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STATE RESPONSIBILITY

[Agenda item 2]

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Seventh report on State responsibility, by Mr. Willem Riphagen, Special Rapporteur

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NOTE

Multilateral conventions cited in the present report:

	Source
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), hereinafter referred to as "1969 Vienna Convention"	United Nations, *Treaty Series*, vol. 1155, p. 331.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

I. "Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles)

A. Texts of the articles and annex of part 3 of the draft

Article 1

A State which wishes to invoke article 6 of part 2 of the present articles must notify the State alleged to have committed the internationally wrongful act of its claim. The notification shall indicate the measures required to be taken and the reasons therefor.

Article 2

1. 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 prescribed in article 1, the claimant State wishes to invoke article 8 or article 9 of part 2 of the present articles, it must notify the State alleged to have committed the internationally wrongful act of its intention to suspend the performance of its obligations towards that State. The notification shall indicate the measures intended to be taken.

2. If the obligations the performance of which is to be suspended are stipulated in a multilateral treaty, the notification prescribed in paragraph 1 shall be communicated to all States parties to that multilateral treaty.

3. The fact that a State has not previously made the notification prescribed in article 1 shall not prevent it from making the notification prescribed in the present article in answer to another State claiming performance of the obligations covered by that notification.

Article 3

1. If objection has been raised against measures taken or intended to be taken under article 8 or article 9 of part 2 of the present articles, by the State alleged to have committed the internationally wrongful act or by another State claiming to be an injured State in respect of the suspension of the performance of the relevant obligations, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

2. Nothing in the foregoing paragraph shall affect the rights and obligations of States under any provisions in force binding those States with regard to the settlement of disputes.

Article 4

If, under paragraph 1 of article 3, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed:

(*a*) Any one of the parties to a dispute concerning the application or the interpretation of article 12 (*b*) of part 2 of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(*b*) Any one of the parties to a dispute concerning the additional rights and obligations referred to in article 14 of part 2 of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(*c*) Any one of the parties to a dispute concerning the application or the interpretation of articles 9 to 13 of part 2 of the present articles may set in motion the procedure specified in the annex to part 3 of the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

Article 5

No reservations are allowed to the provisions of part 3 of the present articles, except a reservation excluding the application of article 4 (*c*) to disputes concerning measures taken or intended to be taken under article 9 of part 2 of the present articles by an alleged injured State, where the right allegedly infringed by such a measure arises solely from a treaty concluded before the entry into force of the present articles. Such reservation shall not affect the rights and obligations of States under such treaties or under any provisions in force, other than the present articles, binding those States with regard to the settlement of disputes.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 4 (*c*) of part 3 of the present articles, the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

The four conciliators chosen by the parties to the dispute shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to submit to conciliation shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Conciliation Commission acting under this annex has competence shall be decided by the Commission.

5. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any State to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

6. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

7. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

8. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

9. The fees and expenses of the Commission shall be borne by the parties to the dispute.

B. Commentaries to the articles and annex of part 3 of the draft[1]

General commentary

(1) Any legal system is faced with the question as to what should happen if its primary rules of conduct are in fact not observed. The obvious simple answer is that in such a case there should be some means of "enforcement" of the primary rules, some way to arrive at a situation of fact which comes as close as possible to the situation which would have resulted from the voluntary observance of the rules. One such way is to establish that situation; another is to induce voluntary observance by the threat of adverse consequences in case of non-observance.

(2) In the international legal system there are inherent limitations to enforcement of primary rules binding on sovereign, territorially separated, States. Indeed, the absence of a central power with its own substratum requires more subtle techniques to promote the desired result. The new substantive legal relationships between States entailed by an internationally wrongful act constitute one of those techniques. However, some form of "organization" remains necessary; substitution of one set of substantive legal relationships for another simply raises the same problem of "implementation" of that other set of rules. Moreover, inevitably, the "secondary" set of rights and obligations tends to move even further away from the desired result as expressed in the primary rules. This is particularly clear where the lack of "organization" leads to the acceptance of a decentralized response to an (alleged) internationally wrongful act, i.e. measures of reciprocity, reprisals and possibly even self-help and punishment.

(3) Moreover, the very existence of an internationally wrongful act depends on a set of facts and a set of primary rules; on both points there may very well be a genuine divergence of opinion between the States concerned in a concrete case.

(4) If State A alleges that it has been injured by an internationally wrongful act committed by State B, it may be led to take measures which themselves are not in conformity with its primary obligations towards State B. State B, denying that it has committed an internationally wrongful act, may then claim for its part to be injured by an internationally wrongful act of State A and itself take measures which themselves are not in conformity with its obligations. The latter measures may then again cause countermeasures, and so on. The old, existing primary legal relationships are thus in danger of becoming, in fact, completely nullified by such escalation.

(5) Only some "organization", some form of compulsory third-party dispute-settlement procedure can help to put a stop to that escalation.

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[1] Part 1 of the draft (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*; part 2 of the draft (Content, forms and degrees of international responsibility), articles 1 to 5 of which have been provisionally adopted by the Commission, and articles 6 to 16 referred to the Drafting Committee, appears in *Yearbook . . . 1985*, vol. II (Part Two), pp. 24-25 (arts. 1 to 5) and pp. 20-21, footnote 66 (arts. 6 to 16).

(6) States, in creating primary rules binding upon them, sometimes also envisage the situation of (allegations of) non-observance of those rules and provide for an organizational device to deal with that situation, possibly in the form of a compulsory third-party dispute-settlement procedure leading to a final and binding decision in concrete cases, and possibly even providing for an organizational device to deal with a situation in which that final and binding decision is not complied with. More often than not, however, no such machinery is established, or for that matter excluded *a priori.*

(7) The articles of part 3 are intended to lay down a minimum of residual rules and procedures to be applied if no other machinery is expressly accepted by the States concerned (cf. art. 2 of part 2). They are inspired by the mechanisms envisaged in the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea.

Article 1

A State which wishes to invoke article 6 of part 2 of the present articles must notify the State alleged to have committed the internationally wrongful act of its claim. The notification shall indicate the measures required to be taken and the reasons therefor.

Commentary

(1) The first step in a situation in which an internationally wrongful act is alleged is obviously that the alleged injured State or States demand reparation *lato sensu,* i.e. measures to be taken by the alleged author State to establish a situation which comes as close as possible to that which would have prevailed if the primary rule had been complied with, possibly including measures to prevent repetition of the act (see art. 6 of part 2).

(2) The notification provided for in article 1 must indicate the alleged facts and the rules allegedly not complied with.

(3) See the notification procedure provided for in article 65, paragraph 1, of the 1969 Vienna Convention.

Article 2

1. 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 prescribed in article 1, the claimant State wishes to invoke article 8 or article 9 of part 2 of the present articles, it must notify the State alleged to have committed the internationally wrongful act of its intention to suspend the performance of its obligations towards that State. The notification shall indicate the measures intended to be taken.

2. If the obligations the performance of which is to be suspended are stipulated in a multilateral treaty, the notification prescribed in paragraph 1 shall be communicated to all States parties to that multilateral treaty.

3. The fact that a State has not previously made the notification prescribed in article 1 shall not prevent it from making the notification prescribed in the present article in answer to another State claiming performance of the obligations covered by that notification.

Commentary

(1) Normally, some period of time should be accorded to the alleged author State to examine the situation and react to the notification, either by raising objections or by declaring its willingness to take the measures required.

(2) There may, however, be cases of special urgency in which the injured State immediately has to protect its interests, possibly by taking, within its own territory, measures which are themselves not in conformity with its international obligations (cf. also art. 10, para. 2 (*a*), of part 2). In the latter case, however, another notification is required (para. 1).

(3) Such measures may involve the interests of third States, in particular where the obligations the performance of which is to be suspended by the injured State are stipulated in a multilateral treaty (cf. arts. 10 to 13 of part 2). Such third States should then be informed, in order to be able to raise objections (para. 2).

(4) Paragraph 3 is based on article 65, paragraph 5, of the 1969 Vienna Convention. It may well be that an immediate measure taken by a State whose interests are adversely affected by the act of another State is, for the time being, rather considered by the former State as a measure of retortion (i.e. an act not itself prohibited by international law). If, however, the second State considers this measure as constituting an internationally wrongful act, the first State must be in a position to invoke article 8 or article 9 of part 2.

Article 3

1. If objection has been raised against measures taken or intended to be taken under article 8 or article 9 of part 2 of the present articles, by the State alleged to have committed the internationally wrongful act or by another State claiming to be an injured State in respect of the suspension of the performance of the relevant obligations, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

2. Nothing in the foregoing paragraph shall affect the rights and obligations of States under any provisions in force binding those States with regard to the settlement of disputes.

