambiguous. A material breach clearly does not result automatically in termination or suspension of a treaty, nor does it allow the nonbreaching party or parties simply to declare the treaty terminated or suspended. Rather, the nonbreaching party to a bilateral treaty may "invoke the breach as a ground" for terminating it or for suspending its operation in whole or in part. With respect to a multilateral treaty, a nonbreaching party may

37. See id. at art. 44(3).
38. See id. at art. 65(1).
39. See id. at art. 65(2).
40. Under Article 66, any of the parties to the dispute may set in motion a conciliation procedure. See Vienna Convention, supra note 2, at art. 66. If a violation of a peremptory norm of general international law (jus cogens) is alleged, however, any party may submit the dispute to the International Court of Justice unless the parties consent to arbitration. Id. at art. 66(a); see also id. at arts. 53, 64 (relationship between peremptory norms and treaties).
41. See Vienna Convention, supra note 2, at art. 72(1).
42. Id. at art. 72(2).
43. See the Commission's commentary to what became article 60, in Report, Eighteenth Session, supra note 13, at 254-55 (para. 6). See generally Briggs, supra note 1, passim. The exception is in Article 60(2)(a), which allows the nonbreaching parties to a multilateral treaty, acting unanimously, to suspend it in whole or in part or to terminate it between themselves and the defaulting state or among all the parties. Vienna Convention, supra note 2, at art. 60(2).
44. Vienna Convention, supra note 2, at art. 60(1).
invoke the breach as a ground for suspending the treaty's operation between itself and the breaching party, if the nonbreaching party is specially affected by the breach. The procedural requirements of the Vienna Convention prevent a nonbreaching party from having the last say regarding its response, even as to designating the part or parts it wishes to suspend. Nevertheless, the nonbreaching party does have the first say as to the part or parts it wishes to suspend. If its decision is not challenged effectively, the nonbreaching state will have succeeded in choosing its remedy for the breach. Furthermore, its choice may become a precedent for subsequent state practice.

C. Applicability of the Procedural Requirements to Suspensions

The procedural requirements provide the context for much of the analysis, since Article 65 could be read to preclude the nonbreaching party from suspending any part of the treaty obligation—even provisionally—until the period for the other party to object has expired. That period would be a minimum of three months for parties to the Vienna Convention, and would be a reasonable time—possibly on the order of three months—for nonparties bound in this respect only by custom.

Three arguments, however, support immediate suspension at least of the part of the nonbreaching state's performance that corresponds to the allegedly breached provisions. In the case of a sudden material breach, a fourth argument exists that could support immediate suspension of all treaty obligations. We will assess the validity and scope of each argument in turn.

1. The Textual Argument

Unlike Article 60 on material breach, Article 65 says nothing about suspension in part. Insofar as it deals with suspension, Article 65 simply refers to "suspending [the treaty's] operation." On its face, this language seems to refer to suspending the entire treaty's operation. Under this reading, the nonbreaching state need not fulfill the Article 65 procedural requirements if it suspends only part of the treaty.

This interpretation is consistent with the primary concern of Sir Humphrey Waldock, whose purpose in drafting procedural requirements was to impose safeguards against states arbitrarily terminating

45. Id. at art. 60(2)(b).
46. Id. at art. 65(2).
47. See RESTATEMENT (THIRD), supra note 6, at § 337, comment a.
48. This application of the reciprocity principle is distinct from the law of reprisal, which contains a more general proportionality requirement.
49. See supra note 34 and accompanying text.
50. The language is: "A party which, under the provisions of the present Convention, invokes . . . a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor." Vienna Convention, supra note 2, at art. 65(1).
treaty relations. Concern about unilateral termination could well lead to limitations on a state’s ability to suspend unilaterally the entire treaty, and perhaps to suspend a separable part of the treaty, without affecting partial suspension when the part suspended is not separable. Under Vienna Convention Article 44, separable provisions are the exception rather than the rule. Thus, the text of Article 65 supports an argument that when a state materially breaches a nonseparable treaty provision, the nonbreaching party may respond by immediately suspending performance of part of its obligations under the treaty without first completing Article 65 dispute procedures. Such a suspension would then be lawful if the suspended provisions correspond to the provisions allegedly breached or, alternatively, if the suspension satisfies the requirements of reprisal—a doctrine that has its own procedural preconditions and substantive limitations.


53. Article 44(2) provides:

A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs [setting forth conditions for separability] or in article 60.

2. Reciprocity and Reprisal Argument

The second argument for partial (or even total) suspension is that rights of reciprocity and/or reprisal exist wholly apart from the law of treaties. These rights may justify countermeasures by the nonbreaching party that have the same effect as suspension of some or all of its obligations in the treaty, but are not technically "suspension of the operation" of the treaty. That being the case, these countermeasures would not fall within Article 65 at all.

