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Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur - the internationally wrongful act of the State, source of international responsibility

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STATE RESPONSIBILITY

(Agenda item 2)

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Eighth report on State responsibility, by Mr. Roberto Ago, Special Rapporteur

The internationally wrongful act of the State, source of international responsibility (continued)**

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CONTENTS

ABBREVIATIONS

C.N.R.	Consiglio Nazionale delle Ricerche (Italy)
C.N.R.S.	Centre national de la recherche scientifique (France)
I.C.J.	International Court of Justice
I.C.J. Reports	I.C.J., *Reports of Judgments, Advisory Opinions and Orders*
ILO	International Labour Organisation
P.C.I.J.	Permanent Court of International Justice
P.C.I.J., Series A	Collection of Judgments (through 1930)
Series C, —Nos. 1–19	P.C.I.J., *Acts and Documents relating to Judgments and Advisory Opinions given by the Court* (through 1930)
Series C, —Nos. 52–88	P.C.I.J., *Pleadings, Oral Statements and Documents* (beginning in 1931)
S.I.O.I.	Società Italiana per l'Organizzazione Internazionale (Italy)

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Special Rapporteur.

* See footnote 207 below.

** The present report is a continuation of the seventh report on State responsibility, submitted by the Special Rapporteur to the Commission at its thirtieth session (*Yearbook ... 1978*, vol. II (Part One), p. 31, document A/CN.4/307 and Add.1 and 2).

CHAPTER IV

Implication of a State in the internationally wrongful act of another State (*concluded*)[1]

2. INDIRECT RESPONSIBILITY OF A STATE FOR THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE

1. In the introduction to this chapter, we explained that two separate cases would be dealt with successively under the one heading "Implication of a State in the internationally wrongful act of another State". The first case was that of a State which participated in the independent commission by another State of an internationally wrongful act by sending aid or assistance to the latter State. We noted that this case was characterized by the fact that, along with the responsibility of the actual perpetrator of the internationally wrongful act, an ulterior responsibility would be incurred by the State which had contributed, in any of the forms indicated, to the commission of the internationally wrongful act in question. This case was the subject of section 1. The second case (to be considered in this section) is that of a State which, while not necessarily taking part in the commission by another State of an internationally wrongful act and not especially rendering aid or assistance to it, is in a special situation vis-à-vis that other State—a situation such as to justify its being held indirectly responsible, at the international level, for the wrongful act of the other State, in place of the latter State, which committed the act in question.

2. Draft article 1, as adopted by the Commission in first reading,[2] provides that:

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

However, as indicated in the commentary to that article:

... it is clear that the Commission refers in article 1 to the normal situation, which is that the offending State incurs international responsibility. Most members of the Commission recognized that there may be special cases in which international responsibility devolves upon a State other than the State to which the act characterized as internationally wrongful is attributed. These cases, too, will be covered later in the draft. But in view of their exceptional character, the Commission did not consider that they should be taken into account in formulating the general rule on responsibility for wrongful acts, since that might detract from the basic force of the general principle stated at the outset.[3]

The purpose of this section is therefore to determine whether there are cases in which the international responsibility arising out of an internationally wrongful act should devolve upon a State other than the one to which the act in question is attributed. In other words, the issue is *indirect responsibility or responsibility for the act of another.*

3. The expression "indirect" or "vicarious responsibility" ("*responsabilité indirecte*" in French, "*mittelbare Haftung*" in German) has sometimes been used, especially in the past, to refer to a great variety of situations,[4] including those involving the responsibility incurred by a State on the occasion of injurious acts by private individuals,[5] or on the occasion of acts

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[1] For the beginning of chapter IV (Introduction and Section 1), see *Yearbook ... 1978*, vol. II (Part One), p. 52, document A/CN.4/307 and Add.1 and 2.

[2] For the text of all the draft articles adopted so far by the Commission: *ibid.*, (Part Two), pp. 78 *et seq.*, document A/33/10, chap. III, sect. B.1.

[3] *Yearbook ... 1973*, vol. II, p. 176, document A/9010/Rev.1, chap. II, sect. B, article 1.

In order to emphasize the fact that the wording adopted should also cover cases in which responsibility for the internationally wrongful act of a State devolved upon a State other than the one committing it, the Special Rapporteur had proposed in his second report that article 1 should be formulated as follows: "Every internationally wrongful act by a State gives rise to *international responsibility*.*" (*Yearbook ... 1970*, vol. II, p. 187, document A/CN.4/233, para. (30)). Cf. also paragraph (29) of the commentary to that article (*ibid.*, pp. 186–187). However, in view of the abnormality of cases in which a wrongful act might entail the responsibility of a State other than the State to which the act in question would be attributed, the Rapporteur himself proposed in his third report the wording which was subsequently adopted by the Commission (*Yearbook ... 1971*, vol. II (Part One), pp. 213–214, document A/CN.4/246 and Add.1–3, para. (48).

[4] For the various acceptations of the expression "indirect responsibility", see in particular F. Klein, *Die mittelbare Haftung im Völkerrecht* (Frankfurt-am-Main, Klostermann, 1941), pp. 41 *et seq.*

[5] The Commission recorded its opposition to the use of such terminology, which dates back to L. Oppenheim and has in any event been virtually discarded. In its commentary to article 11, it stated:

> "... the responsibility of the State on the occasion of acts committed by private persons can in no case be described as an 'indirect' or 'vicarious' responsibility. In any legal system, the responsibility defined as 'indirect' or 'vicarious' is the responsibility which a subject of that juridical order incurs for the wrongful act of another subject of the same juridical order. This anomalous form of responsibility entails separating the subject that commits an internationally wrongful act from the subject that bears the responsibility for that act. However, in cases where the State is held internationally responsible on the occasion of actions of private persons, those persons cannot be regarded as separate subjects of international law. The conditions for indirect responsibility are therefore entirely lacking." (*Yearbook ... 1975*, vol. II, p. 73, document A/100/10/Rev.1, chap. II, sect. B.2, para. (11) of the commentary to article 11.

We might add that, in view of the position taken by the Commission in draft article 11, in cases where a State is said to be internationally responsible on the occasion of acts committed by private individuals the State is answerable, not in any way for the acts of the individuals, but for the conduct adopted by its organs in relation to those acts. It would therefore be manifestly incorrect to speak in that connection of responsibility of the State "for the act of another", since in this particular situation the State is in fact answerable only for its own act.

committed by organs which lacked competence or which had contravened their instructions,[6] or with regard to the conduct of territorial governmental entities possessing, under the internal juridical order, a personality separate from that of the State itself.[7] But, in fact, as was mentioned above, the only correct use of the expression "indirect responsibility" of a State under international law, the only one corresponding to the sense in which the terms "indirect responsibility" or "responsibility for the act of another" are used in other systems of law, and the only one to which the Commission has adhered throughout its draft whenever it has encountered this problem is, in our view, the use designed to cover the set of cases in which a State is required to answer for an internationally wrongful act commited by another State or another subject of international law. This is also the sense in which the expression is used by nearly all contemporary writers.[8] In this section, therefore, we use this expression to refer precisely to cases in which international responsibility is attributed to a state for an internationally wrongful act committed by another State. Cases in which a State incurs international responsibility for the act of a subject of international law other than a State (e.g. an international organization or an insurrectional movement), although intellectually conceivable, are not covered, because there are no known cases in which this has actually happened and such cases are unlikely to occur in the future.

4. Nearly all writers on international law who have dealt with the topic of indirect responsibility of States have for long agreed that there are cases—exceptional ones, it is true—in which the responsibility arising out of an internationally wrongful act should devolve upon a State other than that to which the wrongful act is attributed. However, there have been changes in thinking with regard to the identification of such cases and the justification for dissociating the attribution of the internationally wrongful act and the attribution of the resulting responsibility, and some differences of opinion on the subject remain to this day. One view which predominated for a long time was that a State should be held responsible for the internationally wrongful act of another State—if the latter, having accepted the "supremacy" of the former, conferred on it the right to represent it vis-à-vis third States in international relations. According to this theory, it is precisely the existence of such a relationship of representation between the two States that justifies the attribution of responsibility. A more recent view is that a State is responsible for the internationally wrongful act of another State entity if the latter, while retaining an international personality of its own, places itself in a relationship of dependence or subordination to the State in question, whether this involves a *de jure* relationship or even, in some opinions, a purely *de facto* one. As an example of a *de jure* relationship, reference is sometimes made to the relationship between a federal State and its member States, or more

[6] In draft article 10 [see footnote 2 above], the Commission indicated that a State might be held responsible for such acts. However, it also indicated that the responsibility of the State was manifestly a direct responsibility; since the organ had acted as such, even though in excess of its competence or in contravention of the instructions it had received, it remained a State organ which had acted in that capacity. It was not simply a private individual, much less a subject of international law separate from the State of which it was an organ. The State was therefore answerable for an act which was its own and not someone else's, as would have to be the case if indirect responsibility were involved.

[7] In these cases also, the fact that the State is held responsible at the international level for the conduct of the organs of such entities does not, of course, mean that it is answerable as a matter of indirect responsibility. In order for that to be so, the first prerequisite would be that the entity in question should have a personality separate from that of the State under the international order, and not only under the internal order. Generally speaking, however, as the Commission pointed out in its commentary to article 7 (*Yearbook . . . 1974*, vol. II (Part One), p. 280, document A/9610/Rev.1, chap. III, sect. B.2, para. (9), such entities do not possess an international personality. If the State is answerable for the actions of their organs, its responsibility is nearly always direct because, as specified in draft article 7 [see footnote 2 above], the conduct of such organs will be considered under international law as an act of the State (in this case, the federal State). It is only in the very rare cases where such entities are themselves subjects of international law, having an international legal capacity of their own, although a very limited one, and where they were acting in the framework of that capacity when committing the breach of an international obligation incumbent on them, that one could—provided that the other conditions were fulfilled—speak of an indirect international responsibility of the State of which the entities in question form part.

[8] It is precisely in this sense that D. Anzilotti already uses the term "indirect responsibility" in *Teoria generale della responsabilità dello Stato nel diritto internazionale* (Florence, Lumachi, 1902), reprinted in: S.I.O.I. (Società italiana per l'organizzazione internazionale), *Opere di Dionisio Anzilotti*, vol. II, Scritti di diritto internazionale pubblico (Padua, CEDAM, 1956), vol. II, t. 1, p. 146, and in "La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers", *Revue générale de droit international public* (Paris), vol. XIII, No. 3 (1906), p. 300 (reprinted in S.I.O.I., *op. cit.*, p. 197). See also P. Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau, Kern's), Supplement 2 to vol. X (1917), p. 42; C. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, Brill, 1924), vol. II, pp. 93 and 105; A. Decencière-Ferrandière, *La responsabilité internationale des Etats à raison des dommages subis par des étrangers* (Paris, Rousseau, 1925), p. 63 and pp. 192 *et seq.*; R. Ago, *La responsabilità indiretta nel diritto internazionale* (Padua, CEDAM, 1934), p. 25 (reprinted, with some changes, in *Archivio di diritto pubblico* (Padua, CEDAM), vol. I, No. 1, January–April 1936, pp. 12 *et seq.*); F. Klein, *op. cit.*, pp. 64 *et seq.*; A. Verdross, "Theorie der mittelbaren Staatenhaftung", *Oesterreichische Zeitschrift für öffentliches Recht*, (Vienna), vol. I, No. 4 (new series; May 1948), p. 389; G. Barile, "Note a teorie sulla responsabilità indiretta degli Stati", *Annuario di diritto comparative di studi legislativi* (Rome), 3rd series (special), vol. XXII, No. 3 (1948), p. 434; A. P. Sereni, *Diritto internazionale* (Milan, Giuffrè, 1962), vol. III. pp. 1560–1561; I. von Münch, *Das völkerrechtliche Delikt in der modernen Entwicklung der Völkerrechtsgemeinschaft* (Frankfurt-am-Main, Keppler, 1963), p. 235; J. H. W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijtoff, 1973), vol. VI, pp. 705–706; H. J. Schlochauer, "Die Entwicklung des völker rechtlichen Deliktsrechts", *Archiv des Völkerrechts* (Tübingen), vol. 16, No. 3 (1975), p. 262.

frequently to that between a protecting State and the protected State or between a State entrusted with an international mandate or trusteeship and the mandated territory or trust territory. As an example of a *de facto* relationship, reference is made to the relationship between an occupying State and an occupied State or between a "dominant" State and a "puppet" State. However, whereas those who first advanced this view considered that in order for the "dominant" State to be held responsible for the wrongful act committed by the "dependent" State it was sufficient that there should be a relationship of dependence of the type indicated, their successors, realizing the need to circumscribe and make more specific the possible scope of application of indirect responsibility, regard such a relationship as a necessary, but not a sufficient, condition for that purpose. Some of them hold that, in addition, it must be impossible for the injured State to inflict punishment on the dependent State which committed the wrongful act without at the same time affecting the interests of the dominant State, or without reaching into its "juridical sphere". Others, who have gone more thoroughly into the question and whose view is now clearly the predominant one, consider it a further requirement that the dominant State should exercise some control over the actions of the dependent State and that the wrongful act committed by the latter should occur in a sphere of activity which is subject to such control. Lastly, some writers also allow of another, somewhat marginal case of indirect responsibility, namely, the case which would occur where a State coerces another State, even though the latter is not bound to it by a standing relationship of dependence or subordination, to commit an internationally wrongful act. In this case, there would be a situation of what might be termed "occasional" dependence, which materializes only on the occasion of a specific wrongful act. We may now proceed to a more detailed analysis of these different presentations and explanations of the abnormal phenomenon of indirect responsibility as they have succeeded one another in the course of the evolution of legal thinking, and see how the conception which seems to us to be soundest was arrived at.

5. It was Anzilotti who put forward for the first time, in 1902,[9] the argument that a State which was responsible for the international representation—and more specifically the general and obligatory representation—of another State should, as a consequence, by indirectly responsible for internationally wrongful acts committed by that other State. His justification for this argument was that, since the representation of State B had been assumed by State A, it would be impossible for any third State that might be injured by an international wrongful act committed by State B to address itself to the latter in order to assert its international responsibility, because State B no longer maintained direct international relations. And since the international responsibility created by the wrongful act could not be erased, it could only be the representing State that should answer for the wrongful act committed by the represented State.[10] Apart from these cases, Anzilotti did not mention any case in which a State is responsible for acts of another State.

6. The theory advanced by Anzilotti met with considerable success at first; during the first thirty years of this century, most writers who discussed the question[11]

[9] Anzilotti, *Teoria generale ...* (*op. cit.*), pp. 146–147. The same argument was repeated in later works by the same writer: "La responsabilité internationale ..." (*loc. cit.*), pp. 300 *et seq.*, and *Corso di diritto internazionale*, 3rd ed. (Rome, Athenaeum, 1928), p. 473.