Commentary

Notification and objection thereto create a situation of dispute between States which should be settled by peaceful means. Paragraphs 1 and 2 of article 3 basically repeat the wording of article 65, paragraphs 3 and 4, of the 1969 Vienna Convention.

Article 4

If, under paragraph 1 of article 3, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed:

(*a*) Any one of the parties to a dispute concerning the application or the interpretation of article 12 (*b*) of part 2 of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(*b*) Any one of the parties to a dispute concerning the additional rights and obligations referred to in article 14 of part 2 of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(*c*) Any one of the parties to a dispute concerning the application or the interpretation of articles 9 to 13 of part 2 of the present articles may set in motion the procedure specified in the annex to part 3 of the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

Commentary

(1) Article 4 is based on article 66 of the 1969 Vienna Convention, and accordingly makes a distinction between the types of rules of international law the application and interpretation of which are involved in a dispute.

(2) Subparagraph (*a*) of article 4 deals with the exception of *jus cogens* within the context of the application of article 12 (*b*) of part 2. The typical effect of a rule of international *jus cogens* is that it can be set aside only by another rule of international *jus cogens* (normally subsequent, but possibly contemporaneous, as in the hypothetical case where the rule of *jus cogens* provides for its own suspension as such for other States in case of its violation by one or more States). The situation in which the commission of an internationally wrongful act by one State is invoked by another State to justify measures of reciprocity or reprisal which are themselves contrary to a rule of international *jus cogens* is comparable to the situation in which a State invokes a treaty in order to justify acts in conformity with its obligations under that treaty, but conflicting with a peremptory norm of general international law. The supremacy of the latter norm, however, makes it necessary to ascertain its particular quality. In case of diverging opinions of States on this point, "the principal judicial organ of the United Nations" is best qualified to decide the issue.

(3) Though conduct not in conformity with a rule of international *jus cogens* does not necessarily constitute an international crime, there is an obvious connection between the two concepts, if only because both concepts involve the protection of fundamental interests of the international community and also recognition by that community as a whole that such protection requires a particular rule overriding other international rules of conduct and entailing particular additional legal consequences in case of a breach. Consequently, subparagraph (*b*) of article 4 provides for the same procedure of final and binding decision of the ICJ as in subparagraph (*a*). This subparagraph does not refer to article 15 of part 2 (the additional legal consequences of aggression) because the (alleged) commission of aggression and the related claim of self-defence should be dealt with in the first instance in accordance with the relevant provisions of the Charter of the United Nations. Whether, to what extent and how the ICJ has a role to play in the process is a matter of interpretation and application of the Charter itself.

(4) Subparagraph (*c*) of article 4 deals with cases in which the prevention of escalation is the main reason for organizing a procedure of compulsory conciliation. If and when objection is raised against a notification of (intended) measures of reciprocity or reprisal, and no solution is reached by other peaceful means, a third-party operation, even if it does not result in binding decisions, could help to restore as much as possible the original legal relationships between the States concerned.

Article 5

No reservations are allowed to the provisions of part 3 of the present articles, except a reservation excluding the application of article 4 (*c*) to disputes concerning measures taken or intended to be taken under article 9 of part 2 of the present articles by an alleged injured State, where the right allegedly infringed by such a measure arises solely from a treaty concluded before the entry into force of the present articles. Such reservation shall not affect the rights and obligations of States under such treaties or under any provisions in force, other than the present articles, binding those States with regard to the settlement of disputes.

Commentary

(1) Article 5 is based on the 1982 United Nations Convention on the Law of the Sea inasmuch as it recognizes the interaction, and therefore the legal nexus, between the substantive rules and the international machinery for settling the inevitable difficulties that arise in their application in concrete cases.

(2) However, the provisions of part 3 are still meant to be residual rules. In creating a primary rule of conduct—or at least before the question of actual performance becomes controversial—States may expressly provide for another way of dealing with such controversies, if and when they arise. In particular, they may, at the time of creating a rule of international law, envisage that future controversies relating to its implementation should be resolved exclusively by consensus as a result of negotiation. Even though such an attitude would reflect on the legal character of the rule itself and of the rights and obligations resulting therefrom, it cannot be denied that the articles of part 3 (like other articles on "implementation" in respect of other topics, proposed by the Commission and/or adopted at United Nations Conferences) contain an element of progressive development of international law. Indeed, this is in line with the other parts of the present articles, which to a certain extent move away from the "unilateralism" (unlimited admission of countermeasures) and "bilateralism" (relationships only between an author State and a directly affected State) which characterize older rules of international law.

(3) Nevertheless, on balance, it would seem appropriate to admit a reservation, be it only in respect of the legal consequences—provided for in article 4 (*c*) of part 3—of the infringement of a right created by a treaty

concluded before the date of entry into force of the present articles.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 4 (*c*) of part 3 of the present articles, the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

The four conciliators chosen by the parties to the dispute shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to submit to conciliation shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Conciliation Commission acting under this annex has competence shall be decided by the Commission.

5. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any State to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

6. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

7. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

8. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

9. The fees and expenses of the Commission shall be borne by the parties to the dispute.

Commentary

(1) Paragraphs 1 and 2 of the annex reproduce (with the necessary changes of reference) paragraphs 1 and 2 of the annex to the 1969 Vienna Convention. Paragraphs 3 and 4 are taken from articles 12 and 13 of annex V to the 1982 United Nations Convention on the Law of the Sea; the text is inspired by the concept of a compulsory conciliation procedure.

(2) Paragraphs 5, 6, 7 and 8 are modelled on paragraphs 3 (changing the reference to "any party to the treaty" to "any State"), 4, 5 and 6 of the annex to the 1969 Vienna Convention. Paragraph 9 is taken from article 9 of annex V to the United Nations Convention on the Law of the Sea. It would seem that, in the context of State responsibility, this rule is preferable to the one contained in paragraph 7 of the annex to the 1969 Vienna Convention, which, in the context of presumably less frequent procedures relating to the validity of a treaty, puts the financial burden on the United Nations.

II. Preparation of the second reading of part 1 of the draft articles (arts. 1 to 35)

A. Introduction

1. In their written and oral comments on articles 1 to 35 of part 1 of the draft, several Governments remarked that their comments were provisional, inasmuch as they were subject to the content of parts 2 and 3 of the draft, which were still unknown to them. It may thus be expected that at least some Governments will later com-

ment in written or oral form on those articles in the light of the complete set of draft articles on State responsibility.

2. Nevertheless, it would seem useful for the Commission, after it has provisionally adopted the draft articles of parts 2 and 3, to start the second reading of part 1 in the light of the comments and observations already received from Governments, possibly also taking into account the published comments of learned authors on the Commission's work in this field.

3. It would seem advisable, at the present stage, to concentrate on criticism voiced in respect of individual provisions of articles 1 to 26 (chapters I to III of part 1 of the draft). Indeed, the whole history of the debates in the Sixth Committee of the General Assembly on successive reports of the Commission on the topic gives the impression that the Commission's approach to the topic, and the various draft articles it has provisionally adopted, have met with the general approval of the Sixth Committee.

4. Accordingly, the present section will not deal with the arguments sometimes advanced by those who doubt the feasibility of arriving at a generally acceptable progressive development and codification of the rules of international law on State responsibility, in the form of a United Nations convention on State responsibility or otherwise.

5. Obviously, in the final stage of its work on the topic, the Commission will have to decide what to recommend to the General Assembly with regard to how that work should be followed up; but the approach of presenting a set of draft articles now seems beyond question.

6. Consequently, the present section summarizes, in respect of individual articles of chapters I to III of part 1 of the draft, the suggestions for improvement —or, as the case may be, deletion—made in the written comments received from Governments to date.[2]

B. Written comments of Governments

Article 1. Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

(1) Austria seems to suggest that the text of article 1 should indicate more clearly that "international responsibility is not limited to internationally wrongful acts". In this context, it notes "seemingly contradictory comments" in the Commission's commentaries to articles 1 and 2, referring *inter alia* to circumstances precluding wrongfulness.