Initially, it should be noted that this argument would have little or no practical significance for the present discussion if the law of reciprocity and reprisal contains essentially the same procedural requirements as does the law of treaties. Willem Riphagen, the Commission's former special rapporteur on the law of state responsibility, proposed a set of procedural requirements for reciprocity and reprisal based on Vienna Convention Article 65. The Commission, however, has not yet adopted these requirements, and it is not at all clear that they would codify existing law if they were adopted. Consequently, we must assess the argument that suspension of part of a treaty for material breach may be justified by reciprocity and reprisal regimes without regard to the Vienna Convention.

a. Applicability of Article 42(2) to Suspension in Part

The evaluation starts with Vienna Convention Article 42(2). As noted above, Article 42(2) limits the "suspension of the operation of a treaty" to instances authorized by the application of the treaty itself or of the Vienna Convention. The Commission stressed that "application" of the Vienna Convention would include application of its procedural

---


Mr. Riphagen also proposed dispute-settlement procedures based on those in the Vienna Convention. See id. at 15-19; Seventh Report on State Responsibility by Willem Riphagen, Special Rapporteur, U.N. Doc. A/CN.4/397, at 3-13 (1986), reprinted in [1986] 2 Y.B. INT'L COMM'N, PART ONE, at 1, U.N. Doc. A/CN.4/SER.A/1986/Add.1 (Part 1) [hereinafter Riphagen's Seventh Report on State Responsibility]. If these are or become law, the party asserting material breach of a treaty, and wishing to suspend its performance in part, would be subject to essentially the same procedural duties under the law of reciprocity and reprisal as it would under treaty law if Vienna Convention article 65 applied to suspension in part. This point would not depend on the law of reciprocity/reprisal being wholly independent of treaty law; the two bodies of law may well coexist in the realm of material breach and a resulting suspension, in whole or in part, of the operation of the breached treaty. See infra section II(C)(2).

55. This argument assumes that the suspension is applied in proportion to the alleged treaty violation, as reprisal doctrine requires. See infra text accompanying note 89.

56. See E. ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 14-42 (1984); Simma, Article 60, supra note 1, at 19-23, 39-40 (stressing the intent of the nonbreaching party); Simma, Termination and Suspension of Treaties: Two Recent Austrian Cases, 21 GERMAN Y.B. INT'L L. 74, 78-80, 85, 88-89 (1978) [hereinafter Simma, Two Recent Austrian Cases].

57. See Riphagen’s Seventh Report on State Responsibility, supra note 54.

58. See supra text accompanying note 35.
requirements. 59

This raises some perplexing questions. First, does Article 42(2) refer to partial, as well as total, suspension? It seems quite likely, though not crystal clear, that the reference in Article 42(2) to "suspension of the operation of a treaty," like the similar reference in Article 65, 60 is to total suspension. As in Article 65, the reference in Article 42(2) could also extend to suspension of a separable part. But the language in Article 42(2) does not appear to encompass the situation we have examined in this section, that is, when a state responds to a material breach by partially suspending its performance of some non-separable treaty provisions. The contrast between the language in Article 60—suspension "in whole or in part," without reference to separability—and the language in both Articles 42(2) and 65 supports this conclusion.

The drafting history of Article 42 also tends to support the conclusion that Article 42(2) does not apply to partial suspension of a non-separable treaty provision. In the Commission's discussion of the draft article that became Article 42, the overwhelming concern was to limit the ways in which states could terminate a treaty or challenge its validity. During the key discussion in 1966, which led to the Commission's adoption of the article, there was no mention of suspension in part and very little mention of suspension at all. 61 In the Committee of the Whole at the Vienna Conference, the discussion focused almost entirely on invalidity and on the procedure for establishing invalidity. 62 In the only meaningful reference to suspension, Sir Humphrey Waldock said simply that suspension needed to be mentioned in the article, "since several of the substantive articles which followed contained provisions concerning it." 63

Thus, little or no thought was given to suspension—especially not to suspension in part—in the context of Article 42(2). Article 42(2) should not be interpreted to subject suspension in part to the Vienna Convention's substantive or procedural requirements, unless the suspension happens to be of legitimately separable treaty provisions.