[10] Anzilotti expressed himself as follows:

"When a country has accepted the supremacy of another State, but without being completely absorbed into it, it retains its international personality and continues to be a separate subject of international law in its relations with other States; the rules of international law prohibiting any act of injurious to another State then apply to it as to any other person under international law: it is therefore capable of engaging in an activity contrary to the duties imposed on it by international law, but, as it cannot enter into relations with the injured or offended State, the latter must address itself to the State which represents it, and the duty to redress the damage caused rests with that State." (Anzilotti, "La responsabilité internationale ..." (*loc. cit.*), p. 301). Similarly, in *Teoria generale ...* (*op. cit.*), p. 146, and *Corso ...* (op. cit.), p. 473.

It should be noted in this connection that H. Triepel—although not referring to indirect responsibility—had already asserted that the responsibility of a federal State for acts of a member State which had retained an international personality and of a protecting State for acts of the protected State was a responsibility for the act of another; as grounds for the existence of such a responsibility, he mentioned, *inter alia*, the fact that the member State and the protected State had ceased to be "subjects of international 'action law', as either plaintiffs or defendents" (H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), pp. 367–368).

[11] See, for example, although with some differences from author to author: E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1915; reprinted: New York, Banks Law Publishing, 1928), pp. 201–202; P. Fauchille, *Traité de droit international public*, 8th ed. (Paris, Rousseau, 1922), vol. I, part 1, p. 523; C. de Visscher, *loc cit.*, p. 105; A. Verdross, "Règles générales du droit international de la paix", *Recueil des cours de l'Académie de droit international de La Haye, 1929-V* (Paris, Hachette, 1931), vol. 30, p. 465; J. Spiropoulos, *Traité théorique et pratique de droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1933), p. 281. This theory was also accepted by most of the members of the Institute of International Law (see the report of L. Strisower and the relevant debate: *Annuaire de l'Institut de droit international, 1927–I* (Paris), vol. 33, pp. 488 *et seq.* and 547 *et seq.*, and *ibid.*, *1927-III*, pp. 147 *et seq.*), and was incorporated in article IX, second paragraph, of the resolution adopted at the Lausanne session (1927) on "International responsibility of States for injuries on their territory to the person or property of foreigners" (see *Yearbook ... 1956*, vol. II, p. 228, document A/CN.4/96, annex 8). It affirms that "a protecting State is responsible for the conduct of a protected State ... so far as the latter (the protecting State) represents the protected State towards third States wronged by it and employing the right to press their claims". The influence of this doctrine is also to be seen in the draft convention prepared by Harvard Law School in 1929, article 3 of which is worded as follows:

"A State is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions ...

subscribed to it, as did State organs[12] and apparently even an international arbitrator.[13]

7. However, this theory came under critical scrutiny in the 1930s, when it was pointed out that simply because, owing to the fact that State A had been authorized by State B to represent it, third States injured by State B could no longer address themselves directly to it in order to claim reparation for its wrongful act, it did not follow that they could no longer demand such reparation from it and could not assert its responsibility. The mere existence of the international representation relationship between A and B has no consequences for third States except that their relations with the represented State are conducted through the representing State; there is nothing to prevent those States from demanding of the represented State, through the representing State, an indemnity by way of reparation. Nor is there anything to prevent the represented State from making such reparation through the representing State. Consequently it cannot be deduced from the mere fact that States which are injured by an internationally wrongful act committed by a State that has authorized another State to be responsible for its international representation address their claims for reparation for the injury suffered to that other State, that in so doing they are asserting the responsibility of the representing rather than the represented State. In other words, if they address themselves to it solely in its capacity as the representative of another State,[14] what they are asserting is the *direct* responsibility of the represented State and not any indirect responsibility of the representing State. Channelling through a second State the demand for the reparation due from the first State, which committed the breach of an international obligation, does not mean holding the second State responsible for that breach. Indirect responsibility on the part of the second State—a responsibility incurred by it for the act of another—could be found to exist only where international law imposed on it the obligation to make reparation, which is obviously not the case when it is approached solely as the "representative" of the State which is, and remains, under an obligation to make reparation.[15]

8. Once these criticisms had been voiced, most writers gradually came to the conclusion that the mere fact that one State was responsible for the international representation of another, even where such representation was general and obligatory, could not constitute a ground for attributing indirect responsibility to it,[16] and they began to seek some other justification for this particular type of responsibility. A few years later, it is true, Verdross "resurrected" the theory of representation as a ground for indirect responsibility, a theory which, in his view, had not been correctly understood by its critics. Verdross agrees with Anzilotti's critics that the fact that injured States must address themselves to the representing State in order to obtain reparation for wrongful acts committed by the represented State does not necessarily imply that, in doing so, they are asserting the indirect responsibility of the representing State. If they are addressing themselves to it purely us a subject acting

For the purpose of this article, a dominion, a colony, a dependency, a protectorate, or a community under mandate, which does not independently conduct its foreign relations, is to be assimilated to a political subdivision." (*Ibid.*, p. 229, annex 9.)

[12] See the replies of the Governments of Austria and Japan to the request for information addressed to them by the Preparatory Committee for the Codification Conference (League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III, *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (C.75.M.69.1929.V), pp. 121 and 123 respectively). The replies of the Governments of Australia, Great Britain and Czechoslovakia, although not very clear, also appear to have been influenced by the representation theory (*ibid.*, pp. 121, 122 and 124 respectively).

[13] See the arbitral decision rendered by M. Huber on 1 May 1925 in the *British claims in the Spanish Zone of Morocco* case between Great Britain and Spain, in which he stated: "If the protectorate puts an end to direct diplomatic relations between the protected State and other States, so that the latter can no longer address themselves directly to the protected State, that limitation imposed on third States must necessarily entail an obligation on the protecting State to be answerable in place of the protected State" (United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.I), p. 648). The influence of Anzilotti's theory was also seen in a passage from the judgement rendered on 30 August 1924 by the Permanent Court of International Justice in the *Mavrommatis Palestine concession* case, reading as follows:

"The obligations resulting from these engagements are therefore obligations which the Administration of Palestine must respect; the Mandatory is internationally responsible for any breach of them since, under Article 12 of the Mandate, the external relations of Palestine are handled by it" (*P.C.I.J., Series A*, No. 2, p. 23).

[14] The situation might be different if they were addressing themselves to it on some other ground. See para. 12 below.

[15] Ago, *op. cit.*, pp. 30 *et seq.* The author stated, as others had done in the past, that cases where a relationship of obligatory representation existed between two subjects of international law could certainly not be considered the only cases in which indirect responsiblity might arise (*ibid.*).

[16] See, in particular, A. P. Sereni, *La rappresentanza nel diritto internazionale* (Padua, CEDAM, 1936), pp. 417 *et seq.*; Klein, *op. cit.*, pp. 71 *et seq.*; Barile, *loc. cit.*, pp. 435 *et seq.*; M. V. Polak, "Die Haftung des Bundesstaates für seine Gliedstaaten", *Oesterreichische Zeitschrift für öffentliches Recht*, Vienna, vol. I, No. 4 (new series; May 1948), p. 384; R. Quadri, *Diritto internazionale pubblico*, 5th ed. (Naples, Liguori, 1968), p. 600; A. Ross, *A Textbook of International Law* (London, Longmans, Green, 1947), pp. 262–263.

It is true that to this day there are still some writers who speak of indirect responsibility on the part of the representing State for wrongful acts of the represented State, but it should be noted that these writers do not mention the objections that have been raised to Anzilotti's theory and do not explain how they might be overcome (see, for example, P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1954), vol. II, pp. 26–27; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), pp. 214 *et seq.*; A. Schüle, "Völkerrechtliches Delikt", *Wörterbuch des Völkerrechts*, 2nd ed. (Berlin, de Gruyter, 1960), vol. I, pp. 334–335; F. Berber, *Lehrbuch* (Munich, Beck's, 1977), vol. III, pp. 17–18; Schlochauer (*loc. cit.*), p. 262).

on behalf the represented State, what they are asserting is the responsibility, and the direct responsibility, of the represented State. However, there is another possibility, namely, that international law imposes on a State which undertakes the general and obligatory representation of another State an obligation to answer for the wrongful acts of the latter as a *quid pro quo* for having "hemmed it in", as it were, by cutting off direct contacts between it and third States. If such were the case, says Verdross, the States addressing themselves to the representing State would be asserting the latter's own responsibility, and not that of the represented State. According to Verdross, the practice of States shows that international law has opted for this second possibility. In support of his argument, he refers in particular to the passage in Mr. Huber's decision in the *British claims in the Spanish Zone of Morocco* case, where it is stated that "the responsibility of the protecting State arises from the fact that it alone represents the protected territory in its international relations" and that the protecting State is answerable "in place of the protected State".[17]

9. This revised version of the "representation" theory was, however, no sounder than the original version. Verdross may be right in saying that in theory there is nothing to prevent international law from attributing to the representing State the responsibility for any wrongful act committed by the represented State, but he does not succeed in proving that such an attribution is in fact made by international law, or that it constitutes a rule now in effect, nor does he provide valid arguments in favour of its introduction *de jure condendo*. As for the arbitral decision by Huber to which Verdross refers, a close scrutiny of it shows that the real concern of the learned Swiss jurist was simply to ensure that, in the case of a protectorate which put an end to direct international relations by the protected State, international responsibility for internationally wrongful acts committed by the protected State should not ultimately be erased, to the detriment of the State which suffered from those wrongful acts. He therefore viewed as the means of obviating that danger the acceptance by the protecting State of the obligation to answer in place of the protected State. The reasons mentioned by Huber for attributing international responsibility to the protecting State do include the fact that the latter represents the protected State in its international relations, but he makes this point in the context of a more extensive set of grounds and in a sense different from that understood by Verdross. What the arbitrator in the *British claims in the Spanish Zone of Morocco* case was seeking was that the protecting State should be confronted with an alternative: either it does not accept the responsibility incurred by the protected State for its acts, in which case it must agree that responsibility remains with the protected State—and this, we repeat, is in no way precluded by the existence of the relationship of representation, since there is nothing to prevent third States from addressing themselves to the represented State through the representing State—or it does not want to run the risk of the injured State's taking action to protect its rights, because such action may also affect the rights of the protecting State itself, in which case it must itself be prepared to assume responsibility in place of the protected State.[18] What the arbitrator is referring to here is the institution of protectorates as such and the almost total constraint on the independence of the protected State which it entails, in most cases. He regards the attribution to the protecting State of responsibility for acts of the protected State as a consequence of that constraint, since at the international level the protecting State is viewed as the "sovereign" of the territory subjected to the protectorate, so that the factor of its international "representation" is not the true reason. It is therefore reading Huber's mind to attribute to him the idea that the existence between two States of a relationship of international representation has as its automatic counterpart the attribution to the representing State of indirect responsibility for internationally wrongful acts of the represented State. Huber could, in our view, be criticized for not making a more searching study of the situation of the protecting State vis-à-vis the protected State and for failing to realize the need to distinguish between different cases in order to determine who is internationally responsible for acts committed in the

[17] A. Verdross, "Theorie ..." (*loc. cit.*), pp. 408 *et seq.* Unlike Anzilotti, however, Verdross does not believe that the case in which a State undertakes the international representation of another State is the only case in which there can be indirect responsibility.

[18] The most striking passages in Huber's decision are the following:

"If the protectorate puts an end to direct diplomatic relations between the protected State and other States, so that the latter can no longer address themselves directly to the protected State, this limitation imposed on third States must necessarily entail a duty on the part of the protecting State to answer in place of the protected State.

"...

"... it would be most extraordinary if, as a result of *the introduction of protectorates, the responsibility incumbent on the territory of Morocco under international law were to be diminished. If responsibility has not been assumed as its own by the protecting State, it remains incumbent on the protected State; in no case can it have been erased. Since the protected State no longer acts without an intermediary in the international field, and since any action taken by a third State to obtain respect of its rights by the Shereefian Government would inevitably affect the interests of the protecting State also, the latter must take upon itself the responsibility of the protected State, at least as a derived responsibility.**

"The responsibilities which exist under international law and the consequent right of third States to provide diplomatic protection for their nationals cannot have undergone any diminution as a result of bilateral agreements concluded between the protected and protecting States." (United Nations, *Reports of International Arbitral Awards*, vol. II (*op. cit.*), p. 648.)

"... since the situation of the protecting State vis-à-vis other countries is that of a *sovereign** State, its responsibility must be the same." (*Ibid.*, p. 649.)

territory of the protected State, but he cannot be made out to be an adherent of the "representation theory" as the basis for indirect responsibility.

10. Since Verdross believes that the practice of States also provides confirmation of the soundness of his revised theory of representation, it should first of all be pointed out that remarks similar to those made above are also called for as regards the replies by States to point X of the request for information addressed to them by the Preparatory Committee for the 1930 Codification Conference. Point X was worded as follows: "Responsibility of the State in the case of a subordinate or protected State, a federal State and other unions of States". While it is true that two or three (and in fact only two or three)[19] of the replies expressed themselves as indicated above, to the effect that in the cases mentioned responsibility devolved upon the State representing the offending State, those replies give no reasons for the view advanced, make no distinction between the various cases, and appear to be by no means convincing technically. There are other, much more detailed replies, such as that of Denmark, which expressly rule out the thesis of the indirect responsibility as a counterpart of representation, even though the thesis predominated in the legal literature of the time. These replies make a very clear distinction between cases in which the representing State is answerable for an act committed by one of its organs and those in which the represented State must be answerable, even if the claim is addressed to it through the representing State, because the act was committed by its own organs.[20]

11. So far as the point now under discussion is concerned, not very much is known about State practice in the years following the 1930 Conference, but there is no reference in the literature to any case in which the indirect international responsibility of a State was asserted on the basis of its status as the representative of another State. On the contrary, attention may be drawn to the attitude of the Government of Italy in the *Phosphates in Morocco* case. In the application instituting proceedings, that Government asserted that the case involved an unlawful act owing to which

> France has incurred international responsibility of two kinds, namely: indirect responsibility as the State protecting Morocco, and personal and direct responsibility resulting from action taken by the French authorities, or with their co-operation, purely for the sake of French interests.[21]

The Rome Government therefore requested the court to notify its application to the Government of the French Republic, as such, and as protector of Morocco.[22] It made no mention of France's status at that time as the representative of Morocco; the only ground mentioned for the indirect responsibility of France was the fact that it was the State protecting Morocco. Nor did either party make any mention in the subsequent proceedings of the relationship of representation which existed between France and Morocco.