(2) In the opinion of the present Special Rapporteur, the text of article 1 can remain as it stands. The relationship between article 1, article 3, chapter II, chapter III and chapter V (in particular article 35) is sufficiently clear from the texts themselves. It is true that article 35 is simply a saving clause, but that does not necessarily mean that "any question that may arise in regard to compensation for damage caused by that act" (i.e. an act the wrongfulness of which is precluded by the—non-exhaustive—provisions of the other articles of chapter V) is necessarily a question to be dealt with under the

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[2] The written comments of Governments on the articles of part 1 of the draft, referred to in the present section, were published as follows:

Yearbook . . . 1980, vol. II (Part One), document A/CN.4/328 and Add.1-4:

	Pages	*Paragraphs*
Austria		
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Yearbook . . . 1981, vol. II (Part One), document A/CN.4/342 and Add.1-4:

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Yearbook . . . 1982, vol. II (Part One), document A/CN.4/351 and Add.1-3:

	Pages	*Paragraphs*
Spain		
Article 22	16-17	3

topic "International liability for injurious consequences arising out of acts not prohibited by international law". Indeed, the suggested limitation of the scope of the latter topic to environmental matters would exclude such coverage. It is quite another question whether the draft articles on State responsibility should, as it were, fill the gap left by article 35, and a question on which the Commission has not yet pronounced.

Article 2. Possibility that every State may be held to have committed an internationally wrongful act

Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

(1) The Federal Republic of Germany believes that the content of article 2 is self-evident and suggests its deletion, or at least the incorporation of its legal substance in article 1.

(2) In the opinion of the present Special Rapporteur, the latter suggestion could be accepted. Indeed, articles 1 and 2 embody the same legal rule, looked at from two different points of view: that of the injured State and that of the author State. No change of wording seems to be required: article 2 could simply become paragraph 2 of article 1.

(3) Austria's comments refer to the position of member States of a federal State, and can better be dealt with under article 7.

Article 3. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when:

(*a*) conduct consisting of an action or omission is attributable to the State under international law; and

(*b*) that conduct constitutes a breach of an international obligation of the State.

(1) Austria raises the issue of the omission of "fault" from the definition of the subjective elements, and the omission of "damage" or "injury" from the definition of the objective elements of the internationally wrongful act.

(2) Czechoslovakia raises the same issue, as well as that of the omission of the "existence of causal connection".

(3) In their written comments, these two Governments reserve their position; their final opinion is said to depend on the complete set of draft articles.

(4) In the opinion of the present Special Rapporteur, article 3 can remain as it stands. Inevitably both the *subjective* and the *objective* elements of an internationally wrongful act are based on the interpretation of the primary rule involved. Indeed, a legal relationship between States, being a legal relationship between legal entities, requires a translation of legal notions into facts (including the fact of causal connection) and vice versa, in order ultimately to arrive at the desired result of primary rules, which is a situation of fact. In this sense "abstractions" and "fictions" (both, in essence, the separation of the relevant from the irrelevant) are necessary ingredients of primary legal rules. The present articles on State responsibility, being meant to be applicable irrespective of the origin and content of the primary rules involved, cannot but move to a higher level of abstraction and fiction.

(5) Consequently, article 3 reduces the elements of an internationally wrongful act to two: attributability of human conduct to the State, and breach of an international obligation. A third element—the absence of "circumstances precluding wrongfulness"—is added in chapter V, while what could be called a fourth element—the requirement that the international obligation be in force for the State at the time the act was performed—is added in article 18 and elaborated in articles 24 to 26.

(6) It would seem to the present Special Rapporteur that the three additional elements referred to by Austria and Czechoslovakia (i.e. *fault, causal connection* and *damage*) are, one way or another, taken care of by the system of the draft articles.

(7) *Fault* can actually be seen as a "breach of an international obligation" in the sense of article 16, if and when the primary rule requires of the State only conduct which can be reasonably required of it. This is particularly true if the conduct consists of an omission (in the case of an obligation of due diligence). To what extent that is the case depends on the (interpretation of the) primary rule itself, particularly in the light of its object and purpose. Obviously, circumstances precluding wrongfulness may also play a role in determining fault on the part of the State. At the same time, the element of attributability of human conduct to the State contains an element of fault on the part of the State. The draft articles recognize this in accepting attributability to the State of conduct of persons who are organs of the State but act outside their competence or contrary to instructions, in accepting attributability to the State of conduct of persons who are not organs of the State but act "in fact on behalf of the State", and in accepting that "conduct which is related to that of the persons or groups of persons" not acting on behalf of the State may give rise to State responsibility.

(8) *Damage* as a possible element of an internationally wrongful act is again a matter of the (interpretation of the) primary rule involved. As is the case with fault, articles 20, 21 and 23 of part 1 of the draft are relevant here. Also, in the opposite sense, article 35 is relevant. Furthermore, it is self-evident that (pecuniary) compensation can be claimed only if there is damage (cf. also art. 6 of part 2).

(9) Finally, *causal connection* as a possible element of the internationally wrongful act refers to a link between an act or omission and a situation of fact which may be qualified as "damage". Here it is even more obvious that the (interpretation of the) primary rule is involved. There exist in international law obligations *per se* requiring a particular course of conduct irrespective of possible factual consequences of conduct not in conformity with that required by the obligation (as is recognized in article 20).

Article 6. Irrelevance of the position of the organ in the organization of the State

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State.

(1) Yugoslavia and the Federal Republic of Germany suggest the deletion of article 6, since its content is nowadays undisputed.

(2) The present Special Rapporteur considers that it would be useful to retain article 6 as it stands. It is a fact that, in the modern State, power is functionally decentralized, and that the organs of the State are often to a greater or lesser extent independent of each other. In this sense, to consider the State as one, as it were monolithic, entity is to create a legal fiction. Nevertheless it is a basic tool of international law and, as such, article 6—like its territorial analogue, article 7—merits a place in the present draft articles. On the other hand, it is to be noted in this connection that rules of international law sometimes recognize the functional decentralization of power within the State and the relative position of its organs. Articles 21 (para. 2) and 22 illustrate this point (cf. also art. 18, para. 5).

Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

Paragraph 1

(1) Austria refers to questions arising from the situation in which member States of a federal State have retained a limited measure of international personality.

(2) It will be recalled that the Commission dealt with this question first in the commentary (paras. (10) and (11)) to article 7,[3] and then in the commentary (para. (18)) to article 28.[4] It arrived at the following conclusion: (*a*) "In the cases . . . in which component States retain an international personality of their own . . . it seems evident that the conduct of their organs is . . . attributable to the federal State where such conduct amounts to a breach of the federal State's international obligations";[5] (*b*) "where the conduct of organs of a component State amounts to a breach of an international obligation incumbent upon the component State, such conduct is to be attributed to the component State and not to the federal State";[6] (*c*) "the federal State should be responsible for internationally wrongful acts attributable to the member State if they were committed in a sphere of activity subject to the control or direction of the federal State"[7] (by virtue of article 28, paragraph 1).

(3) It is to be noted that Austria, in its written comments, refers to an entirely different question and seems to suggest "that the consequences of an internationally wrongful act committed by a member State of a federal union may affect the federal State, for instance if it resulted in the duty to make monetary compensation and the member State did not possess financial autonomy".

(4) In the opinion of the present Special Rapporteur, the Commission should reconsider the question. The Commission's position, as set out in paragraph (2) above, seems to be based upon a strict separation between the member State, having retained "an international personality of [its] own" and therefore able to have its own international obligations, the breach of which by it entails its own international responsibility, and the federal State, which is, so to speak, a "third" State in respect of the legal relationship between the member State and another State, and therefore responsible towards the latter State only if the internationally wrongful act of its member State is "committed . . . in a field of activity in which that [member] State is subject to the power of direction or control" of the federal State. On the other hand, even if the member State has retained "an international personality of [its] own", it is considered to be "a territorial government entity within a State" (i.e. within the federal State), and therefore the conduct of its organs is considered as an act of the federal State, irrespective of whether or not the member State, under the Constitution of the federal State, has acted within the field of its "autonomy" (i.e. not under the direction or control of the federal State, in other words not holding a "subordinate position" in the sense of article 6).

(5) The lack of symmetry is obvious, but does not necessarily make the set of articles 6, 7 (para. 1) and 28 (para. 1) unsuitable for application in the case of federal unions. The point seems to be rather that, whatever measure of "international personality" is retained by the member State, the territory of this territorial governmental entity is, at the same time, part of the territory of the federal State. This aspect is bound to be relevant when the question of the new rights of the injured State comes up. If it is accepted that such new rights include a right of the injured State to claim reparation *lato sensu* (under draft article 6 of part 2) and, under certain circumstances, a right to suspend the performance of its obligations towards the author State (under draft articles 8 and 9 of part 2), the question arises whether the "separation construction" underlying paragraph 1 of article 28 is realistic. As noted by Austria (see para. (3) above), a member State which has not committed the internationally wrongful act "in a field of activity in which that State is subject to the power of direction or control" of the federal State may simply not have itself the (financial and other) means to fulfil its new obliga-

[3] *Yearbook . . . 1974*, vol. II (Part One), pp. 280-281, document A/9610/Rev.1.

