# Chapter V

# CIRCUMSTANCES PRECLUDING WRONGFULNESS

## *Commentary*

(1) Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation. The six circumstances are: consent (art. 20), self-defence (art. 21), countermeasures (art. 22), *force majeure* (art. 23), distress (art. 24) and necessity (art. 25). Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law. Article 27 deals with certain consequences of the invocation of one of these circumstances.

(2) Consistent with the approach of the present articles, the circumstances precluding wrongfulness set out in chapter V are of general application. Unless otherwise provided,[950] [305] they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists. This was emphasized by ICJ in the *Gabčíkovo-Nagymaros Project* case. Hungary sought to argue that the wrongfulness of its conduct in discontinuing work on the Project in breach of its obligations under the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System was precluded by necessity. In dealing with the Hungarian plea, the Court said:

> The state of necessity claimed by Hungary—supposing it to have been established—thus could not permit of the conclusion that … it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.[951] [306]

Thus a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in chapter V operate as a shield rather than a sword. As Fitzmaurice noted, where one of the circumstances precluding wrongfulness applies, "the non-performance is not only justified, but 'looks towards' a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present".[952] [307]

(3) This distinction emerges clearly from the decisions of international tribunals. In the *"Rainbow Warrior"* arbitration, the tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while

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[950] [305] For example, by a treaty to the contrary, which would constitute a *lex specialis* under article 55.

[951] [306] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 39, para. 48.

[952] [307] *Yearbook … 1959*, vol. II, p. 41, document A/CN.4/120.

it was in force, including the question whether the wrongfulness of the conduct in question was precluded.[953] [308] In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

> [E]ven if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but—unless the parties by mutual agreement terminate the treaty—it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.[954] [309]

(4) While the same facts may amount, for example, to *force majeure* under article 23 and to a supervening impossibility of performance under article 61 of the 1969 Vienna Convention, the two are distinct. *Force majeure* justifies non-performance of the obligation for so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. *Force majeure* excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory Committee of the 1930 Hague Conference. Among its Bases of discussion,[955][310] it listed two "[c]ircumstances under which States can decline their responsibility", self-defence and reprisals.[956] [311] It considered that the extent of a State's responsibility in the context of diplomatic protection could also be affected by the "provocative attitude" adopted by the injured person (Basis of discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces "in the suppression of an insurrection, riot or other disturbance" (Basis of discussion No. 21). However, these issues were not taken to any conclusion.

(6) The category of circumstances precluding wrongfulness was developed by ILC in its work on international responsibility for injuries to aliens[957] [312] and the performance of treaties.[958] [313] In the event, the subject of excuses for the non-performance of treaties was not included within the scope of the 1969 Vienna Convention.[959] [314] It is a matter for the law on State responsibility.

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[953] [308] *"Rainbow Warrior"* (footnote [40] 46 above), pp. 251–252, para. 75.

[954] [309] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 63, para. 101; see also *ibid*., page 38, para. 47.

[955] [310] *Yearbook … 1956*, vol. II, pp. 219–225, document A/CN.4/96.

[956] [311] *Ibid*., pp. 224–225. Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

[957] [312] *Yearbook … 1958*, vol. II, p. 72. For the discussion of the circumstances by Special Rapporteur García Amador, see his first report on State responsibility, *Yearbook … 1956*, vol. II, pp. 203–209, document A/CN.4/96, and his third report on State responsibility, *Yearbook … 1958*, vol. II, pp. 50–55, document A/CN.4/111.

[958] [313] See the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote [952] 307 above), pp. 44–47, and his comments, *ibid*., pp. 63–74.

[959] [314] See article 73 of the Convention.

(7) Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, *i.e.* those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself. In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in chapter V are recognized by many legal systems, often under the same designation.[960] [315] On the other hand, there is no common approach to these circumstances in internal law, and the conditions and limitations in chapter V have been developed independently.

(8) Just as the articles do not deal with questions of the jurisdiction of courts or tribunals, so they do not deal with issues of evidence or the burden of proof. In a bilateral dispute over State responsibility, the onus of establishing responsibility lies in principle on the claimant State. Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V, however, the position changes and the onus lies on that State to justify or excuse its conduct. Indeed, it is often the case that only that State is fully aware of the facts which might excuse its non-performance.

(9) Chapter V sets out the circumstances precluding wrongfulness presently recognized under general international law.[961] [316] Certain other candidates have been excluded. For example, the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness.[962] [317] The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness.[963][318] The so-called "clean hands" doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It also does not need to be included here.[964] [319]

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[960] [315] See the comparative review by C. von Bar, *The Common European Law of Torts* (Oxford University Press, 2000), vol. 2, pp. 499–592.

[961] [316] For the effect of contribution to the injury by the injured State or other person or entity, see article 39 and commentary. This does not preclude wrongfulness but is relevant in determining the extent and form of reparation.

[962] [317] Cf. *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70,* p. 4, especially at pp. 50 and 77. See also the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote [952] 307 above), pp. 43–47; D. W. Greig, "Reciprocity, proportionality and the law of treaties", *Virginia Journal of International Law,* vol. 34 (1994), p. 295; and for a comparative review, G. H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1988), pp. 245–317. For the relationship between the exception of non-performance and countermeasures, see below, paragraph (5) of commentary to Part Three, chap. II.

[963] [318] See, *e.g.*, *Case concerning the Factory at Chorzów, Jurisdiction* (footnote [28] 34 above), p. 31; cf. *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 67, para. 110.

[964] [319] See J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, vol. 10 (1964), p. 225; A. Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux", *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the

## DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

### International arbitral tribunal

*Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*

In its 1990 award in the *Rainbow Warrior* case, the arbitral tribunal observed that France had alleged, "citing the report of the International Law Commission", [that] the reasons which may be invoked to justify non-execution of a treaty are a part of the general subject matter of the international responsibility of States".[965] [137] Having considered that, *inter alia*, the determination of the circumstances that may exclude wrongfulness was a subject that belonged to the customary law of State responsibility, the tribunal referred to the set of rules provisionally adopted by the International Law Commission under the title "circumstances precluding wrongfulness" (draft articles 29 to 35), and in particular to draft articles 31, 32 and 33, which it considered to be relevant to the decision on that case.[966] [138]

[A/62/62, para. 86]

### International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

*In the matter of an Arbitration Between Guyana and Suriname*

In its 2007 award in the *Guyana* v. *Suriname* case, involving the delimitation of a maritime boundary between the two States, the arbitral tribunal constituted to hear the case considered a challenge by Suriname to the admissibility of the proceedings on the grounds of lack of good faith and clean hands. In dismissing such challenge, the tribunal maintained that "[n]o generally accepted definition of the clean hands doctrine has been elaborated in international law", and noted that "the Commentaries to the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely and, when it has been invoked, its expression has come in many forms".[967] [19]

[A/65/76, para. 22]

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dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), pp. 392–394.

[965] [137] See footnote [40] 46 above, para. 74.

[966] [138] *Ibid*., pp. 251–252, paras. 75–76.

[967] [19] *In the matter of an Arbitration Between Guyana and Suriname*, Award, 17 September 2007, para. 418 (footnote omitted), referring to paragraph (9) of the general commentary to Part One, Chapter V ("Circumstance precluding wrongfulness").