12. Thus it cannot be argued that international legal precedents and practice furnish proof of the soundness of the assertion that a State, having undertaken the general and obligatory representation of another State, is for that reason alone indirectly responsible for internationally wrongful acts committed by that other State. It should be clearly understood that all we are saying here is that it cannot be deduced from international judicial decisions and from statements of position by Governments that the representing State should be held responsible for internationally wrongful acts of the represented State *because of its status as representative*. However, this does not of course mean that such responsibility cannot be attributed to that State on some other ground. In fact, there are many cases in which a State which has undertaken the general and obligatory international representation of another State also has the right to interfere in the internal activities of the represented State. It may be that, in such a case, the State in question will be required to answer for internationally wrongful acts committed by the other State in the exercise of its activities—not, however, because it represents that State but because it controls it, because the other State's freedom of decision and freedom of action are restricted for the benefit of the first State. It is hardly necessary to point out that, when the relationship of representation existing between two States is not accompanied by any situation of subordination of one State to the other—as for example, in the case of the relationship between Liechtenstein and Switzerland—there can be not question of indirect responsibility on the part of the representing State for wrongful acts of the represented State.[23]

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[19] See footnote 12 above.

[20] "When the right of international representation is entrusted exclusively to one of the States, that State is, generally speaking, *responsible for its officials*,* whether these have not acted in the name of the other State. But, if the act involving the State's responsibility has been done by the courts, officials, or private individuals in the other State, *the material responsibility, e.g. the payment of compensation, may devolve on that State, even if the claim under international law to establish such responsibility has to be submitted to the State possessing the right of international representation.*" (League of Nations, *Bases of discussion ... (op. cit.)*, p. 122.)

[21] *P.C.I.J., Series C, No. 84*, p. 13.

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

[23] Barile (*loc. cit.*, pp. 437–438) rightly points out that: "The fact that obligatory and general representation is entrusted by one State to another State is actually an *indicator*, and nothing but an *indicator*, of the existence of a relationship of dependence of the first State on the second State, a relationship of dependence which, when it assumes certain concrete forms, may in and of itself constitute, under international law, the first ground for responsibility for the act of another."

Other writers, while still speaking of responsibility on the part of the representing State for wrongful acts of the represented

(*Continued on next page.*)

13. Thus, contrary to the impression gained by the distinguished leader of the Vienna school, the linking of indirect responsibility to the existence of a relationship of international representation as such is no more grounded in the reality of international legal relations than it is in the respective theoretical bases of the notion of representation and that of responsibility for the act of another. The great majority of contemporary writers who have dealt with the question are so convinced of the truth of this statement that they regard the responsibility of a State for internationally wrongful acts of another State as being linked to the existence, between the two States, not of a relationship of international representation but of a relationship involving, in one form or another, dependence or subordination of one of the two States vis-à-vis the other.[24] However, as was noted above, opinions diverge when it comes to determining whether the special phenomenon of indirect responsibility arises in all or only in some of the cases where one State is subordinate to or dependent on another, and also whether it is incurred on the occasion of all internationally wrongful acts committed by the dependent State or only on the occasion of some of them, namely, those where certain conditions are fulfilled. The differences of opinion are particularly pronounced when it comes to defining the basis or ground of the phenomenon itself.

14. It is hardly necessary for us to linger over the conclusions of those who confined themselves to the question whether or not, in certain specific cases, what is sometimes called the "dominant" State and sometimes the "superior" or "principal" State should be held responsible for an internationally wrongful act committed in each individual case by the "dependent" or "subordinate" State, without seeking to identify the principle underlying their conclusion. The views on which we should focus our attention for the purpose of this study are those which attempted to go from the particular to the general, to formulate criteria, and to draw up a rule establishing in what circumstances and on what bases the act of a "dependent" State could result in the attribution of international responsibility to the "dominant" State. In this context, two main

(*Footnote 23 continued.*)

State, have agreed that the real basis for such responsibility is to be found not in the relationship of representation, but in the relationship of subordination which exists between the two States. The position of L.B. Sohn and R.R. Baxter on this point seems to us particularly revealing. In the draft convention which they prepared for Harvard Law School in 1961, Sohn and Baxter use in article 17 (*c*) a wording similar to that which had appeared in the 1929 Harvard Law School draft. According to that article, a State would be responsible, *inter alia*, for acts committed by "the government of any protectorate, colony, dependency, or other territory of a State, for the international relations of which that State is responsible" (*Yearbook ... 1969*, vol. II, p. 146, document A/CN.4/217 and Add.1, annex VII). In the commentary to that article, Sohn and Baxter note that a distinction must be drawn between the case referred to in article 17 (*c*) and the case of

> "representation of the foreign interests of one State by another, as Liechtenstein's foreign relations are conducted by Switzerland or as a neutral State protects the interests of a belligerent nation in time of war. In this event, the State conducting foreign relations for another country acts in a representative capacity, rather than as the principal, as in the cases previously considered. The relationship involved in representation of foreign interests also implies no political dependence of the State so represented on the State performing this function. Responsibility accordingly attaches to that international person the organ, agency, official, or employee of which has caused an injury to an alien, even though the claim may have to be presented to that State through the diplomatic representatives of a nation representing the interests of the responsible State." (F.V. García Amador, L.B. Sohn and R.R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Dobbs Ferry, N.Y., Oceana, 1974), pp. 255–256.)

[24] See, in particular: Schoen, *loc. cit.*, pp. 100 *et seq.*; K. Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts* (Stuttgart, Kohlhammer, 1920), vol. III, part 3, pp. 109 *et seq.*; Decencière-Ferrandière, *op. cit.*, pp. 188 *et seq.*; C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 26 *et seq.*; H. Kelsen, "Unrecht und Unrechtsfolgen im Völkerrecht", *Zeitschrift für öffentliches Recht* (Vienna), vol. XII, No. 4 (October 1932), pp. 517 *et seq.*; Ago, *op. cit.*, pp. 36 *et seq.*; M. Scerni, "Responsabilità degli Stati", *Nuovo Digesto Italiano* (Turin), vol. XI (1939), pp. 474–475; Klein, *op. cit.*, pp. 129 *et seq.*; Ross, *op. cit.*, pp. 261 *et seq.*; Barile (*loc. cit.*), pp. 439 *et seq.*; Schüle (*loc. cit.*), pp. 334–335; G. Dahm, *Völkerrecht* (Stuttgart, Kohlhammer, 1961) vol. III, pp. 204 *et seq.*; G. Balladore-Pallieri, *Diritto internazionale pubblico*, 8th ed., rev. (Milan, Giuffrè, 1962), p. 350; von Münch, *op. cit.*, pp. 236 *et seq.*; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), pp. 364–365; E. Vitta, "Responsabilità degli Stati", *Novissimo Digesto Italiano* (Turin), vol. XV (1968), p. 734; G. Ténékidès; "Responsabilité internationale", *Répertoire de droit international* (Paris, Dalloz, 1969), vol. II, pp. 788–789; L. Cavaré, *Le droit international public positif*, 3rd ed., rev. by J.-P. Quéneudec (Paris, Pedone, 1970), vol. II, pp. 507–508; Verzijl, *op. cit.*, pp. 706 *et seq.*

The view that indirect responsibility is incurred in cases of dependence or subordination, even where those situations are not accompanied by a relationship of international representation, is also shared by some writers, including in particular Verdross (see "Theorie ..." (*loc. cit.*), pp. 412 *et seq.*), who consider representation as such to be independent cause of this form of responsibility. Apart from these writers, it should be noted that those who regard representation as the only ground for indirect responsibility always cite as examples specific cases in which there was in fact a relationship of dependence between the represented and representing States.

There are very few writers who deny the existence of any cases of indirect responsibility under international law. Mention may be made of Quadri, *op. cit.*, pp. 600 *et seq.*, and Sereni, *Diritto internazionale* (*op. cit.*), pp. 1562 *et seq.* They consider that, in cases of dependence, there is either direct responsibility on the part of the superior State or direct responsibility on the part of the dependent State. It should be noted that these writers generally assign responsibility to the "superior" State in the same cases as do writers who speak of indirect responsibility, except that in their view the responsibility is always "direct", either because the "dependent" State has no international personality (so that acts of its organs would be attributed to the "superior" State) or because the "superior" State has failed in its duty to prevent the performance of the injurious act by the organs of the "dependent" State. It may be recalled once again that, in the draft convention prepared in 1961 by Harvard Law School, the conduct of organs of a protected State, a mandated territory or a trust territory is attributed to the protecting State or administering authority (art. 17(*c*)), just as the conduct of organs of the administrative subdivisions of a State is attributed to that State (*Yearbook ... 1969*, vol. II, p. 146, document A/CN.4/217 and Add.1, annex VII). Thus, in both cases, the responsibility of the State would be a direct responsibility.

schools of thought can be distinguished. According to one school, which actually consists of writers whose ideas are somewhat outdated and have remained rather isolated, the phenomenon of indirect responsibility should be regarded as a kind of expedient for obviating practical disadvantages. The other school of thought, representing what is now the majority view, consists of those internationalists who, in contrast to the others, have realized the need to consider this phenomenon in greater depth and identify its systematic basis, and have tried to define it.

15. The first school of thought to be considered is therefore the one which holds that the "dominant" State should be internationally responsible for internationally wrongful acts of the "dependent" State because in practice it is impossible for third States injured by those wrongful acts to employ means of "enforcement" against the dependent State, should the latter not spontaneously comply with the obligations arising out of such cases of wrongfulness. If that were not so, they would run the risk of also damaging the interests or rights of the "dominant" States and obliging it, in accordance with the "right-duty" conferred on it by its relationship with the dependent State, to intervene to "protect" that State.[25] The dominant State will thus serve as a shield against any actualization of the international responsibility of the dependent State, and the third State will accordingly hold the dominant State responsible for all internationally wrongful acts committed by the dependent State. We might add that the "*Schutztheorie*", which was introduced by certain writers towards the end of the last century in order to account for the responsibility of a protecting State for the wrongful acts of the protected State,[26] was later invoked not only to justify the existence of indirect responsibility in international protectorate relationships,[27] but also to provide a basis for the responsibility of a federal State for the wrongful acts of member States which had retained, within narrow limits, a separate international personality,[28] and the responsibility of a "suzerain" State for the wrongful acts of "vassal" States.[29] Later still, this idea, which had until then been entertained only in cases of dependence based on a legal relationship (under international law or internal law), was invoked by one writer in support of the extension of the notion of indirect responsibility to *de facto* relationships. The writer in question was F. Klein, who in 1941 applied the "protection" doctrine to any relationship of subordination—*de jure* or *de facto*—between States subjects of international law, thus asserting the responsibility of the dominant State in all cases of this kind because that State, by its presence, prevented injured third States from taking coercive measures against the dependent State.[30] Lastly, as a kind of

[25] This view has accordingly been termed the "protection doctrine" (*Schutztheorie*).

[26] For example, W. E. Hall argued that the protecting State was responsible for wrongful acts committed by the protected State because injured third States "are barred by the presence of the protecting State from exacting redress by force for any wrongs which their subjects may suffer at the hands of native rulers or people" (*A Treatise on International Law* (1880), 8th ed. (Oxford, Clarendon, 1924), p. 150.

Similarly, according to J. Westlake,

"... the fact that outside States are not free in their choice of methods for seeking redress from the inferior will impose on the superior a responsibility for the wrongs committed by it" (*International Law*, 2nd ed., (Cambridge University Press, 1910), part I, p. 23).

[27] See, for example, Schoen, *loc. cit.*, pp. 106–107; Strupp, *loc. cit.*, p. 114; Decencière-Ferrandière, *op. cit.*, pp. 193–194.

[28] Thus, for example Schoen wrote:

"If in this case the member State is held responsible and the federal State is not, the injured State is unable, in the event of the member State's failing to discharge its responsibility, to take any coercive measures under international law without thereby simultaneously affecting the federal State. However, the taking of such coercive measures would only inflict a new injury on the federal State if it was not responsible for the conduct of its member State, and the injured State, instead of gaining its rights would simply incur the obligation to make reparation to the federal State for the injury it had caused it. If, therefore, the injured State is to be enabled to gain its rights in the manner provided for in international law without at the same time itself committing a new breach of the law, it must be assumed that the conduct of the member State entails the responsibility of the federal State also. The existence of the federal State is what prevents the injured State from acting in self-defence against the member State; the federal State protects the member State against any attack from outside, and therefore it must also answer for the conduct of the member State where the latter has acted as a subject of international law." (*Loc. cit.*, pp. 103–104.)

Strupp (*loc. cit.*, pp. 112–113) and Decencière-Ferrandière (*op. cit.*, pp. 192–193) expressed themselves in similar terms.

[29] See, for example, Schoen, *loc. cit.*, pp. 106–107.

[30] F. Klein writes as follows:

"The international responsibility of subject of international law A, which stands in a one-sided *de jure* (under internal or international law) or *de facto* relationship of dependence to subject of international law C, for its conduct in violation of international law to the detriment of a third subject of international law B is practically meaningless so far as subject B is concerned; for in fact the latter could not normally take any coercive measures under international law against subject A without at the same time provoking the resistance of dependent subject A's protecting Power C—the dominant or superior State—which stands between those two subjects A and B and whose status is recognized by and must be respected under international law, or even encroaching injuriously on its interests or its juridical sphere. It must therefore be assumed and affirmed that protecting Power C—the superior State—is itself responsible for any substantial violations of international law by subject A, a State dependent on it and/or under its protection, in all cases in which the latter—for legal or factual reasons—cannot itself in practice be called to account. This responsibility is simply the expression of the fact that, as a result of a certain relationship between two subjects of international law which is either recognized by international law or at the very least is constitutionally sanctioned, coercive action under international law can in practice be taken only against one of those subjects and not against the other, even if the conduct in violation of international law which occasions the coercive action is attributable to the other subject. In any event, to hold that subject C must be answerable is in no way unreasonable; after all, it normally derives not inconsiderable advantages, especially of an economic nature, from the relationship of dependence, so that it does not seem unjustified to require that it should also bear certain legal disadvantages." (*Op. cit.*, pp. 129–130.)