[4] *Yearbook . . . 1979*, vol. II (Part Two), p. 99.

[5] Para. (10) of the commentary to article 7 (see footnote 3 above).

[6] *Ibid.*

[7] Para. (18) of the commentary to article 28 (see footnote 4 above).

tions under draft article 6 of part 2. Furthermore, it may not be in a position such that the performance of obligations towards it alone may be suspended. Finally, and perhaps even more important, any measure, even if only by way of retortion, taken by the injured State is bound to affect also the interests of the federal State as a whole.

(6) The Commission might therefore consider simplifying matters by putting the member States of a federal State (provided, of course, that they are States) on completely the same footing as any other territorial governmental entity within a State. After all, the retention (itself a notion of historical rather than legal meaning) of a measure of international personality by a member State of a federal State is bound to be of a rather limited character, if only because of the full international personality of the federal State.

(7) The present Special Rapporteur accordingly proposes: (*a*) to add, in article 7, paragraph 1, between the words "within a State" and "shall", the phrase "whether or not empowered under the internal law of that State to be subject to international obligations"; (*b*) to delete, in the commentaries to articles 7 and 28, all references to the situation of member States of a federal State retaining a measure of international personality.

(8) In essence, this would mean that, in so far as the (secondary) rules of State responsibility are concerned, the (primary) international obligations of a member State of a federal State are assimilated to international obligations of the federal State (although, of course, with regard to their content, they are limited to that member State).

(9) The observations of Czechoslovakia and Mongolia relate to the points dealt with in the foregoing paragraphs.

Paragraph 2

(1) Canada expresses the opinion that responsibility in respect of the conduct of an entity which is not part of the formal structure of the State must be more restrictively delineated.

(2) Mongolia expresses the opinion that this provision "must in no case and in no circumstances be made the basis for the attribution to a State of the acts of those of its organs which are not State organs".

(3) In the opinion of the present Special Rapporteur, paragraph 2 of article 7 should remain as it stands: it is a necessary link in the chain connecting articles 5, 6, 7 and 8. As the Commission stated in the commentary (para. (18)) to article 7:

> . . . The justification for attributing to the State, under international law, the conduct of an organ of one or other of the entities here considered still lies, in the final analysis, in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. . . .[8]

Indeed, the State can act only through human beings and the way in which it "organizes" those human beings for the purpose of exercising governmental authority is not relevant to its responsibility under international law. In this respect, the most formal way of organization, dealt with in article 5, can be contrasted with the most informal way, referred to in article 8.

(4) Nor does it seem necessary or advisable to try to define the term "elements of the governmental authority". Though, of course, the functions or role of the State in a given society vary from State to State, the exercise of governmental authority can be clearly distinguished in law from other State activities. Furthermore, in cases falling under article 7, paragraph 2, the question whether or not the internal law of the State concerned has conferred on a particular entity the exercise of elements of governmental authority can be easily answered by comparing the nature of the powers conferred with the nature of the powers retained by State organs (in the sense of article 5) or by organs of a territorial governmental entity (in the sense of article 7, paragraph 1).

Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

(*a*) it is established that such person or group of persons was in fact acting on behalf of that State; or

(*b*) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

(1) Austria suggests adding to subparagraph (*a*) the condition of "effective exercise of elements of the governmental authority", or at least to "exclude transactions under private law".

(2) The Netherlands suggests that subparagraph (*a*) could be deleted if the phrase "in the absence of the official authorities" were deleted from subparagraph (*b*).

(3) Canada expresses the opinion that "the circumstances in which a State may be held responsible for such actions" (i.e. as described in subparagraph (*b*)) "must be more restrictively delineated".

(4) Yugoslavia considers that, from a logical point of view, article 8 should be placed after articles 9 and 10, and suggests inserting in the draft articles a clause containing *inter alia* a definition of "an entity empowered to exercise elements of the governmental authority".

(5) In the opinion of the present Special Rapporteur, there are valid reasons for dealing in separate articles with the cases covered by subparagraph (*a*) and those covered by subparagraph (*b*). As the Commission remarked in the commentary (para. (1)) to article 8,[9] there is a clear distinction between the two groups of cases with regard to where the initiative lies. In this respect, the cases dealt with in article 8, subparagraph (*a*), are in between the situation referred to in article 7, paragraph 2, and that referred to in article 11, paragraph 1, whereas the cases dealt with in article 8, subparagraph (*b*), are rather in between the situation referred to in article 7, paragraph 2, and that referred to in article 14; these are the gradations between legal and illegal power.

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[8] *Yearbook . . . 1974*, vol. II (Part One), p. 282, document A/9610/Rev.1.

[9] *Ibid.*, p. 283.

(6) Subparagraph (*a*) deals with the unofficial agents of State entities *lato sensu*. It is obvious that, if such agents are used in order to try to evade the State responsibility which would have been incurred by the same conduct of an official agent, such evasion cannot be admitted by international law. The State entity, in making use of an unofficial agent, would itself commit at least a related act in the sense of article 11, paragraph 2. By the same token, it seems clear that in such situations the objective and subjective elements of the internationally wrongful act are inextricably interwoven (as is also the case in article 27).

(7) For this reason a formulation of the rule in terms of "attributability" only presents particular difficulties.

(8) Thus, while there is validity in the argument that the words "in fact acting on behalf of that State" are somewhat vague, it would seem difficult to refer, in subparagraph (*a*), to "effective exercise of elements of the governmental authority", because those terms imply a *prima facie* justification of that exercise, at least under the internal law of the State concerned. It would seem even less possible to combine subparagraphs (*a*) and (*b*) in a single rule, as suggested by the Netherlands, if only because "the absence of the official authorities" is an essential element in the cases covered by subparagraph (*b*).

(9) The Commission might, however, consider another solution, which would be to combine the rule contained in article 8, subparagraph (*a*), with that set out in article 11, paragraph 1, in the form of an exception. Paragraph 1 of article 11 could then read as follows:

> "1. The conduct of a person or group of persons not acting as an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority shall not be considered as an act of the State under international law, except if it is established that such person or group of persons acted in concert with and at the instigation of such organ."

The words "in concert with and at the instigation of" are taken from the commentary (para. (5)) to article 8.[10] This solution, while still dealing with the cases covered by article 8, subparagraph (*a*), within the framework of attributability, would perhaps better indicate that it is not so much the fact that persons act on behalf of the State which creates attributability as the fact that those persons being only *de facto* agents of the State is not a bar to State responsibility for an internationally wrongful act, if otherwise committed.

(10) If this solution were adopted, article 8 would be limited to the present subparagraph (*b*). Here, as already noted, we are dealing with an entirely different situation inasmuch as the initiative lies with the private persons concerned and not with the State organs. Though no written comments of Governments have yet been presented concerning subparagraph (*b*) of article 8, the present Special Rapporteur ventures to suggest that the Commission should reconsider the adequacy of retaining the final words: "and in circumstances which justified the exercise of those elements of authority".

(11) It would seem to the present Special Rapporteur that those words are not necessary to distinguish the situation envisaged in subparagraph (*b*) from that of an "insurrectional movement" under article 14. On the other hand, from the point of view of international law, the mere fact that, "in the absence of the official authorities", a person or group of persons on their own initiative "fill the gap" equates their conduct of in fact exercising elements of governmental authority to such conduct of official authorities. In any case, whether or not the circumstances justify their filling the gap is rather a matter of appreciation under the internal law of the State. To burden the application of rules of international law on State responsibility with such appreciation would seem inappropriate.

(12) Incidentally, the combination of article 8, subparagraph (*a*), and article 11, paragraph 1, would go some way in the direction of Yugoslavia's proposed sequence of articles (see para. (4) above). As for the definition of "elements of the governmental authority", reference may be made to paragraph (4) of the comments concerning paragraph 2 of article 7 above.

Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.

(1) Chile suggests the following wording for article 10:

> "The conduct of an organ or entity, as the case may be, which exceeded its competence according to internal law or contravened instructions concerning its activity shall also be considered as an act of the State under international law."

(2) The Netherlands and Yugoslavia remark that article 10 should also be made applicable to the organ mentioned in article 9.

(3) In the opinion of the present Special Rapporteur, the present wording of article 10 is sufficiently clear as to be understood as referring to "an entity empowered to exercise elements of the governmental authority" in the situations mentioned both in article 7, paragraph 2, and in article 10.

(4) The suggestion made by Chile raises the problem of distinguishing between conduct of an organ "acting in that capacity" and conduct of the same human being acting as a private person. According to the commentary (para. (29)) to article 10,[11] the Commission introduced the phrase "such organ having acted in that capacity"—which does not appear in the text suggested by Chile—"to indicate that the conduct referred to comprises only the actions and omissions of organs in carrying out their official functions and not the actions and omissions of individuals having the status of organs

[10] *Ibid.*, p. 284.