59. See Report, Eighteenth Session, supra note 13, at 237 (para. 4) (Commission's commentary to what became Article 42(2)).
60. See supra note 38 and accompanying text.
63. Id. at 227.
b. Distinction Between “Operation” and “Performance” of a Treaty

The language of Article 42(2) also raises a second question with respect to its applicability to treaty suspensions. This question becomes pertinent when a state suspends an entire treaty or a separable part of a treaty. It is also pertinent if the analysis in the preceding section (section II(C)(2)(a)) is incorrect, when a state suspends a nonseparable part of a treaty. Because of the references in the Vienna Convention to “operation” of a treaty, one might ask if there is a distinction between suspension of the “operation” of a treaty (which would be covered by Article 65) and suspension of the “performance” of a treaty (which would be outside the Vienna Convention’s scope). Some commentators and Commission members have suggested that this distinction exists.\(^6\)

They have suggested that suspension of the operation of a treaty is a treaty law matter, while suspension of its performance is a matter which belongs in the substantive body of state responsibility law—specifically the law of reciprocity and/or reprisal, or more generally, the law of countermeasures. Under this view, the nonbreaching party’s suspension of performance would not have to be governed by Article 65 procedural requirements.

The Commission’s commentary to the draft article that became Article 42 is unclear on this point. First, the Commission said not only that “application” of the Vienna Convention included its procedural provisions, but also that the grounds of suspension provided in the Vienna Convention are exhaustive of all such grounds that are not expressly set forth in the treaty itself.\(^6\) A few sentences later, however, the commentary said that it was leaving aside from the articles on treaty law “cases of a succession of States or of the international responsibility of a State, both of which topics it has under separate study . . . .”\(^6\) The Commission’s restraint is confirmed in Vienna Convention Article 73.\(^6\)

In its separate study of state responsibility, the Commission included reciprocity and reprisal.\(^6\)

Indeed, the Commission’s work on state responsibility could be interpreted as supporting the distinction between suspension of “operation” and of “performance.” A recent draft deals with reciprocity (suspending the performance of obligations corresponding to breached

---


\(^6\) Report, Eighteenth Session, supra note 13, at 237.

\(^6\) Id. See also id. at 177 (para. 31 of the Commission’s Introduction to its 1966 Draft Articles on the Law of Treaties).

\(^6\) Article 73 provides, “The provisions of the present Convention shall not pre-judge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.” Vienna Convention, supra note 2, at art. 73.

\(^6\) See Riphagen’s Fifth Report on State Responsibility, supra note 54, at 3.
international obligations, which could be treaty obligations) and reprisal (suspending the performance of proportional obligations, without necessarily corresponding to the breached treaty or nontreaty obligations). The draft then states that it "shall not prejudice" questions involving, \textit{inter alia}, "suspension of the operation of treaties."\footnote{Id. at 3, 4. Some commentators have viewed the right of reciprocal withholding of performance not as "suspension" at all, but as an application of an entirely separate customary international law and Roman law principle \textit{inadimplenti non est adimplendum} or of the similar Roman law principle \textit{exceptio non adimplenti contractus}. See E. Zoller, \textit{supra} note 56, at 15; Schachter, \textit{In Defense of International Rules on the Use of Force}, 53 U. Chi. L. Rev. 113, 128-29 n.69 (1986). \textit{Cf.} Simma, \textit{Article 60}, \textit{supra} note 1, at 20 (distinguishing retaliatory nonperformance from reciprocity as embodied in the principle \textit{inadimplenti non est adimplendum}).}

On the other hand, some evidence tends to refute this distinction. At one point in the Commission's work on the law of treaties Sir Humphrey Waldock acknowledged that the material breach article encompassed the principle of reciprocity.\footnote{See Waldock's \textit{Second Report}, \textit{supra} note 21, at 76.} At that stage in the drafting, the article allowed full or partial suspension, but the latter could be only in respect of "the provision of the treaty which has been broken."\footnote{Id. at 73.} This reciprocity language was later removed from the article, leaving the reference simply to suspension in whole or in part. But even then, the Commission deemed the reciprocity principle to be incorporated in the article: "The right [to invoke a material breach as a ground for termination or suspension, in whole or in part] arises under the law of treaties independently of any right of reprisal, the principle being that a party cannot be called upon to fulfill its obligations under a treaty when the other party fails to fulfil those which it undertook under the same treaty."\footnote{Report, Eighteenth Session, \textit{supra} note 13, at 255 (Commission's commentary to article that became Article 60).}

During the drafting stage, when the material breach article still referred expressly to reciprocity, Sir Humphrey noted that the right to suspend the operation of the provision breached by the defaulting party could also be justified as a nonforcible reprisal.\footnote{See id.} He added that such a reprisal might even encompass some other provision of the treaty, even though the draft article did not say so.\footnote{See id.} He thought, however, that it was "better not to introduce the law of reprisals, as such, into the present article."\footnote{See id.} This must have meant that he did not wish to plunge into the law of reprisals, with all of its ramifications. The statement may have meant also that he regarded the law of reprisals as an entirely self-contained source that could authorize suspension of treaty provisions even if the law of treaties did not. But he later clearly indicated that suspension of the operation of a treaty for purposes of reprisal could come...
within the provision that became Article 60.\textsuperscript{76} The Commission's commentary to that article is in accord.\textsuperscript{77} In fact, it is reasonable to surmise that the change in the article from a reference to pure reciprocity as the basis for suspension in part, to a broader reference containing no express limit on the part that may be suspended, was to accommodate reprisals that would not necessarily be limited to the breached article.\textsuperscript{78}

This suggests that there is no legally-significant difference between suspension of the "operation" of a treaty (under the law of treaties) and suspension of the "performance" of a treaty (under the law of state responsibility), in response to a material breach of the same treaty.