See also Dahm, *op. cit.*, pp. 208–209.

variant of the idea of holding the dominant State responsible for internationally wrongful acts of the dependent State on the basis of the right-duty of the former to protect the latter, Verdross introduces the idea of "intrusion" (*Eingriff*). He argues that the taking of coercive measures (and in particular of reprisals—unarmed, of course) against a subordinate State would be an inadmissible "intrusion" into the *juridical sphere* of the "superior" State in cases where the "subordinate" State actually forms part of the "superior" State. This applies, in his view, to the relationship between a member State and a federal State and between a vassal State and a suzerain State (because the territory and citizens of the one also form part of the territory and citizenry of the other). This situation would therefore justify the attribution to the federal State of indirect responsibility for internationally wrongful acts of the member State and to the "suzerain" State of indirect responsibility for acts of the "vassal" State.[31]

16. Despite the scholarly credentials of some of their proponents, the ideas reported above seem no more convincing than the one which seeks to make the existence of a relationship of international representation the basis for attributing to a State the international responsibility for an internationally wrongful act committed by another State. In the first place, the supposed justifications based on a concern to avoid situations in which the "superior" State would be impelled to intervene in order to protect the subordinate State, or to avoid intrusion into the juridical sphere of the "superior" State as a result of coercive measured by a third State against the subordinate State, seem to us to be the product of an ingenious theoretical exercise; the fact remains, however, that scarcely a trace of them is to be found in statements of position by States[32] or in the reasoning of international judges and arbitrators. Secondly, even if one wished to consider the matter from a purely theoretical standpoint (which would be more understandable in this case than in others), the arguments advanced have one common feature: they are based on a concern to obviate the disadvantages which might arise if the dependent State, being held responsible for its own internationally wrongful acts, should refuse to acknowledge that responsibility, so that the third State which had suffered from those wrongful acts would be impelled to take coercive measures against it. Leaving aside the fact that the dreaded disadvantages appear to us to be quite marginal, now that international law has placed very restrictive limits on the forms of coercion that may lawfully be used in such cases, it does not in any event seem clear how those disadvantages would be avoided merely because the responsibility for the internationally wrongful acts in question was attributed to the dominant State. Being itself held responsible, the dominant State would become the direct target of the coercive measures taken against it if it refused to fulfil the obligations arising out of the responsibility it had incurred owing to the act of the subordinate State. This would simply mean a more direct intrusion into its juridical sphere. But there is more to it than this. Although existing international law has allowed and does allow, in some cases, for so serious a derogation from the criteria normally applicable as dissociation between the subject to which an internationally wrongful act is attributed and the subject to which the responsibility arising out of that act is attributed, only a logically and systematically valid ground can justify such a derogation. And if the dissociation in question is to be seen in a whole set of different circumstances, the justification for it must if possible be found in a ground that is common to that set of circumstances. In any event, an anomaly of this magnitude cannot be put forward as a mere practical expedient for avoiding supposed disadvantages which might arise, in a few cases, from the application of the criteria normally governing the attribution of responsibility for internationally wrongful acts.

[31] Verdross did not, however, consider that this situation arose in the case of a protectorate; accordingly, in that case, the attribution to the protecting State of responsibility for acts of the protected State would have to be justified on the ground either of the international representation of the protected State by the protecting State or of the control exercised by the protecting State over the activities of the protected State (Verdross, "Theorie ..." (*loc. cit.*), pp. 415 *et seq.*). For a view similar to that of Verdross, see Ross, *op. cit.*, pp. 261 *et seq.* In the case of a wrongful act committed by a member State of a federal State, or by a vassal State, Verdross explains (*ibid.*, pp. 415–416) that, in his view, the injured third State should address itself in the first instance to the member State or vassal State in order to demand reparation from it for the wrongful act. Only if such reparation were refused could the third State address itself to the federal or suzerain State. However, it seems clear that such a case would not involve indirect responsibility on the part of the federal or suzerain State, since the responsibility as such, i.e. the obligation to make reparation, would rest with the member State or the vassal State. What would be incumbent on the federal or suzerain State would be rather an obligation to ensure the fulfilment by the member State or vassal State of its obligation to answer for its wrongful acts. On this point, see also Barile, *loc. cit.*, p. 439.

[32] At first sight, it would appear that a statement of position in favour of the latter argument is to be found in the letter dated 1 September 1871 from Chancellor Bismarck to the German Chargé d'Affaires in Constantinople concerning the case involving the German national Strousberg, who had suffered injury as a result of breach of contract by the Government of the Principalities of the Danube (later Romania), vassals of the Ottoman Empire. The reason given by the Chancellor for addressing himself to the Ottoman Porte with a view to its securing performance of the contract by the authorities of the Principalities was precisely that any coercive measures taken against the Principalities would constitute an intrusion upon the rights of the Porte ("*Eingriff in ihre Rechte*") and, as such, would provoke protests by the Porte itself. On closer scrutiny, however, it can be seen that the German Chancellor considered the Principalities a kind of province of the Ottoman Empire, possessing purely internal autonomy and lacking, at that time, a separate international personality. Consequently, as far as Bismarck was concerned, this particular case did not fall into the category of those in which the question of the responsibility of one subject of international law for the act of another subject may arise. See Bismarck's letter in J. Wythrlik, "Eine Stellungnahme des Reichskanzlers Bismarck zu dem Problem der mittelbaren Staatenhaftung", *Zeitschrift für öffentliches Recht* (Vienna), vol. XXI, Nos. 3–4 (1941), p. 273.

17. The second, and most important, school of thought to which we must refer for the purpose of this study is composed of those writers who begin by establishing a necessary link between responsibility and freedom. They argue that the international responsibility arising out of an internationally wrongful act can be attributed to a State only if that State, in committing it, was operating in a sphere of action for which it had complete freedom of decision. Contrariwise, in so far as that State was subject to the control of another State and its freedom of decision was thereby restricted for the benefit of another State, it is that other State which should be held responsible. This argument, which we shall call the "control theory", and which was already to be found in works of the late nineteenth century,[33] was later taken up and developed with a number of variations. In 1928, the American internationalist C. Eagleton buttressed the argument with a thorough study of international practice, and then stated his conclusion in the following terms:

> ... if one State controls another in any circumstances which might prevent the latter from discharging its international obligations, the basis of a responsibility of the protecting State for the subordinated State is laid. Responsibility must be located in each separate case by ascertaining the actual amount of freedom from external control, or, conversely, the actual amount of control left, to the respondent State.[34]

Eagleton thus indicates clearly that in protectorate relationships, as in other comparable relationships, the responsibility for a breach of an international obligation incumbent on the protected State can be attributed to the protecting State only if, and to the extent that, it has control over the other State. This writer thus provided a valid criterion for distinguishing, as would subsequently be done, between cases in which responsibility for the breach of an obligation of the dependent State truly devolves upon the dominant State, because the breach occurred in a field where it had control over the activities of the other State, and cases in which the dependent State itself remains responsible, because it operated in a field of action where its freedom of decision was not restricted.[35] What is still lacking in Eagleton's analysis, however, is a definition of the criteria for distinguishing between cases in which the responsibility attributed to the dominant State is a direct responsibility and those in which it is, in the true sense of the term, indirect, or responsibility for the act of another. Indeed, it may be noted that Eagleton, not having as yet a clear perception of this distinction despite the fact that it is essential, does not use the expression "indirect responsibility" or any similar expression.

18. The present Special Rapporteur went into this question in his study on indirect responsibility under international law published in 1934, where he noted that, in what are usually termed relationships of dependence,[36] the interference of one State in the affairs of the other can take two different forms. Sometimes it involves an actual substitution, in certain fields, of the activity of the former State for that of the latter; in such cases, what we have is an activity exercised by organs of the dominant State in the territory of the dependent State. If a breach of an international obligation of the dependent State is committed in the course of such activity, the dominant State is not only answerable, but directly answerable for it, because the responsibility in question arises out of its own act, the act committed by its own organs, acting in subordination to it.[37] The interference of one of the two States in the activities of the other may, however, take another and less extreme form. In this case, a given activity is left to the dependent State and the organs of that State are responsible for carrying it out; however, in the performance of that activity, the freedom of decision of the dependent State is restricted by either the prior or the subsequent control of the dominant State.[38] It is precisely in connection with this second form of interference that the case of indirect international responsibility arises.[39] Any act committed in the exercise of the activity in question is undeniably an act attributable to the dependent State. If that act constitutes a breach of an international obligation of that State, it is clearly an internationally wrongful act of the dependent State, and if the responsibility for it is attributed to the

[33] In 1883, F. de Martens wrote:

> "Logic and equity would require that States which are in this dependent situation should be responsible for their actions towards foreign Governments only in proportion to their freedom of action. The actions of the Egyptian Khedive or of the Bey of Tunis should entail a measure of responsibility for the European Powers under whose tutelage they stand" (*Traité de droit international*, trans. [into French] A. Leo (Paris, Maresq aine, 1883), vol. I, p. 379).

[34] C. Eagleton, *op. cit.*, p. 43. Elsewhere in his study, he writes: "A State may be held responsible, as a subject of international law, only to the extent that it has rights and duties which it is free to exercise; ..." (*ibid.*, p. 42).

[35] In such cases, as we have several times pointed out, this responsibility does not cease to be a responsibility of the dependent State simply because it will have to be pursued through the dominant State where the latter has undertaken the international representation of the dependent State.

[36] As examples of this kind of relationship at the time when he was writing, the author cited vassalage, protectorates and mandates, a common feature of which is that they are all *de jure* relationships. He was inclined at that time to exclude the possibility of attributing to a State international responsibility for the act of another State in situations of *de facto* dependence (Ago, *op. cit.*, pp. 60–61).

[37] *Ibid.*, pp. 36 *et seq.*

[38] "The ground for attributing responsibility to a State for the wrongful act of another State lies in the fact that the wrongful act was committed by a subject of international law in the exercise of an activity in a sphere of action within which that subject is not free to act as it chooses, in accordance with rules established by itself, and that it cannot pursue goals of its own but must act according to rules established by another subject and must pursue goals laid down by the latter." (*Ibid.*, p. 59.)

[39] *Ibid.*, pp. 46 *et seq.*

dominant State, then this is a responsibility for the act of another, a responsibility that can and should be called "indirect". The final conclusion drawn by the author in question from his analysis of the various practical situations studied was that the existence between two States of a situation of dependence is a necessary, but not a sufficient, condition for attributing to the State benefiting from such a situation "indirect" responsibility for any breach of an international obligation of the State which is subjected to that situation. Thus, as was mentioned above, responsibility may in some cases be attributed to the dominant State but be a "direct" responsibility of that State, because the sector of activity within which the breach occurred was reserved for organs of that State. Contrariwise, the responsibility may after all be a "direct" responsibility of the dependent State; that is so in the admittedly rather exceptional cases where the internationally wrongful act is committed by that State in a field of activity in which it enjoys complete freedom of decision without any control.[40] In order for there to be "indirect" responsibility on the part of the dominant State as a result of an internationally wrongful act of the dependent State, a twofold condition must be fulfilled: organs of the dependent State must have committed the act in question, and they must have operated in a field of action in which their freedom of decision was restricted, in one way or another, by the control of the dominant State.

19. In subsequent years, many writers endorsed the basic ideas outlined above. While using various formulae, they agreed in substance that it was the interference or control attributed to one State in or over the external or internal activity of another State that gave rise to indirect responsibility on the part of the former State for internationally wrongful acts committed by the latter. In the view of most of these writers, there are no cases of indirect responsibility provided for in international law except in the above-mentioned circumstances of interference or control. This view is held by Scerni,[41] Barile,[42] Rolin,[43] Morelli[44] and Vitta.[45] There are also those, such as Klein, who profess to be critics of the "control theory" but in fact, while contributing some useful developments to it, remain very close to its approach.[46] Lastly, there are some who fully acknowledge its validity for the purpose of establishing indirect responsibility in what they call "attentuated" cases of protectorate or quasi-protectorate, where the protecting State does not undertake the international representation of the protected State. Examples are Verdross[47] and Ross.[48]

20. The fact that the basic ideas were initially shared by the writers mentioned above does not mean that their views did not subsequently diverge on individual points. For example, they disagree on whether or not the relationship between a federal State and its member States should be regarded, at least in part, as a relationship between subjects of international law, that being a relationship within which the phenomenon of the indirect responsibility of a subject of international law for the act of another subject might arise.[49] They

[40] Thus, even if it will normally be so, it cannot be said that every internationally wrongful act committed by organs of the dependent State automatically gives rise to responsibility on the part of the dominant State (*ibid.*, pp. 62–63).

[41] "Under both international and internal law, the only true cases of indirect responsibility are those in which there is a relationship of interference in and direction of the activity of a subordinated subject by a dominant subject" (Scerni, *loc. cit.*, p. 474).

[42] This writer regards as the basis for indirect responsibility of a State the fact that that State has a "possibility of control" over the activity of the other State, which is linked to it by a relationship of dependence (Barile, *loc. cit.*, pp. 443 *et seq.*).

[43] H. Rolin writes that "it would seem that indirect responsibility should be acknowledged in the case of a State exercising control over the internal affairs of another State" ("Les principes de droit international public", *Recueil des cours ...*, 1950-II, vol. 77 (Paris, Sirey, 1951), p. 446.

[44] "Indirect responsibility presupposes, in the international juridical order, the existence of a certain relationship between the subject responsible for the wrongful act and the subject which committed it, that relationship being characterized by the fact that the former has the possibility of controlling the conduct of the latter or, in other words, of guiding that conduct in a certain direction." (Morelli, *op. cit.*, p. 364.)

[45] Referring to the problem of the responsibility of the protecting State for wrongful acts of the protected State, E. Vitta notes: "It is only in the case of a wrongful act committed by organs of the protected State which are subject to the control of the protecting State that responsibility should be attributed to the latter. We should then have an analogy with indirect responsibility in private law." (*Loc. cit.*, p. 734.)

[46] Klein argues that "the truly existing and legally relevant basis for indirect responsibility under international law is in all cases purely and simply the unique relationship between the two subjects of international law A and C as such, and not the fact that in a particular case this internal relationship assumes the form of '*sottoposizione*' in the sense of not only a purely potential '*ingerenza*' but rather a complete and effective one" (*op. cit.*, p. 126) [translation by the Secretariat]. Thus, for this writer, it is sufficient that there should be potential interference (which in his view occurs in any relationship of dependence), and there need not be any actual interference—something which, in fact, the adherents of the control theory do not claim.

[47] "Only the control theory can account for indirect State responsibility in the case of an attenuated protectorate or a quasi-protectorate" (Verdross, "Theorie ..." (*loc. cit.*), p. 413).

[48] This writer, referring to the responsibility of the protecting State, says that "the responsibility will be restricted to the extent to which the protector State actually has protected or been able to exercise control of the protégé State" (Ross, *op. cit.*, p. 262; cf. also p. 261).