[11] *Yearbook . . . 1975*, vol. II, p. 70, document A/10010/Rev.1.

in their private life". On the other hand, in the same commentary, the Commission considered and rejected any limitation on the rule of State responsibility laid down in article 10, such as the qualification that the conduct of the person involved should at least be within his "general competence" or "apparent competence", or should have been performed with "the use of means derived from function" (paras. (22) to (25)),[12] recognizing at the same time (para. (26))[13] "that it is not always easy to establish in a specific case whether the person acted as an organ or as an individual".

(5) In the opinion of the present Special Rapporteur, the distinction between conduct of a person "acting within the scope of the discharge of his State function" and conduct of that person "in his private life" is at once somewhat artificial and in practice often not easy to make. Only one human being is involved, and whether his motivation in performing, or refraining from performing, certain acts is to serve the interests of the State or to let his personal bias prevail is probably, in many cases, not even clear to himself. On the other hand, for the victim of his conduct, the distinction is clearly irrelevant, and the question of proof becomes paramount (cf. para. (18) of the commentary to article 10[14]). Accordingly, the correct wording of article 10 is dependent upon a choice of the direction of development of the law on State responsibility in relation to the development of the primary rules of international law. It seems clear that States hesitate to take the risk of being held responsible for acts of their organs-human beings which are motivated by personal bias—generally prohibited under internal law. But there is at least *culpa in eligendo* on the part of the State; and, on the other hand, effective protection of the interests of injured States in international law requires that such States are not burdened with the task of proving that a person, being an organ of another State, really acted in a specific case "on behalf" of that State.

(6) On balance, the present Special Rapporteur is of the opinion that the retention of the words "such organ having acted in that capacity" in article 10 might (unintendedly) create uncertainty in international relations, since they might be interpreted as permitting the—in itself logical—defence that the organ, when "contravening instructions concerning its activity", and even more so when "exceeding its competence according to internal law", did not act as an "organ of the State". He therefore proposes following the suggestion of Chile (para. (1) above) as to the wording of article 10. This would also be in line with the proposed combination of article 8, subparagraph (*a*), with article 11, paragraph 1 (cf. para. (9) of the comments concerning article 8 above).

Article 11. Conduct of persons not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

(1) The Federal Republic of Germany suggests "that the purview of article 11 be worked into article 8".

(2) The present Special Rapporteur agrees with the substance of this proposal, but would prefer to do it the other way round, as proposed above in paragraph (9) of the comments concerning article 8.

Article 12. Conduct of organs of another State

1. The conduct of an organ of a State acting in that capacity which takes place in the territory of another State or in any other territory under its jurisdiction shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

Article 13. Conduct of organs of an international organization

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

(1) The Federal Republic of Germany considers that "the legal content of articles 12 and 13 is . . . something that can be taken for granted and that could without harm be omitted from the draft".

(2) The present Special Rapporteur is of the opinion that the articles should be retained. In time of peace, an organ of a State, acting in that capacity in the territory of another State, can do so only with the consent of that other State. It seems useful to provide, if only implicitly, that such consent in itself does not make that other State responsible for the conduct of such organ. Similar considerations apply in favour of retaining article 13.

(3) Austria comments, in relation to article 13: "It is doubtful whether the Commission's decision not to include in this article a second paragraph, corresponding to the provisions in articles 11, 12 and 14, meets the requirements of the case."

(4) The present Special Rapporteur is of the opinion that the reasons advanced by the Commission in the commentary (para. (13)) to article 13[15] for not inserting a clause corresponding to paragraph 2 of articles 11, 12 and 14 are not particularly convincing. While, as stated above, the mere consent of the territorial State to the activities of organs of international organizations within its territory does not make that State responsible for the conduct of such organizations, the situation is not fundamentally different from that envisaged in article 12. The Commission itself recognized, in the paragraph of the commentary just cited, that:

. . . if the territorial State associated itself with the perpetration, by an organ of the organization, of an action constituting an internationally wrongful act, or if it failed to react in the appropriate manner to such an action, it might incur international responsibility by reason

[12] *Ibid.*, pp. 67-69.

[13] *Ibid.*, pp. 69-70.

[14] *Ibid.*, p. 67.

[15] *Ibid.*, pp. 90-91.

of its own conduct which, by virtue of draft articles 5 to 10, would always be attributable to it.

Indeed, international organizations having generally less power than a State, it would seem more likely that, if an international organization commits an internationally wrongful act at all, it has had or might receive some form of support from the territorial State.

(5) Unlike the Commission, the present Special Rapporteur does not think that, in the case of article 13, the formulation of the clause "would pose special problems going beyond the scope of the present draft". After all, the clause is rather in the nature of a reminder that, while on the one hand the mere presence of an organ of a foreign State or of an international organization within the territory of a State does not in itself make the latter State responsible, on the other hand the factual situation might well involve also an internationally wrongful act of that territorial State.

(6) It is therefore proposed that a second paragraph be added to article 13 worded in the same way as paragraph 2 of article 12.

Article 14. Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

Article 15. Attribution to the State of the act of an insurrectional movement which becomes the new Government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new Government of a State shall he considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

(1) Austria expresses the opinion that "it is not clear whether article 14, paragraph 1, includes the case of an insurrectional movement, recognized by foreign States as a local *de facto* government, which in the end does not establish itself in any of the modes covered by article 15 but is defeated by the central authorities".

(2) In the opinion of the present Special Rapporteur, articles 14 and 15 and the commentaries thereto are sufficiently clear on this point: whether the insurrectional movement is recognized by foreign States or not is irrelevant for the non-attributability of its conduct to the State within whose territory it is established.

(3) Czechoslovakia deems it appropriate "that the Commission pay due attention to the definition" of the term "insurrectional movement" and refers in this respect to the 1977 Additional Protocols to the Geneva Conventions of 12 August 1949.

(4) The present Special Rapporteur recalls that the Commission, in the commentary (para. (29)) to article 14[16] and the commentary (para. (22)) to article 15,[17] clearly intended the term "insurrectional movement" to be a neutral term and to cover also national liberation movements. For the purposes of the present articles 14 and 15, it does not seem necessary to distinguish between the two types of movement. However, if the Commission, in the final stage, should wish to insert in the set of articles a definition of terms (including the term "insurrectional movement"), it would seem proper in that context to mention specifically national liberation movements.

Article 17. Irrelevance of the origin of the international obligation breached

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

(1) The Federal Republic of Germany suggests that consideration should be given to the possibility of incorporating in article 17, paragraph 1, the concept embodied in article 19, paragraph 1, by adding the words "and regardless of the subject-matter of the obligation breached".

(2) The present Special Rapporteur would be inclined to accept this suggestion, but feels that a decision to this effect could be taken only after the second reading of article 19.

Article 18. Requirement that the international obligation be in force for the State

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

[16] *Ibid.*, p. 99.

[17] *Ibid.*, pp. 105-106.

(1) With regard to paragraph 2 of article 18, Austria expresses the opinion that: "The words 'ceases to be considered an internationally wrongful act if, subsequently . . .' are by no means precise enough to prevent the occurrence of situations which, according to the commentary, the Commission intended to exclude."

(2) Canada considers that the concept of retroactivity, as embodied in paragraph 2 of article 18, "should be circumscribed to the maximum degree possible".

(3) Chile, in respect of paragraph 2 of article 18, suggests "to state expressly that it would apply only during the interval between the occurrence of the breach and the utilization of the mechanisms for 'implementing' the resulting international responsibility".

(4) The Netherlands states: "An objection to the present wording of the second paragraph of article 18 is that it does not make it sufficiently clear that it is the primary norm of peremptory law itself which determines its effect: either retroactive force or immediate effect."

(5) Yugoslavia suggests including in paragraph 2 of article 18 "some material from the commentary [to that paragraph] so that the proposed provisions would be clearer from a reading of the text itself".

(6) Sweden considers paragraph 2 of article 18 as "not compatible with articles 64 and 71 of the Vienna Convention on the Law of Treaties" and remarks: ". . . it may be argued that paragraph 2 of article 18 deals with the existence or not of an obligation . . . and that therefore it should not be included in a legal instrument aimed at codifying secondary rules only."

(7) Mali points to the relationship between article 18 and articles 24 to 26 and consequently suggests "to emphasize that link, either by bringing those articles closer to article 18 or through cross-references".

(8) Sweden expresses some doubts about paragraphs 4 and 5 of article 18, considering that "they are difficult to understand and they deal with problems which could presumably be solved by using ordinary logic".