Vienna Convention Article 72\textsuperscript{79} provides additional support for the view that there is no substantive difference between suspension of a treaty's operation and performance. Article 72 expressly ties suspension of the operation of a treaty to suspension of "the obligation to perform" the treaty. Moreover, the Commission's commentary to the provision that became Article 72 reinforces the notion that suspension of "operation" and of "performance" are the same.\textsuperscript{80}

Nevertheless, it has been pointed out that Article 72 releases both parties from the obligation to perform. This result seems inconsistent with a reprisal, which is a suspension by one party in an effort to induce the other party to perform.\textsuperscript{81} The argument has force, although it is inconsistent with the views of several scholars who treat suspension of

\textsuperscript{76} See Records, Second Part of Seventeenth Session, supra note 61, at 64-66. See also Records, Fifteenth Session, supra note 19, at 245 (comments of Sir Humphrey Waldock).

The Swiss amendment that led to Vienna Convention article 60(5) clearly was based on the understanding that suspension under Article 60 could be by way of reprisal. Article 60(5) excepts humanitarian treaties, "in particular . . . provisions prohibiting any form of reprisals against persons protected by such treaties," from those that could be terminated or suspended for material breach by another party. Vienna Convention, supra note 2, at art. 60(5). See also U.N. Conf. on the Law of Treaties (1st Sess.), supra note 24, at 354-55 (remarks of Mr. Bindschedler).

\textsuperscript{77} Report, Eighteenth Session, supra note 13, at 253-54.

\textsuperscript{78} This is the thrust of Sir Humphrey Waldock's remarks in Records, Second Part of Seventeenth Session, supra note 61, at 64-65.

\textsuperscript{79} 1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

Vienna Convention, supra note 2, at art. 72.

\textsuperscript{80} The commentary points out that "the legal nexus between the parties established by the treaty remains intact"—as is the case when the underlying obligation persists, but the performance of it is suspended. Report, Eighteenth Session, supra note 15, at 267.

\textsuperscript{81} See Simma, Two Recent Austrian Cases, supra note 56, at 88-89; see also Simma, Article 60, supra note 1, at 55.
the operation of a treaty as a form of reprisal. The broad focus of Article 72 further weakens the argument. Instead of dealing specifically with suspension for material breach, Article 72 encompasses suspension permitted by any Vienna Convention article. Moreover, Article 72 focuses on suspension of the entire operation of a treaty or of a separable part. The discussions leading to its adoption demonstrate no intent to exclude reprisals. Instead, they demonstrate an oversight. No meaningful account was taken of the one situation—material breach—in which suspension in part, without regard to separability, would be permitted. Thus no effort was made to distinguish the unique effect of material breach suspension.

Finally, the argument for no legally-significant distinction is supported by an indication in the Commission’s early discussion of the material breach article that “suspension” includes reprisal. Sir Humphrey Waldock expressed his view that “suspension would involve non-application of the clause in question until it became clear that the defaulting State was ready once again to apply the whole of the treaty.”


83. See Vienna Convention, supra note 2, at art. 57 (suspension under treaty’s provisions or by consent of all parties), id. at art. 58 (suspension by agreement among some parties to multilateral treaty), id. at art. 59 (conclusion of later treaty), id. at art. 60 (material breach), id. at art. 61 (impossibility), id. at art. 62 (fundamental change of circumstances).

84. In the Commission’s consideration of the draft that became Vienna Convention Article 72, there was some mention of partial suspension and of suspension in response to a breach, but these points were not developed. See Summary Records, Eighteenth Session, supra note 52, at 26-31, 162 (especially the remarks of Messrs. Reuter and Rosenne). See also Report, Eighteenth Session, supra note 13, at 57-58 (comments of the Government of Israel). Sir Humphrey Waldock disposed of the matter by saying that the article on separability sufficiently covered the question of partial suspension. Summary Records, Eighteenth Session, supra note 52, at 31.