[49] In the view of the Special Rapporteur, the cases in which the member States of a federal State have a separate international personality are so few (and in particular, the international legal capacity which they retain is so limited), that it seems somewhat unrealistic to conceive of any cases in which the indirect international responsibility of the federal State for internationally wrongful acts committed by a member State would actually arise. See Ago, *op. cit.*, pp. 25 *et seq.* Other writers, such as Verdross

also disagree on whether or not the possibility should be recognized of indirect responsibility on the part of an occupying State for an internationally wrongful act committed by the occupied State in a field in which its activity is subject to interference and control by the occupying State. The Special Rapporteur definitely believes that it should, since the situation is similar in a number of respects to that which exists in the case of relationships of dependence, but other writers take a different view.[50] A particular subject of controversy is whether only a "legal" relationship of dependence of one State on another can constitute the framework for the creation of indirect international responsibility on the part of the latter State for an internationally wrongful act committed by the former,[51] or whether such a framework can also be provided by a situation of *de facto* dependence. And it has been argued that, for this purpose, *de facto* situations include both some relatively stable situations, such as that which comes into existence between a "dominant" State and a "puppet" State created on its initiative, and other purely occasional ones, such as that created through coercive action taken by one State against another with the aim of compelling it to adopt a certain line of conduct.[52]

21. Finally, there is one last question on which no consensus exists in the group of authors all of whom endorse the idea that the incurrence, by a subject of international law, of indirect responsibility for the internationally wrongful act of another subject is based on and grounded in the control attributed to the former over the sector of activity within which the latter engaged in its wrongful conduct. The question in dispute is whether, if the conditions for the existence of indirect responsibility on the part of the dominant State are fulfilled, that responsibility should be considered to preclude any responsibility on the part of the dependent State, or whether, on the contrary, it would be conceivable that this other responsibility should subsist alongside that of the dominant State. A further question then is whether, if the two responsibilities do coexist, the injured State should or should not in the first instance pursue the direct responsibility of the dependent State and assert the indirect responsibility of the dominant State only if it meets with a refusal by the dependent State to make due reparation.[53]

22. From the analysis made thus far, we may therefore draw the following conclusion: through the gradual evolution of its ideas, legal thinking—despite what are, after all, marginal differences of opinion within the dominant school of thought—has, in our view, ultimately managed to delineate correctly the juridical configuration of indirect responsibility or responsibility for the act of another under international law. It has also succeeded in defining the basis for such responsibility in terms which, if strictly adhered to, should make it possible to settle the few points which are still in dispute, not always for any good reason. We have now come to the stage where we should, as usual, turn our attention to international practice in order to see whether or not a careful consideration of the positions taken can provide confirmation of the soundness of the conclusions reached on the basis of logical principles. Unfortunately, the known practical cases in which the issue was the international responsibility of a State for inter-

("Theorie ..." (*loc. cit.*), pp. 395 *et seq.*), Ross (*op. cit.*, pp. 259–260) and Morelli (*op. cit.*, pp. 263–264), take a more affirmative attitude on this point, but it seems to us that at times some of them regard as separate subjects of international law entities which in fact are devoid of international personality.

[50] It was in an article published in 1945, in particular, that the Special Rapporteur expounded the idea that military occupation might be one of the situations that could constitute a basis for indirect responsibility under international law. On the question of the control exercised by the occupying State over certain fields of activity of the occupied State, he pointed out that such control was, within certain limits, permitted and sometimes even required by international law, irrespective of the question of the lawfulness of the occupation as such (see R. Ago, "L'occupazione bellica di Roma e il Trattato lateranense", Istituto di diritto internazionale e straniero della Università di Milano, *Comunicazioni e Studi* (Milan, Giuffrè, 1945), vol. II, pp. 163 *et seq.*). A comparison between the situation of military occupation and that of relationships of dependence for the purpose of determining the existence of cases of indirect responsibility had already been drawn by Verdross. For the last expression of his thinking on the subject, see *Völkerrecht*, 5th ed. (Vienna, Springer, 1964), p. 390. Ross, on the other hand, maintains that in cases of military occupation the occupying State could incur only direct responsibility.

[51] This view is still held by G. Morelli, *op. cit.*, p. 364.

[52] Among the adherents of the idea that cases of indirect international responsibility can also arise in "any relationship of *de facto* dependence", mention may be made of Barile, *loc. cit.*, p. 446. This writer further states that in his view there is also no need to make a distinction according to whether the creation of the relationship of *de facto* dependence was lawful or unlawful. Actually, it should be noted, those who accept as a basis for indirect responsibility the mere fact of the dependence of one State on another, and not interference or control by the dominant State in or over certain activities of the dependent State, normally make no distinction between "legal" situations of dependence and purely *de facto* situations. See, for example, Strupp, *loc. cit.*, pp. 112–113; Klein, *op. cit.*, p. 111; von Münch, *op. cit.*, p. 236. It may also be pointed out that in the view of some writers the fact that "indirect" responsibility of the dominant State is precluded in cases of *de facto* dependence is no reason for totally precluding the responsibility of that State, which in their opinion should be considered a "direct" responsibility. See, for example, Ross, *op. cit.*, p. 260; Quadri, *op. cit.*, p. 603; Verdross, "Theorie ..." (*loc. cit.*), pp. 413 *et seq.*; Verzijl, *op. cit.*, pp. 712 *et seq.* Eagleton (*op. cit.*, pp. 41 *et seq.*) also acknowledges the existence of the responsibility of the dominant State for actions of the dependent State in situations of *de facto* dependence; however, as has been mentioned, he makes no distinction between direct and indirect responsibility.

[53] Eagleton (*op. cit.*, pp. 26 *et seq.*) and Ross (*op. cit.*, p. 261) take the view that the attribution of responsibility to the dominant State must preclude any responsibility on the part of the dependent State. The idea that the two responsibilities arise and subsist side by side was formerly held by the present Special Rapporteur (*La responsabilità indiretta ...* (*op. cit.*), p. 54), in which respect he was followed by Barile (*loc. cit.*, p. 447), Rolin (*loc. cit.*, p. 446) and Morelli (*op. cit.*, p. 364). It would appear, however, that this idea should be reconsidered in the light of further research into the problem. The idea that the responsibility of the dominant State is only subsidiary to that of the dependent State has been advanced by Verzijl (*op. cit.*, p. 705).

nationally wrongful acts committed by another State linked to it, in one way or another, by a relationship of dependence or submission, are not very numerous. This is hardly surprising, in view of the fact that the practice of States in the matter under discussion has been only very partially recorded, and in view also of the fact that some of these types of relationship are dying out. Nevertheless, as we shall see, there are at least a few cases which can provide useful indications for our purposes.

23. It does not seem necessary to make a detailed analysis of the cases which occurred during the somewhat ephemeral lifetime of the relationship known as "suzerainty" or "vassalage", according as it was viewed from the standpoint of one or the other of the entities involved in such a relationship. In many cases in which States that were formally "vassals" of the Ottoman Empire had caused injury to third States through the conduct of their organs, the third States in question simply invoked the responsibility of the vassal State in the belief that, with few exceptions, those vassal States, with which they were by that time maintaining direct diplomatic relations, were acting free of any interference by the suzerain State. This was the course taken in 1861–1867 by Italy and France on the occasion of internationally wrongful acts committed by Tunisia and by Egypt.[54] On the other hand, the same States regarded Tripolitania not as a vassal State but as a province of the Ottoman Empire, and accordingly attributed directly to the Porte the responsibility for international offences committed in that region. The United States of America, for its part, always regarded the Barbary States, including Tripolitania, as being in fact independent of the Porte and responsible for their violations of international law.[55] Thus, among all these cases, for one reason or another, "indirect" responsibility on the part of the suzerain State for the actions of the vassal State could not be made out in a single one. It may also be recalled that one of them, the *Strousberg* case, has already been discussed above,[56] where we noted the gist of the German Government's position as being that what was then called the Principalities of the Danube (Romania) were, from the international standpoint, simply part of the Ottoman Empire, which "covered it with its sovereignty", and therefore lacked any international personality of its own. Consequently, for Chancellor Bismarck, as we indicated, there could not even have been in that particular case a question of any "indirect" responsibility incurred by Turkey for the internationally wrongful act of another subject of international law. If and end had not been put to the wrongful situation of which the German Government complained, that Government would obviously have considered that Turkey itself had incurred a real and "direct" responsibility of its own. As for the Ottoman Government, its attitude consisted of the assertion that the Principalities was by that time acting in full autonomy and without any control on its part. After stating that it had no basis for interfering in any way, even through its judicial organs, in the "legislative and administrative" affairs of the Principalities,[57] the Porte confined itself to using its influence with the Principalities to induce Bucharest to settle the problem by direct agreement with Strousberg, which was done in 1872. It is not very clear whether, on the question of the international status of the Principalities the views of the Porte were the same as those of the German Government or whether they differed from them, as some of the terminology used would suggest. However, it is apparent that, while the Ottoman Porte had by that time resigned itself to recognizing the Principalities as a separate subject of international law, although linked to it by a relationship of vassalage, it was definitely preparing to deny any responsibility on its part, should Bucharest refuse to settle the case, on the ground that the Principalities enjoyed complete independence in the field in which the breach of Strousberg's contract had occurred. In short, this case is of some relevance to us, although mainly of a negative kind, since neither party invoked the notion of responsibility for the act of another, the reason being that both of them considered the preconditions for it to be lacking in this case—from Germany's standpoint, because in its view only one subject of international law was involved, and from Turkey's standpoint, because, even if in its view there might be two such subjects, another essential condition was not fulfilled, in that the suzerain had no control over the internal activities of the vassal.

24. It does not seem necessary in the present context to consider the no doubt numerous cases in which a federal State has been held internationally responsible for an act of a member State. The cases usually cited in this connection are cases arising out of actions by organs of a member State which has a personality separate from that of the federal State only under

[54] See S.I.O.I.–C.N.R., *La prassi italiana di diritto internazionale* (Dobbs Ferry, N.Y., Oceana, 1970), 1st series (1861–1887), vol. I, paras. 230 and 232, and vol. II, paras. 964, 978, 1012 and 1023 (concerning Tunisia), and vol. II, paras. 1013, 1021 and 1031 (concerning Egypt); and A. C. Kiss, *Répertoire de la pratique française de droit international public* (Paris, C.N.R.S., 1966), vol. II, pp. 10 *et seq.* The situation does not seem to have been any different in the *Chadourne* case, involving France and Bulgaria, in which, contrary to the opinion of some writers, no responsibility was laid on Turkey. The French Government simply informed the Porte of the treaty violations committed by Bulgaria, and the responsibility for them was pursued with the Bulgarian authorities. All that the French Government asked of Constantinople was the Porte's backing for the *démarches* to Sofia.

[55] See J. B. Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. V, pp. 391 *et seq.*

[56] See footnote 32 above.

[57] See the letter of 21 December 1870 from the German Ambassador at Constantinople, in Wythrlik, *loc. cit.*, p. 276, and Chancellor Bismarck's letter, already mentioned, of 1 September 1871 (*ibid.*, pp. 279–280).

internal law—hence, actions which international law, as we have twice reaffirmed,[58] simply deems to be acts of the federal State. Consequently, these cases as such have no evidential value for the purpose of confirming the assertion that the federal State would incur indirect responsibility if the member State possessed an international personality of its own and if its organs had acted within the restricted area reserved to the international legal capacity of the member State and in breach of an international obligation of the member State. The assertion of indirect responsibility on the part of the federal State in the latter case therefore appears to be a deduction—and a fully valid one—from the general principles that have been affirmed in the matter, rather than a conclusion which is also grounded in precedents.

25. On the other hand, it is logical to devote more attention to cases which arose in the framework of a relationship of international dependence in the true sense, such as an international protectorate, a mandate or some similar type of relationship. In this connection, the Special Rapporteur ventures to point out that, while relationships of this kind are becoming a thing of the past (although a few do survive), the interest of cases involving such relationships is by no means purely historical or theoretical, since the principles affirmed in those cases may be applicable to other situations which are comparable at least in part and which, regrettable as it may be, still exist.

26. It must be said, however, that international legal precedents in this matter will inevitably prove somewhat disappointing to anyone who expects to find in them a rich harvest of clear decisions and definite positions. As has been mentioned, the main reason is that the cases considered and the decisions on them date back a considerable way. The *Studer* case is an illustration of this. Studer, a United States citizen, claimed to have suffered from acts of invasion and destruction, committed by the Sultan of Johore, of land to which he had been granted a concession by the former ruler of the territory. The United States invoked the responsibility of Great Britain, as the protecting Power of Johore, and the case came before an Arbitral Tribunal, which rendered its decision on 19 March 1925. The Tribunal noted that the United States claim was for the invasion and destruction of Studer's concession through the wrongful acts of the Sultan of Johore, and that:

> The British Government appears in this proceeding by virtue of its assumption of responsibility internationally for the Government of Johore under the provisions of a treaty made in 1885.[59]

The 1885 treaty gave the British Government very extensive control over all international and internal activities of the Sultanate, including in particular matters relating to concessions, in respect of which special restrictions were placed on the Sultan. That being so, and in view of the precise purpose of the claim, it would be natural to interpret the passage from the arbitral decision reproduced above as meaning that the British Government appeared in the proceeding by virtue of its assumption of responsibility internationally for an act committed by the authorities of a protected State in an area in which those authorities were obliged to submit to the directions and control of the protecting State. However, this interpretation is not clearly confirmed by anything else that is said in the decision; it is therefore conceivable that this passage was intended by the arbitrator to have a less specific and broader scope, in view of the fact that the 1885 treaty also required the Sultan to accept "the guidance and control of his foreign relations" and to have no "political correspondence" with foreign States. Since, moreover, the arbitrator did not consider himself equipped to rule on the merits and therefore simply recommended that the case should be taken before the courts of Johore, it would hardly seem that the case could be regarded as a really sure precedent on the point under consideration here.

27. Two other cases, one relating to a protectorate and the other to a League of Nations mandate, are in a way comparable, since at first sight both of them seem to show some influence on the ideas of D. Anzilotti concerning international representation as the basis for indirect international responsibility. They are the *British claims in the Spanish Zone of Morocco* case, arbitrated by M. Huber in 1925, and the *Mavrommatis concessions in Palestine* case, in which the Permanent Court of International Justice gave its judgement on 30 August 1924. It may be noted in passing that Anzilotti was at that time, like Huber, a member of the Court. In both cases, however, his influence was only apparent. Our review of Huber's decision above[60] showed that the deference apparently paid to the "representation theory" was only the starting-point for the development of different ideas. As was noted, the arbitrator actually took the view that, in the protectorate which provided the setting for the case submitted to him for a ruling, the protecting State had ultimately become the true sovereign of the territory of the protected entity. That constituted the ground for his belief that, along with sovereignty over the territory, the protecting State had of necessity also assumed responsibility for internationally wrongful acts committed in that territory.[61] We might add that, while the arbitrator

[58] See footnotes 7 and 49 above. The attribution to the Federal State of acts of organs of its member States lacking international personality is provided for in draft article 7 and is explained in the commentary to that article (see *Yearbook ... 1974*, vol. II (Part One), p. 277 *et seq.* document A/9610/Rev.1, chap. III, sect. B.2).