(9) In the opinion of the present Special Rapporteur, it is clear that paragraph 2 of article 18 deals with a question of so-called intertemporal law (i.e. of conflict between primary rules in time). Such questions arise in any legal system. Actually, if and when a rule is established, it is in the first instance up to those who establish the rule to indicate the intended scope of its force, including its force *vis-à-vis* other primary rules, past, present and future.

(10) In the international legal system we can take as a starting-point that there are, possibly were, and hopefully will be some rules of international *jus cogens*, formally defined in article 53 of the 1969 Vienna Convention as "a norm accepted and recognized by the international community of States as a whole as a norm from which *no derogation** is permitted and which can be *modified** only by a subsequent norm of general international law having the same character".

(11) As regards the force of a norm of international *jus cogens vis-à-vis* norms laid down in treaties, the 1969 Vienna Convention contains special provisions in articles 53 (first sentence), 64, 71 and 66 (*a*). All these provisions and the definition of *jus cogens* itself are "future-oriented" in the sense that they indicate what the legal relationships between States are from the moment a norm of *jus cogens* comes into force up until the moment a later norm of *jus cogens* provides otherwise.

(12) Obviously, "the international community as a whole" is not itself bound by either the definition or the other provisions of the 1969 Vienna Convention on *jus cogens*. It is conceivable, for instance, that that community, while accepting and recognizing a particular norm, expressly derogates from the proviso in article 71, paragraph 2 (*b*), *in fine* in determining that the particular norm does not affect (specific) rights, obligations or legal situations created through the execution of a (specific) previous treaty prior to its termination by virtue of that norm.

(13) The same applies to article 18, paragraph 2, of the present draft articles on State responsibility. It is conceivable, for instance, that the international community as a whole, in creating a norm of international *jus cogens*, expressly determines that that norm shall not have the retroactive force provided for in article 18, paragraph 2. In this sense, the observation of the Netherlands (para. (4) above) is correct, although, in the opinion of the present Special Rapporteur, it does not require a change in the wording of the article.

(14) It should, on the other hand, be recalled that, under paragraph 2 of article 18 of the draft, the retroactive force of a norm of *jus cogens* is rather limited. One might even say that, in a certain sense, there is no retroactive force at all, for the provision is rather directed at the situation of a procedure of dispute settlement between States, set in motion after the entry into force of a norm of *jus cogens*. In the settlement of such a dispute, the norm of *jus cogens* is to be taken into account to the extent that the conduct prescribed (not merely admitted) by that norm, as from the date of its coming into force, "ceases to be considered an internationally wrongful act". In the commentary (para. (18)) to article 18,[18] the Commission made it perfectly clear that "the act of the State is not retroactively considered as lawful ab initio, but only as lawful from the time when the new rule of *jus cogens* came into force". What is perhaps less clear is that the application of the "intertemporal" rule of article 18, paragraph 2, must raise the question of the moment and duration of a breach of an international obligation, a question addressed in paragraphs 3, 4 and 5 of article 18 and in articles 24, 25 and 26.

(15) The normal implication (but see paras. (12) and (13) above) of a norm of *jus cogens* prescribing particular conduct is that, from the moment such a norm comes into force, the prescribed conduct is no longer a breach of an international obligation. The retroactive force of article 18, paragraph 2, then is that, even if the newly prescribed conduct took place before the entry into force of the relevant norm of *jus cogens*, that conduct is no longer considered internationally wrongful

[18] *Yearbook . . . 1976*, vol. II (Part Two), p. 92.

after the entry into force. If one follows the construction of the Commission throughout its treatment of the topic, according to which an internationally wrongful act creates new legal relationships from the moment it occurs, there seems to be room for an analogy with a treaty creating—or whose execution creates—a new legal relationship between States. One would then turn to article 71, paragraph 2 (*b*), *in fine* of the 1969 Vienna Convention for guidance. This rule is inspired by the well-known distinction, made by arbitrator Max Huber in the *Island of Palmas (Miangas)* case,[19] between "creation" of a legal situation and its "continued manifestation". Quite apart from the often remarked intrinsic difficulty of this distinction,[20] there arises the difficulty that some of the legal consequences entailed by an internationally wrongful act in accordance with the articles of part 2 of the draft are not in themselves in conflict with the (new) rule of *jus cogens*. Thus, while it is clear that the State injured by the breach of an international obligation committed before the entry into force of the norm of *jus cogens* cannot, after that entry into force, claim a belated performance of that obligation, the substitute performance, consisting of the payment of a sum of money, is certainly not in itself in conflict with the norm of *jus cogens*. However, an international tribunal which, after the entry into force of the norm of *jus cogens*, decides that such a claim is valid at that time necessarily considers the past conduct to be an internationally wrongful act. Furthermore, if the States concerned arrive at an agreement according to which the State which, in the past, committed the then internationally wrongful act pays a sum of money by way of compensation to the then injured State, such agreement is presumably not void *ab initio*, even if concluded after the entry into force of the (new) norm of *jus cogens*.

(16) Actually, what article 18, paragraph 2, seems to intend to express is rather that, after the entry into force of a norm of *jus cogens*, States shall—to use the wording of article 71, paragraph 1 (*a*), of the 1969 Vienna Convention—"eliminate . . . the consequences" (in this context the legal consequences in the sense of article 1 of part 2 of the draft) of an act now prescribed by that norm, provided that the legal consequences already "executed" before the entry into force of that norm (such as a settlement arrived at through negotiations or otherwise) remain as they are.

(17) But the Commission's commentary seems to go less far inasmuch as it makes a distinction between the period of time before the entry into force of the norm of *jus cogens* and the period after that entry into force, irrespective of the date of settlement of the claim of the injured State, the originally internationally wrongful act remaining an internationally wrongful act until the date of entry into force of the norm of *jus cogens*. This is presumably motivated by the consideration that a settlement usually takes a long time and that the original author State should not profit from the subsequent radical change of opinion of "the international community of States as a whole" as to the wrongfulness of certain conduct, by delaying the settlement of the original claim.

(18) In the opinion of the present Special Rapporteur, all depends on the object and purpose of the particular norm of *jus cogens* involved in the case. In itself, on the international plane, it does not seem very likely that conduct that was considered unlawful suddenly comes to be considered not only as permitted, but as compulsory. It seems much more likely that there is an intermediate stage (of gestation, so to speak) in which the original wrongfulness becomes dubious. After all, the resolution of a conflict between the requirements of a regulation of relationships between States as such and the interests of humanity as a whole is, more often than not, the *raison d'être* of the emergence of a norm of international *jus cogens*. Accordingly, a residual rule of intertemporal law in this field, while on the one hand not interfering with claims already settled, should perhaps at the same time reserve the possibility of compensation for damage caused by an act previously considered internationally wrongful and subsequently considered compulsory.

(19) In this way, the formal force of the emergence of a norm of international *jus cogens* making specific conduct compulsory would be rather in the nature of a "circumstance precluding wrongfulness" of that specific conduct in the past, while nevertheless—by analogy with article 35 of part 1 of the draft—not prejudging "any question that may arise in regard to compensation for damage caused by that act".

(20) Mitigated in this way—and without prejudice to its place in the final draft—the wording of the rule at present contained in article 18, paragraph 2, could, it would seem, be retained, although the commentary should of course be modified. Actually, the present commentary—as Austria (see para. (1) above) and Yugoslavia (see para. (5) above) remark in their written comments—is not fully reflected in the text itself.

(21) The reservation suggested in paragraph (19) above would go in the direction of the written comments of Canada (see para. (2) above).

(22) The suggestion contained in the written comments of Chile (see para. (3) above) would, in the opinion of the present Special Rapporteur, not solve the problem. There are in fact three relevant dates: (*a*) the date of the occurrence of the breach; (*b*) the date of the entry into force of the norm of international *jus cogens*; (*c*) the date of utilization of the mechanisms for "implementing" the resulting international responsibility. If date (*c*) chronologically precedes date (*b*), there seems to be no problem; normally it cannot be presumed that the establishment of a rule of international *jus cogens* is intended to interfere with the settlement of the original claim, or even a settlement the procedure of which is formally commenced. Nor is there, of course, any problem if date (*a*) comes after date (*b*). The only problem arises when dates (*a*) and (*b*) come before date (*c*).

(23) The written comments of Sweden (see para. (6) above) seem in themselves correct. Indeed, article 18, paragraph 2, is intended to describe the force—in terms of time—of particular primary rules. But doing so

[19] Arbitral award of 4 April 1928, see United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 829.