The first paragraph of the Commission’s commentary to this draft article said it “does not touch on the question of responsibility, which is reserved by article [73], but concerns only the direct consequences of the suspension of the operation of the treaty.” Records, Eighteenth Session, supra note 13, at 267. The caveat regarding questions of responsibility apparently refers to the indirect consequences of the suspension, such as whether it could give rise to a further right of suspension by other parties, not to the question whether the suspension itself could be an aspect of the law of state responsibility. See also Summary Records, Eighteenth Session, supra note 52, at 29 (remarks of Grigory Tunkin).

85. Records, Fifteenth Session, supra note 19, at 132.
c. Conclusion: Reciprocity and Reprisal

In light of these conflicting arguments, one cannot say convincingly that there are two separate but equal systems from which the victim of a material breach of a treaty may choose if it wishes to suspend performance of its obligations under a treaty. The strongest arguments, however, suggest that there is no substantive difference between suspension of the operation of a treaty and suspension of performance of a treaty. A significant reason for the Commission's desire to keep its work on the law of treaties separate from its work on state responsibility was that it did not wish, in its treaty project, to define all the conditions that might allow a treaty party to suspend its performance in response to another treaty party's violations of international law outside the treaty.86

Nor is it likely that the Commission wished to face the questions involved in defining when reprisals would be lawful. Such questions could affect treaty rights and obligations but would extend well beyond relationships within a single treaty. Violations that might engender reprisals suspending treaty obligations could be violations of another treaty to which both states are parties or violations of customary international law, and the treaty-suspending reprisals themselves would be subject to restrictions applicable to all varieties of nonforcible reprisal—not just those applicable to the suspension of treaty obligations. In addition, breaches of treaties could lead to reprisals not involving the suspension or termination of treaty obligations.87 The Commission's treaty law project would have ranged far afield if it had addressed all of these matters.

Moreover, once the law of treaties had been codified in the Vienna Convention, the Commission, in its work on state responsibility, would not want to reopen the one instance of treaty suspension in response to another party's violation that was covered in the Vienna Convention, namely, the case of suspension of a treaty obligation, in whole or in part, in response to a material breach of the same treaty. This desire of the drafters of the state responsibility articles to avoid conflicts with the previously-enacted Vienna Convention would explain the caveat in the draft articles on state responsibility, phrased to coincide verbatim with the language on suspension in the Vienna Convention.

Thus, the better view is that suspension of a treaty obligation by way of reciprocity or reprisal would not, for that reason alone, be exempt from the procedural requirements of Vienna Convention Article 65. But the only form of reprisal that could come within the Vienna Convention (and thus within Article 65) would be the suspension of one

86. During the Commission's discussion of Sir Humphrey Waldock's Second Report on the Law of Treaties, a Commission member suggested that reprisal for the violation of another treaty might justify treaty termination. Sir Humphrey replied that the Commission could not enter into such issues in formulating what became Vienna Convention Article 60. See id.

or more obligations in a treaty in response to a material breach of the
same treaty by another party.\textsuperscript{88} Such reprisals also would have to meet
the conditions attached to reprisals generally, including the condition of
proportionality.\textsuperscript{89}

3. Nondefinitive Measures

The third argument for provisional suspension is based on a statement
made by Paul Reuter, a member of the International Law Commission,
in 1966. When the Commission voted to adopt the article that became
Vienna Convention Article 65, Mr. Reuter explained his vote. Referring
to paragraph 2,\textsuperscript{90} he said that he

considered that the word 'measure' had been used, for want of a more
precise term, to designate the measure by which the State clearly defined
its legal position; the rule stated in paragraph 2 did not prevent a State
from ceasing to apply the treaty before the expiry of the period fixed [for
objection to the proposed measure].\textsuperscript{91}

In other words, he asserted that a nonbreaching party could provi-
sionally suspend its performance, without adopting the countermeasure
it intended ultimately to adopt, and without waiting for the dispute-set-
tement procedure to begin. This position is sensible and can be reon-
ciled with the language of Article 65. In addition, it could be justified
under the law of nonforcible reprisals, which arguably recognizes a right
to take some interim, unilateral measures of protection before third-
party dispute settlement has begun (or even during dispute settlement,
if the third party cannot give effective interim measures of protection).\textsuperscript{92}

Nevertheless, one cannot be confident in saying that Mr. Reuter's
view reflected the intent of either the Commission or the Vienna Con-
ference. In fact, the indications are to the contrary. Even though no
Commission member challenged his assertion, one who favored a right

\textsuperscript{88} As we have seen, the terms of Article 65 probably do not cover the suspen-
sion of fewer than all obligations under a treaty, unless the suspension is of a separa-
ble part of the treaty. \textit{See supra} note 52 and accompanying text. Thus, for reasons
other than a supposed wall between treaty law and state responsibility law, suspen-
sion of a nonseparable part of a treaty for material breach would not come within
Article 65.