[59] United Nations, *Reports of International Arbitral Awards*, vol. VI, United Nations publication, Sales No. 1955.V.3), p. 150.

[60] See para. 9 above.

[61] Immediately after stating that "the responsibility of the protecting State arises from the fact that it alone represents the protected territory in its international relations" (it may be noted

(*Continued on next page.*)

speaks of the duty of the protecting State to take upon itself the responsibility of the protégé "*at least*" as a derived responsibility", those words "at least" are rather significant, since it is very probable that, in his view, the responsibility of a protecting State such as Spain for the acts of a protégé such as Morocco is really a direct responsibility. Lastly, Mr. Huber's 1925 decision certainly testifies to his strong belief that the protecting State must assume responsibility for wrongful acts committed by the protected State, but so far as the nature and definition of the responsibility thus assumed and the basis for attributing it are concerned, the decision in question is of little value as a precedent.

As for the judgement of the Permanent Court of International Justice in the *Mavrommatis concessions* case, some influence of the arguments being advanced at that time by Mr. Anzilotti could perhaps be read into the last sentence of the following passage:

> The powers accorded under Article 11 to the Administration of Palestine must, as has been seen, be exercised "subject to any international obligations accepted by the Mandatory". This qualification was a necessary one, for the international obligations of the Mandatory are not, *ipso facto*, international obligations of Palestine. Since Article 11 of the Mandate gives the Palestine Administration a wide measure of autonomy, it was necessary to make absolutely certain that the powers granted could not be exercised in a manner incompatible with certain international engagements of the Mandatory. The obligations resulting from these engagements are therefore obligations which the Administration of Palestine must respect; the Mandatory is internationally responsible for any breach of them since, under Article 12 of the Mandate, the external relations of Palestine are handled by it.[62]

However, even more serious doubts may arise in this case as to whether the authors of the judgement adhered in any way to the "representation theory" and as to the still wider question whether the judgement in this case can be presented as a precedent in regard to the responsibility of a subject of international law for the act of another subject. In the first place, there is nothing to show that the Court regarded what it called "the Administration of Palestine" as an organ of a subject of international law other than the Mandatory itself. Moreover, the British High Commissioner had himself intervened in the approval of the terms on which the contested concessions were granted, and it was shown that the Colonial Office had in turn intervened in the matter. The Court also noted that the operation whereby Mr. Mavrommatis's concessions had been revoked and handed over to Mr. Rutenberg had been the act of the "Palestine and British" authorities.[63] Lastly, as the Court noted, the international obligations violated by that operation were obligations incumbent on Great Britain as signatory to the Mandate, and *not on Palestine*. Thus, the case was far from being one of the indirect responsibility; in order for there to be a responsibility meriting that description, a State must assume responsibility for the breach committed by another State of an international obligation incumbent on that other State. The responsibility incurred by a State for a breach of its own obligations can only be a responsibility resulting from its own act, whether that act was committed by its central organs or by decentralized organs, such as those responsible for administering a mandated territory. Thus this case also is of no value as a precedent for the purpose of determining the grounds of indirect international responsibility.

28. As a positive example of an affirmation of the responsibility which the protecting State must incur indirectly for a breach of an international obligation of the protected State committed by organs of the latter, we cited above [64] the *Phosphates in Morocco* case. In that connection, we stressed the fact that the applicant, the Government of Italy, made no mention of the relationship of international representation which existed at that time between France and Morocco as a ground for its contention of France's indirect international responsibility for the actions of organs of the Makhsen. But that, of course is all that can be noted concerning this precedent.

29. In contrast, the decision in the *Brown* case, rendered on 23 November 1923 by the arbitral tribunal constituted by Great Britain and the United States under the Special Agreement of 18 August 1910,[65] is not only a valid precedent but, in our view, one of great significance in relation to the essential aspects of the question. The United States brought a claim for compensation against Great Britain, as the Power which had had suzerainty over the South African Republic prior to the war and to the British annexation of South Africa, for the denial of justice suffered by an American engineer, Robert Brown, as a result of what amounted to a conspiracy between the three branches of the Government of the Republic, the legislature, the executive and the judiciary. The arbitral tribunal agreed that there had been a denial of justice, but held that Great Britain could not thereby have incurred international responsibility, whether as the successor State to the South African Republic or—and this is the point of interest to us—as the "suzerain" Power at the time when the denial of justice had occurred. The tribunal's reasoning on that subject focused on the following two points: (*a*) although Great Britain had at that time had a peculiar status and responsibility

(*Footnote 61 continued.*)

that he said "the protected territory" and not "the protégé" or "the protected State"), he went on:

> "The responsibility for events which may affect international law and which occur in a given territory goes hand in hand with the right to exercise, to the exclusion of other States, the prerogatives of sovereignty. Since the situation of the protecting State vis-à-vis other countries is the same as that of a sovereign State, its responsibility must be the same." (United Nations, *Reports of International Arbitral Awards*, vol. II (*op. cit.*), p. 649.)

[62] *P.C.I.J., Series A, No. 2*, p. 23.

[63] *Ibid.*, p. 19.

[64] See para. 11 above.

[65] United Nations, *Reports of International Arbitral Awards*, vol. VI (*op. cit.*), pp. 120 *et seq.*

vis-à-vis the South African Republic, its "suzerainty" had involved only rather loose control over the Republic's relations with foreign Powers and had not entailed any interference in or control over internal activities, legislative, executive of judicial; (*b*) accordingly, the conditions under which Great Britain could have been held responsible for an act, such as a denial of justice, committed against a foreign national in the framework of such internal activities were not fulfilled.[66] It is therefore legitimate to deduce from this that, in the opinion of the tribunal, indirect responsibility can and should be attributed to a State for an internationally wrongful act committed by another State which is linked to it by a relationship of dependence when the wrongful act complained of was committed in an area of activity in respect of which the dominant State has effective power of control over the dependent State, and in that case only. The decision in the *Brown* case therefore fully confirms, in our view, the soundness of the conclusions which we reached on the basis of our analysis of the opinions expressed in the literature. Its significance is enhanced by the fact that it considerably antedates the more recent evolution and resulting clarification of the doctrine on the subject.[67]

30. We cannot conclude the first part of our study of international legal precedents and practice—i.e., the part concerned with identifying the State which is answerable for an internationally wrongful act committed in the framework of a legal relationship of international dependence—without recalling once again Denmark's reply to point X of the request for information from the Preparatory Committee for the 1930 Codification Conference. That reply, which in our view is the most thorough and best grounded of all those received by the Committee, expressly stated that:

> The reply depends upon the nature of the relations between the two States, *the extent and character of the control exercised by one State over the administration of the other State, and the degree of autonomy left to the subordinate or protected State.*"[68]

The Danish Government clearly based its views on the same criteria as had been applied by the Anglo-American tribunal in its decision in the *Brown* case. To sum up, we can say that, while the few precedents afforded by arbitral decisions or statements of the views of Governments which relate to classical and largely outdated situations of relationships of dependence and which provide confirmation for the solutions now advocated by most writers, are neither many in number nor, for good reason, recent, they are nevertheless very clear and very definite. And a point which should not be overlooked is that there are no other decisions or statements of views which can be said, after careful study, to provide support for different solutions.

31. We must now proceed to consider how international judicial organs and State practice have reacted to the problem under discussion in the framework of other situations which, unfortunately, unlike those discussed above, are still with us. We are referring in particular to the situation which arises in cases of total, or even partial, military occupation of the territory of one State by another State. It is true that a situation of this kind does not as a rule have its origin, like a protectorate or a mandate, in an international agreement or, like the relationship between a suzerain State and a vassal State or between a federal State and a member State possessing residual international personality, in provisions of internal law; but despite that, and leaving aside of course any question of the lawfulness or unlawfulness of the act

[66] "The point as to suzerainty is likewise not well taken. It is not necessary to trace the vicissitudes of the South African State in its relation to the British Crown, from the Sand River Convention of 1852, through the annexation of 1877, the Pretoria Convention of 1881, and the London Convention of 1884, to the definitive annexation in 1900. We may grant that a special relation between Great Britain and the South African State, varying considerably in its scope and significance from time to time, existed from the beginning. No doubt Great Britain's position in South Africa imposed upon her a peculiar status and responsibility. She repeatedly declared and asserted her authority as the so-called paramount Power in the region; but the authority which she exerted over the South African Republic certainly at the time of the occurrences here under consideration, in our judgment fell far short of what would be required to make her responsible for the wrong inflicted upon Brown. Concededly, the general relation of suzerainty created by the Pretoria Convention of 1881 (reply, p. 26), survived after the concluding of the London Convention of 1884 (reply, p. 37). Nevertheless, the specific authority of the suzerain power was materially changed, and under the 1884 Convention it is plain that Great Britain as suzerain, reserved only a qualified control over the relations of the South African Republic with foreign powers. The Republic agreed to conclude no 'treaty or engagement' with any State or nation other than the Orange Free State without the approval of Great Britain, but such approval was to be taken for granted if the latter did not give notice that the treaty was in conflict with British interests within six months after it was brought to the attention of Her Majesty's Government. Nowhere is there any clause indicating that Great Britain had any right to interest herself in the internal administration of the country, legislative, executive or judicial; nor is there any evidence that Great Britain ever did undertake to interfere in this way. Indeed, the only remedy which Great Britain ever had for maladministration affecting British subjects and those of other Powers residing in the South African Republic was, as the event proved, the resort to war. If there had been no South African war, we hold that the United States Government would have been obliged to take up Brown's claim with the Government of the Republic and that there would have been no ground for bringing it to the attention of Great Britain. The relation of suzerain did not operate to render Great Britain liable for the acts complained of." (*Ibid.*, pp. 130–131.)

[67] Klein (*op. cit.*, p. 89 and pp. 246 *et seq.*) is reluctant to concede the broader implications of this decision, which conflicts with his argument that, in protectorate relationships and relationships of dependence in general, international responsibility exists for internationally wrongful acts committed by the dependent State, whether or not the dominant State has power of control over the sector of activity in which the wrongful act was committed. He acknowledges, however, that those writers who have dwelt on this precedent—Verdross and Möller and the present Special Rapporteur—have considered the principles affirmed in the Anglo-American tribunal's award applicable to all protectorate relationships and relationships of dependence.

[68] League of Nations, *Bases of discussion . . .* (*op. cit.*), p. 122.

which initiated the relationship between the occupying State and the occupied State or territory, that relationship unquestionably has some features resembling those which mark, for instance, the relationship between a protecting State and the protected State.[69] Military occupation, even if it extends to the entire territory, also brings about no change in sovereignty over the occupied territory and does not affect the international personality of the State subjected to occupation. However, the occupying State, like a protecting State, has to exercise in the occupied territory certain prerogatives of its own governmental authority in order to safeguard the security of its armed forces and provide for its own needs in general, and/or to meet the needs of the population of the occupied territory and maintain law and order, the latter being an area in which the exercise of those prerogatives is in fact required, under certain conditions, by the usages and customs of war and by international conventional law.[70] Here too, the governmental machinery of the occupied State does not normally cease to exist, but survives and continues to operate in the territory, even if it is subject to conditions and restrictions which vary greatly from case to case; this was demonstrated by the experience of the Second World War.[71] So too, the conditions of that interference by one State in the international and internal activities of the other,[72] which we found to be a characteristic of the relationships of dependence discussed earlier, are fulfilled. The interference in the international activities of the occupied State has the effect of confining those activities within widely varying limits, going so far in some cases of total and particularly ruthless occupation as to put an end to them altogether. Interference in internal activities is always present, even if it too varies in extent from case to case. Consequently, there will also be some areas of activity which, because they do not affect the interests of the occupying State, will be left to the free decision of the local authorities; it follows that the occupied State will continue to incur international responsibility for any internationally wrongful acts committed in the areas of activity in question.[73] Conversely, the occupying State will sometimes entrust to elements of its own governmental machinery the exercise of certain functions provided for in the juridical order of the occupied State, for which it is unwilling or unable to employ elements of the machinery of the occupied State.[74] The occupying State will then have to assume international responsibility for any internationally wrongful acts committed by organs of its own with which it has replaced corresponding organs of the occupied State, and there will obviously be a direct responsibility or, in other words, responsibility for its own act.[75] Lastly, here too there will be very extensive sectors of activity that will continue to be entrusted to organs of the occupied State, of its territorial governmental entities, of its other governmental entities, and so on, which will, however, act in accordance with the directions and under the control of the authorities of the occupying State.[76] It is precisely within those sectors of activity that the phenomenon of indirect international responsibility will again emerge; it is within those sectors, and for the same reasons as we stated when considering relationships of dependence,[77] that the occupying State, as the party in control, must be held indirectly responsible for breaches of the international obligations of the occupied State committed by organs of that State acting under the conditions indicated. As will now be seen, such cases as are revealed by State practice and international judicial decisions—the few cases which are known—provide the expected confirmation of this.

32. Among the oldest cases, mention should first be made of those in which the Italian Government held the French Empire responsible, as the Power then in military occupation of the territory of the Papal State, for acts deemed to be internationally wrongful that

[69] See, in this connection, para. 20 and the references to the literature in footnote 50 above.

[70] On this subject, see Ago, "L'occupazione bellica ..." (*loc. cit.*), pp. 143 *et seq.*, especially p. 148.

[71] *Ibid.*, pp. 149 *et seq.*

[72] *Ibid.*, pp. 157 *et seq.*

[73] See para. 18 above, *in fine*.

[74] For example, article 5 of the Agreement between the Governments of the United Kingdom, the United States of America, the USSR and France on the Machinery of Control in Austria, signed at Vienna on 28 June 1946 (United Nations, *Treaty Series*, vol. 138, p. 93), listed eight separate areas in which the Allied Commission would act directly. Article 2(*c*) provided that the Allied Commission should also act directly to maintain law and order in cases where the Austrian authorities were unable to do so or where they did not carry out directions received from the Allied Commission. (See M.M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1963), vol. I, pp. 990 *et seq.*).

It should be emphasized that, although the organs of the occupying State are required to exercise their functions within the framework of the juridical order of the occupied State and, in so doing, to comply with the international obligations of that State, they still remain under the exclusive authority of the State to which they belong and act in accordance with its directions and instructions. They must not, therefore, be confused with the organs of a State "placed at the disposal" of another State, which are dealt with in draft article 9 (see footnote 2 above).

[75] See para. 18 above, *in initio*.