[20] See, for example, P. Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1970).

seems inevitable in the context of the draft articles on State responsibility. The concept of international *jus cogens* having been accepted, one cannot ignore its impact on the rules of State responsibility. As a matter of fact, the Commission has recognized the special position of *jus cogens* in various other contexts of State responsibility.

(24) The written comments of Mali (see para. (7) above) are correct (cf. para. (14) above) and raise the question of the place to be given to article 18, paragraph 2, and its suggested mitigation (cf. para. (19) above) in the final set of draft articles. The present Special Rapporteur is fully convinced of the close relationship between article 18, paragraphs 1, 3, 4 and 5, and articles 24 to 26 of the draft. The force of the obligation and the legal determination of the moment and duration of its breach are certainly two sides of the same coin. This might lead the Commission finally to put the all-important article 19 immediately after article 17 and to put article 18, paragraph 2, and its suggested mitigation, as dealing with a special aspect of the intertemporal problem, immediately after article 26.

(25) The doubts expressed by Sweden (see para. (8) above) relate to paragraphs 4 and 5 of article 18 only; apparently, no such doubts are raised by paragraphs 1 and 3. In the opinion of the present Special Rapporteur, paragraphs 1, 3, 4 and 5 of article 18 should be read in conjunction with articles 24 to 26, which in turn are linked with articles 20, 21 and 23, inasmuch as they introduce a typology of obligations and of the corresponding acts of the State. It is therefore proposed to deal with the written comments on all these provisions at the same time.

Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.

Article 21. Breach of an international obligation requiring the achievement of a specified result

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation.

Article 23. Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time

The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently.

Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time

1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

Article 26. Moment and duration of the breach of an international obligation to prevent a given event

The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the event continues.

(1) Canada considers that articles 20, 21 and 23 should be reviewed "to ensure that the distinction they outline is necessary and practical".

(2) The Federal Republic of Germany considers articles 20 to 26 "very abstract and theoretical" and, in particular, considers it necessary "to clarify the relationship" between articles 20 and 23.

(3) Austria, in respect of article 23, notes the absence from the text of the article of the qualifying phrases which appear in the commentary.

(4) The Netherlands is of the opinion that the difference between the rules stated in article 21, paragraph 1, and article 23 is "too slight to justify separate treatment".

(5) Mali considers the present wording of article 23 "too categorical" and is of the opinion that the relationship between this article and paragraph 1 of article 21 must be defined.

(6) With regard to articles 24, 25 and 26, Canada wonders "whether there is a need for the detail and complexity of these three rules".

(7) In the opinion of the present Special Rapporteur, there were two main reasons for the Commission to embark upon a typology of obligations and of breaches thereof. One reason is connected with article 22, on the exhaustion of local remedies, and will be dealt with under that heading. The other reason is the *time factor* (moment and duration) and its legal relevance for a number of questions arising in the context of parts 2 and 3 of the draft articles. The latter reason is underlined in the commentary (para. (5)) to article 24.[21] The time factor is, of course, also relevant in connection with the time limits of the force of the rule of interna-

[21] *Yearbook . . . 1978*, vol. II (Part Two), pp. 86-87.

tional law imposing the obligation breached (see article 18).

(8) It should be recalled that articles 3 (*b*) and 16 put the objective element of an internationally wrongful act in terms of the "breach of an international obligation of the State". Obviously, what is required of a State by an international obligation is a matter of (interpretation of) the primary rule. One can distinguish various types of requirements, but the relevance of such distinctions for the various questions indicated in the preceding paragraph needs to be tested for each of those questions. Thus, as already remarked in the context of article 18, paragraph 2, the force of a rule of international law is not necessarily limited to acts or facts which took place, or to situations which began and ceased to exist, within the time period between the entry into force and the termination of that rule.

(9) The Commission has distinguished between three types of requirements (adoption of a particular course of conduct; achievement of a specified result; prevention of the occurrence of a given event) and between four types of acts of the State (an act not extending in time; an act having a continuing character; a composite act; a complex act). Actually, in so far as concerns the articles of part 1 of the draft adopted on first reading and the articles of parts 2 and 3 adopted on first reading or proposed, the legal relevance of these distinctions is rather limited.

(10) On the other hand, there is bound to exist a large variety of obligations under international law. In particular, the obligations of conduct imposed by a rule of international law are normally explicitly or implicitly linked to the protection of particular interests of another subject of international law, possibly through the "object and purpose" of the rule.[22] The particularity of the course of conduct, as well as the specificity of the result required, often do not have a character of their own. Hence, for example, the objections raised against the wording of article 23 (see paras. (3) and (5) above).

(11) Furthermore, as to the four types of acts of the State, it should be recognized that, in reality, there is no such thing as "an act not extending in time". Certainly there may exist legal obligations which can be fulfilled, or violated, only by a series of acts or omissions situated at different points in time, in order to constitute a particular course of conduct or to achieve cumulatively a specified result. On the other hand, there certainly may exist *per se* obligations for which the effects (being the result) of conduct not in conformity with their requirements are irrelevant. Whether or not, in such cases, acts or omissions, or final results, situated in time beyond the period of force of the obligation should be taken into account in assessing the existence or non-existence of a breach of the obligation is a difficult question; this question, it is submitted, does not necessarily have to receive the same answer in respect of all the legal consequences of a breach (cf. para. (7) above and para. (14) below).

[22] See, for example, article 31 of the 1969 Vienna Convention.

(12) In this respect, article 18, paragraphs 1, 3, 4 and 5, dealing with "acts", seem to be not quite in conformity with articles 24 to 26, dealing with "breaches". While the former set of provisions seems to permit the taking into account only of facts situated within the period of time during which the obligation was in force for the State concerned, the latter set of provisions is construed differently and assigns a moment of beginning and a moment of completion to the breach. In the case of article 24, these two moments are supposed to coincide (indeed, in the examples given—death, destruction—the act, legally speaking, is the result); in the case of article 25, paragraph 1, only the moment of the first act is relevant, although the duration of the breach cannot exceed the period of force of the obligation ("and remains not in conformity with the international obligation"); in the case of article 25, paragraph 2, only the moment of "completion" is relevant, although the duration of the breach extends backwards to the point in time of the first act or omission (irrespective of the moment of entry into force of the obligation?); in the case of article 25, paragraph 3, the same solution applies as in the case of article 25, paragraph 2. Finally, in the case of article 26, the result required being the absence of a given event, only the first moment of the event is relevant, although the duration of the breach extends forward (again, irrespective of the moment of termination of the force of the obligation?) to the moment of termination of the event.

(13) In the opinion of the present Special Rapporteur, the treatment of (*a*) the force of the obligation (art. 18), (*b*) the content of the obligation (arts. 20, 21 and 23), (*c*) the moment and duration of the breach (arts. 24, 25 and 26) and (*d*) the legal consequences of the breach (para. (5) of the commentary to article 24) as separate groups of legal questions (both separate as groups and unified within each group) fails to take into account the interrelationship between those phases in the total process of the law and, consequently, is bound to create confusion and artificialities in its application, even if the residual character of the provisions is admitted (as, for example, in article 28 of the 1969 Vienna Convention). This may account for the—admittedly rather vague—misgivings expressed in the written comments of Governments. Incidentally, in the literature on the topic, the misgivings are much more substantiated.[23]

(14) An example may illustrate the above. A first question relates to the meaning of the words "moment" and "duration" of a breach. At first sight, one might be inclined to think that "duration" is a continuous sequence of moments, in particular when those words are coupled with such terms as "begins", "continues", "accomplished", "initiated" and "completed", and together related to what is called "time of commission" (arts. 24, 25 and 26). The necessary consequence of this

[23] See, for example, J. Combacau, "Obligations de résultat et obligations de comportement: quelques questions et pas de réponse", *Mélanges offerts à Paul Reuter* (Paris, Pedone, 1981), p. 181; J. Combacau and D. Alland, " 'Primary' and 'secondary' rules in the law of State responsibility: categorizing international obligations", *Netherlands Yearbook of International Law, 1985* (The Hague), vol. XVI, p. 81; and J. J. A. Salmon, "Le fait étatique complexe: une notion contestable", *Annuaire français de droit international, 1982* (Paris), vol. XXVIII, p. 709.

view would be that any moment falling within the time of commission would be a moment at which the breach occurs. This conclusion is, however, incompatible with the differentiation made in articles 24 to 26. Apparently, then, the moment and the duration of a breach are not in a relationship of equivalence. Indeed, "moment" seems rather to refer to the period of time during which the obligation is in force, while "duration" seems relevant rather for one of the legal consequences of a breach, namely, in the words of the commentary (para. (5)) to article 24:[24] "the determination of the extent of the injury caused by a given internationally wrongful act and, consequently, of the amount of reparation owed by the State that has committed the act in question". But under article 24, an act of a State "not extending in time" has no duration at all; nevertheless, the effects of such act are clearly relevant for the determination of the amount of reparation, and such effects have to be evaluated *inter alia* in terms of the duration of the interest permanently affected by the breach. On the other hand, as is stated in the same paragraph of the commentary to article 24: "The determination of the moment and duration of the breach of an international obligation will always affect the determination of the *moment** from which the period of prescription will begin to run . . ." But which moment is that: the first or the last moment of the (extended) "time of commission", or somewhere in between? And, to take still another phase in the total process of the law as set out in the same paragraph, the moment and duration of a breach may be decisive with regard to:

> . . . the determination of the existence or non-existence of the competence of an international tribunal to deal with a dispute arising out of the breach by a State of an international obligation where the agreement concluded by the parties to the dispute includes a clause limiting the jurisdiction of the tribunal established under or mentioned in the agreement to disputes concerning "acts" or "situations" subsequent to a specific date, provided that the parties in question have not expressly laid down special criteria for the interpretation of that clause. . . .