\textsuperscript{89} \textit{See Riphagen's Fifth Report on State Responsibility, supra} note 54, at 3 (draft Article
9). The law applying to reprisals of all sorts (not just treaty reprisals) has its own
procedural requirements. \textit{See id.} (draft Article 10); \textit{Riphagen's Seventh Report on State
Responsibility, supra} note 54, at 3, 7-8. Same-treaty reprisals would also have to meet
any express conditions in Vienna Convention Article 60. Thus, Article 60(1) restricts
reprisal by a single party to a multilateral treaty, and Article 60(5) prohibits reprisals
against persons protected by humanitarian treaties. Vienna Convention, \textit{supra} note
2, at arts. 60(2), 60(5).

\textsuperscript{90} \textit{See supra} text accompanying note 39.

\textsuperscript{91} \textit{Summary Records, Eighteenth Session, supra} note 52, at 159.

\textsuperscript{92} \textit{See Riphagen's Fifth Report on State Responsibility, supra} note 54, at 3 (article 10).
Messrs. Riphagen and Reuter both served as arbitrators in the Case Concerning the
Air Services Agreement of 27 March 1946 (U. S. v. Fr.), 54 I.L.R. 304 (1978), joining
in an award that recognized such a provisional right to take counter-measures. \textit{Id.} at
340-41.
of provisional suspension, Milan Bartos, expressed uncertainty about
the possible effect of paragraph 2. Another member, Eduardo
Jiménez de Aréchaga, said at other times that he thought the article, as
drafted, would preclude a nonbreaching party from ceasing to apply the
treaty at least until the period for reply under the dispute-settlement
procedure had expired. Moreover, at the Vienna Conference on the
Law of Treaties, representatives from the U.S. and the United Kingdom
seemed to interpret the procedural requirements as precluding interim
or provisional measures by the party claiming to be the victim of a ma-
terial breach.

4. Cases of Special Urgency

The fourth argument supporting suspension of a treaty in part prior to
fulfillment of Article 65 procedural requirements focuses on the exception in Article 65(2) for “cases of special urgency.” At the Vienna
Conference, Sir Humphrey Waldock pointed out that those words were
intended “to provide for cases of sudden and serious breach of a treaty
which might call for prompt reaction by the injured party to protect
itself from the consequences of the breach.”

These cases are precisely the ones in which a right of immediate,
unilateral suspension is needed. Because Article 65, like Article 60,
deals with material breaches (as distinguished from nonmaterial ones),
the unilateral suspension in cases of special urgency will often be of the
entire treaty obligation. But there may also be cases in which the
injured state may adequately be protected by suspending performance
only of some obligations, such as those reciprocal to those allegedly
breached. That would not be precluded in a case of “special urgency.”

Many questions raised by the special urgency argument will be fact-
tual, rather than legal. Nobody will challenge the right to suspend obligations in cases of special urgency, since it is expressly provided for in
the Vienna Convention. But states will challenge factual claims of spe-
cial urgency, and they may also challenge the reacting state’s choice of
which obligation(s) to suspend. The Vienna Convention does not pro-
vide a mechanism for third-party determinations in those cases, except
to the extent that the facts relating to the urgency may eventually be
considered in the Article 65 dispute-settlement process on the merits.

93. Summary Records, Eighteenth Session, supra note 52, at 158, 159; see also Records,
Fifteenth Session, supra note 19, at 173 (comments of Mr. Bartos).
94. See Summary Records, Eighteenth Session, supra note 52, at 7-8; U.N. Conf. on the
Law of Treaties (1st Sess.), supra note 24, at 356, 404 (nonbreaching party might have
to wait until procedures have been completed).
95. See U.N. Conf. on the Law of Treaties (1st Sess.), supra note 24, at 407 (com-
ments of U.S.), 420 (comments of U.K.).
96. See supra text accompanying note 39.
97. U.N. Conf. on the Law of Treaties (1st Sess.), supra note 24, at 441.
98. Special urgency as a ground for immediate treaty suspensions is also
expressly contemplated in the procedural mechanism being considered by the Com-
mission for the Law of State Responsibility. See Riphagen’s Seventh Report on State
Responsibility, supra note 54, at 2, 4 (art. 2).
Of course, a duty rests upon the suspending party to act in good faith when it claims special urgency and decides which obligation(s) to suspend. The same duty of good faith should prevent a state from invoking Article 65(2) special urgency suspension in order to effect a disguised termination of the treaty.

5. **Conclusion: Applicability of Procedural Requirements**

To summarize, Article 65 does not seem to preclude partial, unilateral suspension of nonseparable obligations by way of reciprocity or reprisal, and clearly permits full or partial suspension in cases of sudden and serious breach ("special urgency"). It is a necessary, but not sufficient, condition that the suspension be truly interim—a suspension in fact, rather than a termination clothed as a suspension.