[76] The instructions of 10 November 1943 to the Allied Control Commission for Italy provided that:

> "The relationship of the Control Commission to the Italian Government and to Italian administration in liberated areas is one of *supervision and guidance** rather than one of direct administration as in the case of the Allied Military Government."

Direct administration was exercised by the Allied Military Government only in areas near the front line. (Whiteman (*op. cit.*), p. 990.)

Article 1 of the Agreement on the Machinery of Control in Austria, which was cited above, provided that:

> "(*a*) The Austrian Government and all subordinate Austrian authorities shall carry out *such directions** as they may receive from the Allied Commission;" (United Nations, *Treaty Series*, vol. 138, p. 86).

[77] See para. 18 above, *in medio*.

were committed by papal organs. In one of the most significant cases, the Turin Government noted that if the Court in Rome no longer had control over its actions and was no longer in a position to answer for their consequences, responsibility for the conduct of papal organs[78] could only rest with the French State and "the mere fact that the French Government disapproved of the actions taken did not suffice to relieve it of the responsibility which such actions entailed for it".[79]

33. Another statement of position, more recent but still prior to the Second World War, is to be found in the judgement rendered on 1 March 1927 by the Alexandria Court of Appeal in the *Fink* case. The petitioner, a German national, claimed compensation from the Egyptian Government for damage suffered as a result of the sequestration of his business and its subsequent liquidation by the British military authorities occupying Egypt. The liquidation, which Fink considered catastrophic, occurred after his senior employees had been invited by the Egyptian police to surrender and had been taken in charge by the military authorities. The Court rejected Fink's petition on the following grounds:

> It is clear from this simple account of the facts that the only intervention by the Egyptian Government was the invitation by the local police to the petition's senior employees to surrender to the military authorities;
>
> In the first place, this invitation was more in the nature of a friendly act, designed to prevent the employees from being arrested *manu militari* and taken through the streets of Cairo in that way;
>
> In addition, *the local authorities, in assisting the occupation forces, have always acted on behalf of the latter in accordance with the principles of international law,** which were universally respected even during the last war, *and the local authorities cannot be held responsible for collaboration imposed by circumstances;**
>
> The only acts causing actionable damage, namely, the sequestration and liquidation of the business, were carried out exclusively by the British military authorities.[80]

The Court therefore ruled that, while the conduct of the Egyptian authorities had been wrongful, it could not have entailed the responsibility of Egypt because the police, who had invited Fink's senior employees to surrender, had been subject to the directions and under the control of the occupying Power. It follows by implication from this negative conclusion that in the view of the Court, which did not have to rule on that other aspect, any responsibility for acts committed by the Egyptian authorities must be placed on the occupying State, obviously as responsibility for the act of another.

34. Coming to more recent times, we may cite two acts which occurred during the German occupation of Rome and which, for all their similarity in execution and in purpose, are particularly relevant to the problem under discussion because of one particular aspect which differentiated them. On 2 May 1944, the German military police, who were occupying Rome, forcibly entered a building forming part of the Basilica of St. Mary Major, where they made arrests.[81] That action was an obvious international offence, since the extraterritoriality of the property of the Holy See in Rome was guaranteed by an obligation expressly set forth in the Lateran Treaty and that obligation, because of its typically localized and territory-linked character, was binding not only on Italy but also on any State exercising its authority in exceptional circumstances in Rome.[82] The responsibility of Germany which the Holy See asserted on that occasion[83] was thus, without any possible doubt, a responsibility incurred by the German State for an act of its organs, and of its organs alone—hence, from every standpoint a direct responsibility. Three months earlier, however, on 3 February 1944, it was the Italian police who forcibly entered St. Paul's Outside the Walls, where they committed acts of depredation and made arrests.[84] But as it was common knowledge that the Italian police in Rome operated under the control of the occupying Power, the Holy See addressed its protest not to any Italian authorities but to the German authorities, thus asserting the responsibility of the occupying Power in this case also.[85] However, in doing so, it attributed to Germany international responsibility for offences committed by non-German organs in a sector of activity that was subject to the control of the German occupation authorities—a responsibility which must therefore be called indirect.

35. Another statement of position particularly relevant to the question under discussion may be noted in the decision rendered on 15 September 1951 by the Franco-Italian Conciliation Commission established under article 83 of the Treaty of Peace with Italy (1947), in the *Heirs to the Duc de Guise* case. In this case, the French Government called on Italy to return a property owned by French citizens which had been requisitioned under the decrees issued on 21 November 1944 and 4 January 1945 by the (Italian) High Commissioner for Sicily, which at that time was under

[78] Visconti Venosta to Nigra, 13 July 1863, Pasolini to Nigra, 11 March 1863, reproduced in S.I.O.I.–C.N.R., *op. cit.*, vol. II, pp. 875–876. The conduct complained of consisted of unlawful actions with regard to Italian vessels in the ports of Latium and other similar actions.

[79] Nigra to Pasolini, 19 March 1863 (*ibid.* p. 876).

[80] *Journal du droit international* (Paris), 55th year, No. 1 (January–February 1928), p. 196.

[81] See Ago, "L'occupazione bellica . . ." (*loc. cit.*), p. 160.

[82] *Ibid.*, pp. 154–155. See in particular the many references in footnote 28 of that study to writers expressing this view.

[83] This responsibility consisted primarily in the obligation to release the persons wrongfully arrested and in the restoration of the situation existing prior to the offence (*in integrum restitutio*).

[84] *Ibid.*, pp. 167–168.

[85] As a result of the Holy See's remonstrances, there was no repetition of such incidents.

military occupation by the Allied and Associated Powers. The Commission allowed the French claim, observing, *inter alia*, that:

> The fact that on 21 November 1944 administrative *control** in Sicily was being exercised by the Allied and Associated Powers is irrelevant in this case, since no interference either by the commander of the occupation forces or by any allied authority with the aim of causing the requisition decrees of 21 November 1944/4 January 1945 to be issued has been proved.[86]

This decision therefore expressly affirms that the occupied State remains responsible for internationally wrongful acts committed by it without any interference or control by the occupying State. It must obviously be deduced, *a contrario*, that if such interference occurs and such control is established over the activity in the framework of which the international offence takes place, responsibility passes to the occupying State, which is then answerable for the act of the occupied State.

36. A special situation, involving both international dependence and military occupation, is the situation of what are called "puppet States" ("*Etats fantoches*"). This expression is used to describe States or Governments, normally set up in a given territory on the initiative or an occupying State, which, while purporting to be free, are in fact dependent, often to a very high degree, on the State which brought them into existence. The relationship established between the puppet State and the State which created it has already been mentioned, in connection with its impact on questions of international responsibility, in the seventh report of the Special Rapporteur[87] and, subsequently, in the Commission's report on its thirtieth session. The Commission noted that:

> In situations like this, it is possible that in certain circumstances the "dominant" State will be called upon to answer for an internationally wrongful act committed by the "puppet" ... State ... it is then the existence of the relationship established between the two States which becomes the decisive factor in this transfer of responsibility from one subject to the other.[88]

The Commission therefore concluded that the problems of international responsibility arising out of the conduct of organs of a puppet State, like those arising out of the conduct of organs of any dependent State, fell within the notion of "indirect responsibility".

37. In order to illustrate its conclusion with a classic example, the Commission first of all referred to the ancient precedent of the situation, between 1806 and 1810, of the "Kingdom of Holland", a pseudo-independent State created by the French Empire and placed under the rule of Louis, the brother of Napoleon I. The Commission cited the conclusion of the Board of Commissioners established by the Convention of 4 July 183 between the United States and France, that the responsibility for the sale and confiscation of goods brought to Holland in American ships must be assumed by France, even though those measures had been taken by organs of the so-called Kingdom of Holland, since the "Kingdom" had had no freedom of decision concerning its actions, being entirely subject to the directions and control of France. Thus, in view of the conditions which were fulfilled in this case, all that the Board did was to apply correctly the notion of international responsibility of a State for the act of another State.

38. The Commission's report on the work of its thirtieth session also mentioned the much more recent outcome of many international disputes which arose from breaches of international obligations committed during the Second World War by organs of a puppet State or Government set up in occupied territory by the occupying State in pursuit of its own policy. The responsibility arising out of such breaches was not usually attributed to the State in whose territory the puppet State or Government had existed and had operated under enemy occupation.[89] It was only when international conventional law provided in that respect for an express derogation from the principles of general international law that such an attribution was made, as, for example, in the cases considered by the Italian/United States and Franco/Italian Conciliation Commissions established under the Treaty of Peace with Italy to rule on internationally wrongful acts committed by the "Italian Social Republic". The Agent of the Italian Government in his pleadings, and the Italian Commissioner in his dissenting opinions, strongly asserted that the Social Republic had been simply the *longa manus* of the German Third Reich, and that Germany, not Italy, should therefore be held responsible for the conduct of organs of that "republic".[90] However, the majority of the Commission held that the "Italian Social Republic" had been a *de facto* Government of a separate State and

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[86] United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), p. 161.

[87] See *Yearbook ... 1978*, vol. II (Part One), document A/CN.4/307 and Add.1 and 2, para. 64, and in particular footnote 105.

[88] *Ibid.*, vol. II (Part Two) pp. 100–101, document A/33/10, chap. III, sect. B.2, para. (7) of the commentary to draft article 27, and in particular footnote 475.

[89] For example, in the *Socony Vacuum Oil Company* case, the United States of America International Claims Commission refused to attribute to Yugoslavia the responsibility for acts committed by organs of the "Kingdom of Croatia", on the ground, among others, that that "kingdom" had been simply a puppet State of Italy and Germany in occupied Yugoslav territory. (See Whiteman, *op. cit.* (1963), vol. 2, pp. 767 *et seq.*)

[90] The Italian argument was expounded in particular in the *Dame Mossé* case. In his dissenting opinion, the Italian member of the Conciliation Commission stated:

> "The self-styled Salò Government was regarded, both by Italy and by the United Nations (i.e., by both parties to the present dispute), as a *longa manus* or, in other words, as an organ of the occupier. The issue was therefore quite different: it was a question not of imputing to a State acts performed by a *Government* which in fact exercised authority over all or part of its territory, but of imputing to it acts performed by another State, the occupying *State*" (United Nations, *Reports of International Arbitral Awards*, vol. XIII (*op. cit.*), p. 495).

not simply an "agency" of Germany. It therefore attributed responsibility for its internationally wrongful acts to the Italian State on the basis of the acceptance by Italy, in article 78 of the 1947 Treaty of Peace, of responsibility for all acts committed by the *de jure* or *de facto* Governments which had exercised authority in Italy during the war. However, the same majority in the Commission acknowledged that:

> ... the Italian Social Republic was established by Germany and ... its Government, when making decisions, *had to reckon with*,* up to a certain point, the intent of its ally....[91]

Had it not been for Article 78 of the Treaty of Peace, such an acknowledgement would, under general international law, have constituted the precondition for attributing to Germany indirect responsibility for internationally wrongful acts committed by organs of the Italian Social Republic within the limits of the field of action in which it was obliged to take account of and comply with Germany's wishes. In other words, it seems logical to assume that, where the creation of the puppet State or Government is brought about by one State in the territory of another State as an entity which possesses a separate international personality, but is subject in essential sectors of its activities to systematic control by the State that contrived its creation, the latter State must assume indirect responsibility for internationally wrongful acts committed by the puppet State or Government within the framework of its controlled activities.

39. Lastly, there is one more situation which is somewhat different from those discussed hitherto but which may also prompt the question whether it might not give rise to the special phenomenon of indirect responsibility. We are referring to the situation of a State which commits a breach of an international obligation towards another State under coercion by a third State. This case, too, was mentioned, although for different purposes, in the seventh report of the Special Rapporteur[92] and in the Commission's report on its thirtieth session,[93] where it was noted that a State which adopts internationally wrongful conduct under the pressure of coercion by another State is obviously not acting "in the free exercise of its sovereignty" or with complete freedom of decision. The State applying the coercion compels the other State to choose the course of perpetrating an international offence which in other circumstances it probably would not commit. Thus, in this case also, the State committing the internationally wrongful act is, at the time of its commission, in a condition of dependence vis-à-vis another State. It is true that, unlike what occurs in the case of a permanent relationship of dependence established by an international instrument, such as a protectorate, or an equally permanent situation of *de facto* dependence, such as military occupation, the condition of dependence under consideration here is of a purely temporary, or even occasional, nature. But the fact remains that, in this particular case, the State engaging in the wrongful behaviour *coactus voluit*, and that, in this case as in those which occur in the situations discussed earlier, the State in question was deprived of its freedom of decision, because it was subject to the control of another State. The conclusion stated then, which we now definitively confirm, was that, in those conditions also, a dissociation must be made between the subject to which the act giving rise to international responsibility would continue to be attributed and the subject upon which that responsibility devolved. Thus, once again, we have a case of indirect responsibility or of responsibility for the act of another.

40. To refer to a few cases which have occurred in practice and have been published and commented on in journals of international law, we may first recall the main facts of the *Shuster* case, which dates back to 1911. At that time, the Persian Government, under coercion as a result of the occupation of part of its territory by Tsarist troops, broke the contract it had concluded with Shuster, an American financier, whom it had engaged as an economic adviser to reorganize the State finances. The Persian Government reluctantly dismissed Mr. Shuster and took it upon itself to compensate the victim of its action, thus avoiding an international dispute. However, as commentators on the incident pointed out at the time, it was only that spontaneous grant of compensation by the Persian Government which prevented the United States Government from invoking the indirect international responsibility of the St. Petersburg Government, since the action of the Persian authorities had been taken under coercion by the latter Government.[94]

41. We may also mention the *Romano-Americana Company* case, concerning a United States company which suffered injury as a result of the destruction, in 1916, of its oil storage and other facilities in Romanian territory. The facilities were destroyed on the orders of the Romanian Government, then at war with Germany, which was preparing to invade the country. After the war, the United States Government, believing that the Romanian authorities had been "compelled" by the British authorities to take the measure in question, first addressed its claim on behalf of Romano-Americana to the British Government, with a view to obtaining from it compensation for the wrong

[91] Decision of the Italy/United States of America Conciliation Commission in the *Fubini* case (*ibid.*, vol. XIV (Sales No. 65.V.4), p. 429). Similar acknowledgements are to be found in the Commission's decisions in the *Treves*, *Levi*, *Baer* and *Falco* cases (*ibid.*, pp. 265–266, 279, 280, 283, 406, and 417).

[92] *Yearbook ... 1978*, vol. II (Part One), document A/CN.4/307 and Add.1 and 2, paras. 65 to 68.

[93] *Ibid.* (Part Two), pp. 101–102, document A/33/10, chap. III, sect. B.2, paras. (8) to (11) of the commentary to article 27.