Incidentally, the last words quoted underline the residual character of the articles dealt with here. In any case, the Commission, in the commentary (para. (10)) to article 24,[25] considers the analysis of the *Phosphates in Morocco* case[26] particularly instructive for the distinction between an "instantaneous act producting continuing effects" and a "continuing act" of a lasting nature. But this case turns on the interpretation of the words "with regard to situations or facts subsequent to such ratification" in the relevant instrument. Furthermore, within the context of the application of the European Convention on Human Rights, the tendency—referred to in the commentary (para. (21)) to article 18[27]—has been rather to accept the competence of the relevant (quasi-) judicial body even if the government act, curtailing or taking away in respect of a particular private person one of his (otherwise continuing) fundamental freedoms, dated from before the Convention entered into force in respect of the State(s) involved in the dispute. No doubt the object and purpose of the system instituted by that Convention are germane to this tendency.

(15) In view of the foregoing observations, the present Special Rapporteur is of the opinion that the Commission should reconsider whether the *time factor* should be addressed at all in the draft articles on State responsibility. No doubt the problem as such exists and has to be solved in practice. The question is only whether it is feasible to elaborate sufficiently clear and unambiguous rules for the solution of the problem. The present Special Rapporteur is doubtful about this. Actually, in the domestic legal systems of several countries, jurisprudence has shown that general legislative provisions in this field seldom yield easily applicable guidelines which do justice to the wide variety of norms and situations. This is not surprising: as remarked by the famous Argentine writer Jorge Luis Borges, time is an indocile subject.

(16) Any legal norm, legal relationship, legal status or legal obligation has its limits in time: it enters into force and it terminates. This does not mean that facts occurring beyond those limits in time are *a priori* irrelevant for the content of that norm, relationship, status or obligation. But the extent to which, and the manner in which,[28] they are relevant is a matter of choice to be made by those who establish the norm, relationship, status or obligation. Often such a choice is not made, or is left more or less ambiguous. But such rules—or rather metarules—are inevitably more abstract and more given to the use of fiction than the choice made by those who establish the actual norm, relationship, status or obligation. Such metarules tend to become either too revolutionary or too conservative. This is particularly true for modern international law, because of its characteristic of trying to reconcile the coexistence of sovereign States and the dictates of humanity.

Article 22. Exhaustion of local remedies

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.

(1) Austria considers it "advisable not to limit the application of article 22 to the obligations mentioned in article 21, but to include obligations demanding the adoption of a particular course of conduct in the introductory sentence of article 22".

(2) Canada considers that article 22 should be reformulated to take into account the exception to the rule of the exhaustion of local remedies for cases of "injury to foreign individuals or to their property that has been caused outside the territory of the State concerned".

(3) Mali is of the opinion that article 22 "should reflect the fact that the breach of an obligation may occur when the local remedies process drags on indefinitely".

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[24] See footnote 21 above.

[25] *Yearbook . . . 1978*, vol. II (Part Two), pp. 88-89.

[26] Judgment of the PCIJ of 14 June 1938, *P.C.I.J., Series A/B, No. 74*, p. 10.

[27] *Yearbook . . . 1976*, vol. II (Part Two), p. 93, footnote 436.

[28] Cf. commentary to article 18, *ibid.*, pp. 92-93, footnote 433.

(4) The Netherlands considers that the requirement of the exhaustion of local remedies should be restricted to those cases in which the breach of an international obligation of which a State is accused took place within the jurisdiction of that State.

(5) The Federal Republic of Germany "has always understood this rule as a procedural condition for the assertion of claims arising out of the breach of an already substantively defined international obligation".

(6) Spain remarks that article 22 does not cover the situation where—as is the case under the Spanish Constitution of 1978—the central Government, on its own initiative, may prevent or make good the injury when a territorial governmental entity commits a breach of international law.

(7) In the opinion of the present Special Rapporteur, all these written comments reflect misgivings in regard to the construction of the rule of the exhaustion of local remedies, as laid down in article 22, in connection with article 21, paragraph 2, and with the notion of a "complex act" (art. 18, para. 5, and art. 25, para. 3). In fact, article 22 is construed as a special case of application of article 21, paragraph 2, and the "succession of actions or omissions by the same or different organs of the State in respect of the same case" that may occur in the course of the exhaustion of local remedies is the main example of the notion of a complex act.

(8) Obviously, it is again a matter of (interpretation of) the primary rule itself whether the obligation it imposes—in the words of article 21, paragraph 2, and article 22—"allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State". According to article 22, it is only in the case of a "result required . . . by an international obligation concerning the treatment to be accorded to aliens" that the alien concerned should himself take the initiative to exhaust the "effective local remedies available" to him. The breach is then completed only if and when such exhaustion of local remedies fails to bring about the required (or an equivalent) result. Nevertheless, according to article 18, paragraph 5, there is a breach even if the "complex act" is completed only after the period of time during which the obligation is in force for the State concerned. There is no mention in this provision of the situation in which, after the termination of the force of the obligation, the complex act is not completed, the (no longer required) result or an equivalent result having been achieved through the exhaustion of local remedies, or otherwise by acts *proprio motu* of the State.

(9) All this seems to raise the question why special treatment should be accorded to international obligations "concerning the treatment to be accorded to aliens". Is the rationale of the local remedies rule to be found in the statement that the State has not acted until all its competent organs have finally and definitely taken a stand? Or is the non-exhaustion of local remedies a sort of "contributory negligence" on the part of the alien? In the first case, there seems to be no reason for special treatment of obligations concerning the treatment to be accorded to aliens, it being sufficient that any obligation of result allows that this or an equivalent result may be achieved by subsequent conduct of the State. In the second case, there is room for the requirement of an initiative by the alien himself, but this requirement is rather in the nature of a condition for the attribution of his interests to his State on the international plane, and should be qualified. Actually, such qualifications are in essence suggested in the written comments of the Federal Republic of Germany (see para. (5) above) and in those of Canada, Mali and the Netherlands (see paras. (2), (3) and (4) above).

(10) It may be noted that, if paragraph 1 (*b*) of draft article 6 of part 2 were adopted by the Commission, the construction of an obligation of result, which is not really an obligation of result but rather one to achieve an equivalent final result at some indefinite moment of time, would seem to be unnecessary. Indeed, the only reason for such a construction would seem to be to suspend the application of countermeasures, or the submission of a claim to an international tribunal by the injured State, for a reasonable period during which the author State could, by way of (an equivalent) substitute performance, legalize the situation. The requirement of an initiative by the alien himself (exhaustion of local remedies) is based on an entirely different reason, namely that the situation is within the jurisdiction of the alleged author State.

(11) For the above reasons, the present Special Rapporteur proposes for the consideration of the Commission:

(*a*) the deletion of paragraph 2 of article 21; and

(*b*) the redrafting of article 22 as follows:

"When the conduct of a State within its jurisdiction is not in conformity with what is required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, there is a breach of the obligation only if the alien concerned has exhausted the effective local remedies available to him without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment."

(12) This new formulation for article 22 would also go in the direction of the written comment of Austria (see para. (1) above). The remark made by Spain (see para. (6) above) does not require further modification of article 22. The mere possibility for the central Government to "prevent or make good the injury" on its own initiative does not put the alien under an obligation to request such a measure. Actually, article 7, paragraph 1, and article 10 apply in the case mentioned by Spain: an internationally wrongful act has been committed and, if the central Government intervenes, it fulfils the requirement set out in article 6, paragraph 1 (*b*), of part 2, as proposed by the present Special Rapporteur.