D. **Separability**

At one stage in the drafting process, the Commission was prepared, in cases of partial suspension for material breach, to limit the suspension to separable treaty provisions. The reason given was that "even in the case of breach it would be wrong to hold the defaulting State afterwards to a truncated treaty the operation of which was grossly inequitable between the parties." 100

This limitation disappeared in 1966.101 When efforts were made at the Vienna Conference to revive it, Sir Humphrey Waldock pointed out that a separability requirement "would have the awkward result that, when a State committed a breach of one article, the other party might be precluded from suspending the operation even of that article, because it did not fall within [the definition of a separable provision in what is now Vienna Convention Article 44(3)]." 102 He noted also that the principle of separability could apply to very few cases of material breach, i.e. breach of a provision essential to the accomplishment of the object or purpose of the treaty.103 This means, of course, that a breach impairing or even nullifying a separable provision would not be a "material breach" unless the provision was essential to the accomplishment of the object or purpose of the entire treaty.

If the separability principle only applies to few material breaches, the obvious question is whether there are any limits to the nonbreaching party's choice of nonseparable provisions it wishes to suspend. Some

---

99. In the Commission, Sir Humphrey Waldock answered a question about who was to decide when there was a case of special urgency, by saying that the articles "had to be interpreted and applied in good faith. At the present stage in the development of international law the Commission could not go further, and [such] problems . . . could only be resolved by reference to an objective criterion of good faith." Summary Records, Eighteenth Session, supra note 52, at 158. The good faith principle has some practical limitations. See infra note 108.

100. Waldock's Second Report, supra note 21, at 206 (commentary to draft Article 42).


103. Id.
observers have interpreted Vienna Convention Articles 44 and 60 to mean that there are no limits.\textsuperscript{104} This would mean, in our hypothetical case involving failure of the United States to nullify attachments against Iranian property,\textsuperscript{103} that Iran could suspend whichever of its obligations it wished.

Such is not the law. As we have seen, the primary reason for eliminating a separability requirement for suspension in part in material breach cases was to enable the nonbreaching party to respond in a measured, purely reciprocal fashion.\textsuperscript{106} Instead of purely reciprocal suspension, the nonbreaching party may by way of reprisal suspend the operation of the treaty in part,\textsuperscript{107} but reprisals have their own limitations. For present purposes, the most significant is the requirement that the reprisal be in proportion to the breach.\textsuperscript{108}

In our hypothetical case, if the United States had indeed failed to nullify the attachments, it would seem that Iran could have invoked the material breach to suspend its obligation to replenish the security account if it fell below $500 million. That would not be a strictly reciprocal suspension, but it could have been justified as a reprisal—permitted under Article 60 as a suspension in part—within the limits of proportionality. It would be proportional because it would amount to removing one form of security for the payment of U.S. claims in retaliation for an improper U.S. decision to allow American claimants another form of security for payment of some of the same claims.

The United States-France Air Services Award\textsuperscript{109} supports the proposition that no direct equivalence of monetary value would be required.

\textsuperscript{104} See U.N. Conf. on the Law of Treaties (1st Sess.), \textit{supra} note 24, at 355 (Philippine representative criticizing provision that became article 60). See also G. Haraszti, \textit{supra} note 1, at 324-25; S. Rosenne, \textit{Breach of Treaty}, \textit{supra} note 1, at 7 (both discussing article 44). \textit{Cf.} Rosenne, \textit{Modification}, \textit{supra} note 1, at 173-74.

Another scholar seems to say that the wronged party may suspend any provision, even several provisions that would be out of proportion to the breach, provided that all suspended provisions are separable as understood in article 44. E. Zoller, \textit{supra} note 56, at 28.

\textit{Restatement (Third), supra} note 6, at § 338, comment f, ties partial suspension to separable treaty clauses, but it is not clear that it contemplates the material breach situation since it mentions only Article 44, not Article 60.

\textsuperscript{105} See \textit{supra} text accompanying note 31.

\textsuperscript{106} See \textit{supra} text accompanying note 102.

\textsuperscript{107} See \textit{supra} text accompanying note 78.


The principle of good faith would also limit the nonbreaching party's response. See M. Villiger, \textit{supra} note 1, at 371. It has been said, though, that this principle is so amorphous that it is of little practical utility. F. Mann, \textit{Studies in International Law} 162-63 (1973). The International Court of Justice has recognized the principle, but has not established its contours. See Nuclear Tests Cases (Austl. and N.Z. v. Fr.), 1974 I.C.J. 253, 268, \textit{id.} 457, 473; Armed Actions Case (Nic. v. Hond.), 1988 I.C.J. 68, 105 (Jurisdiction).

\textsuperscript{109} Case Concerning the Air Services Agreement of 27 March 1946 (U.S. v. Fr.), 54 I.L.R. 304 (1978).
In that case, France breached the 1946 Air Services Agreement with the United States by refusing to allow Pan American World Airways to change from a jumbo jet to a smaller jet during a London stopover on its West Coast-to-Paris service. In retaliation, the United States prevented Air France from operating its flights between Los Angeles and Paris via Montreal, for as long as France maintained its policy to bar Pan Am from changing planes in London on its West Coast-to-Paris flights.

The arbitral tribunal upheld the U.S. retaliation, finding it within a nonliteral concept of proportionality:

The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of guage in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France.\(^{110}\)

In that case the "principle" was the fear that the French action would set a precedent that could multiply against the United States. This justified countermeasures that were somewhat more burdensome for France than the French measures were for the United States. The point is that monetary equivalence was not required, and that the demonstration effect of the original breach and of the countermeasures could be considered for proportionality purposes. Moreover, the countermeasures would be upheld unless they were "clearly" disproportionate. The proportionality test thus appears to contain some margin for escalation, but it is not meaningless. In our hypothetical case, the Iranian retaliation would seem to fit within the bounds of this standard.

E. Conclusion: Unilateral Suspension in Part

A party acting in good faith may respond to a material breach by immediately suspending a part (or all) of its own performance under the treaty, if the situation involves special urgency. In addition, since a material breach would seldom involve a separable treaty provision, such a part may immediately suspend a proportional, nonseparable part of its own performance.

III. Responses to Nonmaterial Breaches

As noted in Part I, when the United States suspended, but did not terminate, claims in U.S. courts against Iran, it committed a nonmaterial

\(^{110}\) Id. at 338.
breach of the Algiers accords. Vienna Convention Article 60 says nothing about nonmaterial breaches or the permissible responses to them. As we have seen, Vienna Convention Article 42(2) says that the suspension of the operation of a treaty may take place only as a result of the provisions of the treaty itself or of the Vienna Convention. Does this mean that Iran could not have suspended even a proportional part of its performance under the accords?

It is in this type of case, where the substantive articles of the Vienna Convention are silent, that the Convention's Article 73 caveat, regarding questions under the law of state responsibility, transfers the matter entirely outside the law of treaties. The law of state responsibility would permit Iran to suspend a proportional part of its performance, subject to any procedural conditions that body of law may impose.

The proportional suspension of performance for nonmaterial breach is supported by commentators and by the U.S.-France Air Services Award. The arbitral tribunal in the Air Services case upheld the right of the United States to take proportional countermeasures (nonforcible reprisals) after having found that France had breached the relevant bilateral agreement. The tribunal made no finding that the breach was a material one. Thus, the award must be read as having upheld the right of partial suspension of a treaty's operation, by way of nonforcible reprisal in response to a nonmaterial breach of the same treaty.

Conclusion

Article 60 of the Vienna Convention is far from easy to interpret or to apply. The questions posed at the beginning of this essay can only be answered probabilistically. The answers are made difficult not only by the gaps in Article 60, but also by the rather opaque relationships between Article 60 and some other Vienna Convention articles—notably Articles 42, 44, 65, 72 and 73—and by the hazily-defined relationship between the treaty law of material breach and the more general law of state responsibility.

Nevertheless, we may conclude with reasonable confidence that (1) a relatively minor violation of an essential provision in a treaty would not be a material breach; (2) if a material breach does occur, the non-breaching party may immediately suspend its performance proportion-

111. See supra text accompanying notes 8-30.
112. See supra text accompanying note 58.
113. See also Report, Eighteenth Session, supra note 13, at 237 (Commission's commentary to what became Article 42).
115. 54 I.L.R. 304 (1978).
116. Accord, though somewhat more tentatively, Damrosch, supra note 114.
117. See supra notes 8-30 and accompanying text.
ally—at least if the breach is sudden and the suspension is partial; and if a nonmaterial breach occurs, the nonbreaching party may immediately suspend its performance, subject to the restrictions in the law of state responsibility on the use of countermeasures. Suspension refers to temporary withholding of performance with a view to eventual resumption, if possible. The separability doctrine does not affect these conclusions.

Respectable suggestions to the contrary notwithstanding, it is not tenable to attach significant legal consequences to a distinction between suspension of the operation of a treaty and suspension of its performance. Suspension is suspension, and if it occurs in response to a material breach of the same treaty being suspended in whole or in part, it is subject to both the law of treaties and the law of state responsibility.

118. See supra notes 31-110 and accompanying text.
119. See supra notes 111-16 and accompanying text.
120. See supra notes 100-10 and accompanying text.
121. See supra note 64 and accompanying text.
122. See supra notes 64-85 and accompanying text.