[94] See, in particular, C.L. Bouvé, "Russia's liability in tort for Persia's breach of contract", *American Journal of International Law* (Washington, D.C.), vol. 6, No. 2 (April 1912), p. 389.

suffered by its national.[95] However, the British Government denied all responsibility on the ground that no compulsion had been exerted in that case, either by it or by the other Allied Governments, which it asserted had simply urged the Romanian Government, in its own interest and for the sake of the common cause, to take an action which it had carried out in complete freedom and for which it had itself been bound to bear the responsibility in case of damage to third parties.[96] Thereupon the United States Government finally agreed to address its claim to the Romanian Government, which in turn agreed to assume responsibility for the acts committed by its own organs in 1916. It should be emphasized that the only point on which there was disagreement at any time between Washington and London was whether or not, in this particular case, there had been any "compulsion" exerted on Romania by Great Britain. The two Governments seem clearly to have agreed that, if any compulsion or coercion had really been exerted in the case in question, the Government exerting it would have had to answer for the act committed by the Government which had been forced to act against its will.

42. Let us note in conclusion that, if such had been the case, the responsibility attributed to the Government exerting coercion would clearly have been an "indirect" responsibility. The terms of the problem should not be misunderstood, as they have been by some writers who claim that, in cases of this kind the responsibility of the State exercising coercion is a "direct" responsibility,[97] or, in other words, responsibility for its own act. It is not the coercion by State A of State B that constitutes the internationally wrongful act[98] for which State C invokes the responsibility of State A and claims compensation from it; rather it is the separate and different act committed by State B, in breach of its obligation towards State C, under the coercion exerted by A. State B alone is the author of that act, irrespective of the conditions in which it acted. And if, by way of exception, its act does give rise to responsibility on the part of State A in lieu of its own responsibility, then that is clearly a responsibility which A must bear for the act of B, hence a responsibility *for the act of another*.[99]

43. We believe that this completes our consideration of the different situations—all different but all, as has been seen, possessing a common feature—in which the phenomenon of indirect international responsibility can be discerned. In our view, there are no other situations in which a State can be required, under general international law, to assume international responsibility for an act committed by another State. The responsibility which a State may incur *on the occasion* of an internationally wrongful act committed, to the detriment of a third State, by organs of another State acting freely in that capacity in its territory is certainly not an "indirect" responsibility. The Commission has indicated clearly, in draft article 12, that an act of that nature is not attributable to the State in whose territory the act occurred, but only to the State to which the organs committing the act on foreign soil belong.[100]

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[95] In support of its action, the United States Government argued that the circumstances of the case revealed:

"a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, *compelled** a weaker Ally to acquiesce in an operation which it carried out in the territory of that Ally." (Note from the United States Embassy in London dated 16 February 1925, in G.H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1943), vol. V, p. 702).

[96] See the note from the British Foreign Office dated 5 July 1928:

"In the opinion of His Majesty's Government the facts of the case establish beyond any question that the destruction of the property of the Romano-Americana Company was carried out under the direct orders of the Roumanian Government, and was therefore in law and in fact the act of that Government; . . .

"His Majesty's Government do not deny that, in company with the French and Russian Governments, they urged the Roumanian Government, through their accredited representative in Bucharest, to make the fullest use of the powers assumed by them early in the campaign to prevent the enemy from obtaining the means of prolonging a war disastrous alike to all involved in it at that time, but I must reaffirm that they could not and did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause.

". . .

"His Majesty's Government have every reason for believing that the Roumanian Government would be willing to offer the same terms of settlement to the Romano-Americana Company as have already been accepted by the British, French, Dutch and Belgian companies and by those Roumanian corporations such as the Astra Romana and the Steaua Company, in which the shares are mainly held by non-Roumanian shareholders. His Majesty's Government therefore must decline to accept any responsibility whatever for the compensation which may be due to the Romano-Americana Company arising out of the destruction of their properties in Roumania in 1916." (*Ibid.*, p. 704.)

[97] See the writers referred to in footnote 52 above.

[98] From the aspect which concerns us here, it is irrelevant whether, and in what conditions, such coercion constitutes in itself a wrongful act of the State applying it against the State subjected to it. As noted by the Commission in its report on its thirtieth session:

"Solely from the point of view of these relations with the third State, the answer will finally be the same, whether or not the coercion at the origin of the offence against the third State infringed an international subjective right of the State against which it was exercised." (*Yearbook ... 1978*, vol. II (Part Two), p. 101, document A/33/10, chap. III, sect. B.2, para. (9) of the commentary to article 27.)

See also the seventh report of the Special Rapporteur (*ibid.* (Part One) document A/CN.4/307 and Add.1 and 2, para. 66, *in fine*).

[99] We should make it clear, in order to avoid any ambiguity, that "coercion" having the effect of producing so serious a consequence as the dissociation of international responsibility from the act which gave rise to that responsibility and the attribution of the responsibility to a subject other than the author of the act must, in our view, be understood to mean not any and every form of pressure, but coercion in the sense in which that term is accepted in the United Nations system.

[100] See *Yearbook ... 1975*, vol. II, pp. 83 *et seq.*, document A/10010/Rev.1, chap. II, sect. B.2, art. 12, para. 1 and commentary. See also the fourth report by the Special Rapporteur (*Yearbook ... 1972*, vol. II, pp. 126 *et seq.*, document A/CN.4/264 and Add.1, paras. 147 *et seq.*).

Moreover, if the State to which the organs belong acted, through them, in complete freedom of decision and without being subjected to control or coercion by another party, then obviously it alone bears the responsibility for its act. As for the State in whose territory the act occurred, although it too may incur responsibility, that responsibility arises not from the conduct engaged in on its soil by foreign organs but from the fact, attributable to its own organs, that the preventive or punitive measures called for in the circumstances were not taken. That is the meaning of article 12, paragraph 2. Both responsibilities are therefore direct responsibilities,[101] incurred by the two States each of its own act, and there can be no question in such a case of any indirect responsibility.

44. Provision could, of course, be made under international conventional law for extending to other hypotheses the cases in which a State may incur indirect international responsibility for the act of another State. There is nothing to prevent a State, at least in theory, from assuming by treaty an obligation to answer for certain international offences committed by another State to the detriment of a third State. Some writers have referred to this possibility and have presented it as a case in which the indirect responsibility of the State would be beyond question, and indeed as the surest case in which such responsibility would be apparent.[102] We hesitate to share their enthusiasm. In the first place, it seems to us that it would be more appropriate in this case to speak of one State's giving another a guarantee with respect to the economic consequences of any international responsibility incurred by that other State,[103] rather than of its accepting indirect responsibility for wrongful acts of the other State. Apart from this, we believe that, if one goes deeper into the question, it will be seen that what at first sight appears to be a single case actually comprises two different ones. The agreement derogating partly or wholly from general international law could be an agreement between State A—which would assume responsibility for certain acts that might be committed by a State B—and State C, the presumed victim of the acts covered by the provisions of the agreement. If such were the case, it is obvious that State C could claim compensation from State A for offences committed to its detriment by State B, and that State A could not evade the treaty obligation it had accepted in that connection.[104] However, there is clearly no need to provide for this case in the context of the article we are about to draw up, since the articles of the draft can always be derogated from by treaty, in so far as they do not contain rules of *jus cogens*. Secondly, the agreement concluded in derogation of general international law could be an agreement between State A and State B, the latter State being the presumed author of an offence to the dertiment of State C. Obviously, such an agreement—and the resulting extension of cases of indirect responsibility to include cases not provided for under general international law—could operate only with the consent of State C, since the latter is not bound by an agreement which for it is simply a *res inter alios acta*.[105] In any event, here again there is nothing that need be provided for in an article which we are required to formulate solely on the basis of general international law.

45. One last point calls for clarification before we proceed to draft an article on the subject-matter of this section. The question is whether the responsibility which a State must incur indirectly for the internationally wrongful act of another State, in the cases provided for under general international law, precludes responsibility on the part of the State which committed the offence or whether it should be considered to have been incurred in parallel with the responsibility of that other State, which would not be erased as a consequence. It will be recalled that the differences of view which continue to exist on this point were referred to above.[106] Some writers, including the present Special Rapporteur in his first study on the subject, have at times been attracted by the second alternative.[107] After due reflection, however, we are

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[101] All contemporary writers who have dealt with the question agree on this point. See Verdross, "Theorie . . ." (*loc. cit.*), pp. 405 *et seq.* and pp. 421–422; Dahm, *op. cit.*, pp. 203–204; Quadri, *op. cit.*, pp. 602–603; Berber, *op. cit.*, p. 17.

[102] See, for example, Dahm:

> "There are exceptional cases in which a State, irrespective of the participation of its own organs, must also answer for the wrongful acts of others. In such cases, it is legitimate to speak of indirect responsibility in a narrower sense. A responsibility of this kind can be contracted in the first instance by treaty." (*Op. cit.*, p. 204.)

Cavaré:

> ". . . the responsibility for another is an exception . . . Whenever it is accepted, that is because there is a treaty establishing the responsibility of one State for another. Thus, there is one definite case of responsibility for another, namely, responsibilitv under a treaty." (*Op. cit.*, p. 507.)

I. Brownlie:

> ". . . A State may by treaty or otherwise assume international responsibility for another government." (*Principles of Public International Law*, 2nd ed. (Oxford, Clarendon Press, 1973), p. 442.)

[103] See what the present Special Rapporteur said on this subject in *La Responsibilità indiretta . . .* (*op. cit.*), pp. 62–63.

[104] A more doubtful point is whether State B could evade the obligation under general international law to give compensation for the consequences of an internationally wrongful act committed against State C if the latter addressed itself to it for that purpose, in violation of its agreement with State A but without violating any commitment towards B.

[105] If State C, having suffered from an internationally wrongful act committed by State B, refused to accept the agreement concluded by B with A and seek compensation from a State other than B itself, the latter would of course be obliged, in accordance with general international law, to answer for the act committed. It would then have no alternative but to make its own approach to State A in order to obtain reimbursement of the amount of the compensation paid to State C. The true nature of the agreement between A and B as a "guarantee" agreement would then become apparent.

[106] See para. 21 above.

[107] See references cited in footnote 53 above.

convinced that only the first alternative is in keeping with the nature and raison d'être of the institution of responsibility for the act of another, and that that alternative alone finds support in State practice and in international legal precedents. In none of the cases we discussed in connection with the different situations which we successively considered was there any question of responsibility being attributed, in one and the same case, to both the dominant State and the dominated State, the suzerain State and the vassal State, the occupying State and the occupied State or the State which exerted coercion and the State subjected to coercion.[108] Nor was the "indirect" responsibility of a State presented in any case as being merely "subsidiary" to the "direct" responsibility which an internationally wrongful act will always entail for the State that committed it, irrespective of the conditions in which that act may have been perpetrated. In other words, whenever a State has been held indirectly responsible for the act of another State, the former has always been required to answer *in place* of the second and not *in parallel* with it. Moreover, none of the replies by the Governments to the request for information from the Preparatory Committee for the 1930 Codification Conference mentioned the continued existence of the responsibility of the State committing an internationally wrongful act in cases where the responsibility for that act was considered to be incurred indirectly by another State. The Polish Government, for example, stated in its reply that:

> International responsibility for acts or omissions on the part of a State whose independence is limited should be regarded as devolving *exclusively** on the protecting State . . .[109]

All of this, we repeat, seems to us to be in keeping with the very nature and the raison d'être of an institution such as the responsibility incurred by one subject for a wrongful act committed by another subject—in international law as in any other system of law. The basis of the indirect responsibility of a State for an internationally wrongful act committed to the detriment of a third State by another State is, in all the different cases where we discerned this phenomenon, the existence of a *de jure* or *de facto* situation entailing for the State committing the offence a serious restriction of its freedom of decision in the field in which the wrongful conduct was engaged. Logic and simple justice therefore require that the responsibility of the State whose organs acted in such conditions should be erased, and that the State for whose benefit the restriction in question was imposed should alone be required to answer *in place* of the State which engaged in the wrongful conduct.

46. As a result of the analysis made and the data assembled, we believe that we can now draw up the rule intended to govern the particularly difficult subject-matter of this section. Its formulation should be as simple as possible, but should nevertheless cover all the different *de jure* or *de facto* situations, permanent or occasional, in which "indirect" international responsibility may devolve upon a State. The rule must make clear what conditions must be fulfilled in each of these situations in order for the responsibility for an act of a State to be assumed by another State, and must also show what the situations in question have in common despite their differences. The rule must make it clear that the act constituting a breach of an international obligation of a given State must be an act attributable to that State according to the criteria laid down in draft articles 5 to 15.[110] An act having the same effects but committed by organs of another State (the "dominant" State) acting under the directions and control of the latter—hence, an act attributable, irrespective of the conditions in which it is committed, to that other State—can give rise only to a "direct" responsibility of that other State and not to responsibility *for the act of another*, for which the essential precondition is lacking. The rule must make it clear that where the act consists of conduct on the part of organs of the so called "territorial" State, it must not occur in a field of activity left free from all foreign direction or control; an act committed in those conditions can give rise only to responsibility on the part of the State to which the act in question is attributable. Lastly, it must be made clear that the indirect responsibility assumed by one State for an internationally wrongful act of another State replaces the responsibility of that other State, and is not additional to it.

47. In the light of the foregoing, we believe that we may propose to the Commission the adoption of the following text:

Article 28.[111] *Indirect responsibility of a State for an internationally wrongful act of another State*

1. An internationally wrongful act committed by a State in a field of activity in which that State is not in possession of complete freedom of decision, being subject, in law or in fact, to the directions or the control of another State, does not entail the international responsibility of the State committing the wrongful act, but entails the indirect international responsibility of

[108] As we have seen, the publication of the documents relating to the *Strousberg* case (footnote 32 and para. 23 above) has served to dispel some misapprehensions about that case which had previously arisen because of the lack of complete information. The case had been cited as proof—in fact, the only proof—of the "duality" of international responsibilities in cases of dependence or suzerainty. We have also seen that in some cases, such as the *Fink* case (para. 33 above), where the injured State had sought to invoke the responsibility of a dependent State or of a State subjected to military occupation for acts committed by its organs under the directions and control of a dominant or occupying State, that responsibility was firmly denied.

[109] League of Nations, *Bases of discussion . . .* (*op. cit.*), p. 123.

[110] See footnote 2 above.

[111] The last article proposed by the Special Rapporteur in his seventh report was numbered 25. As a result of the renumbering carried out by the Commission at its thirtieth session, it became article 27. This article is therefore article 28.

the State which is in a position to give directions or exercise control.

2. An internationally wrongful act committed by a State under coercion exerted to that end by another State does not entail the international responsibility of the State which acted under coercion, but entails the indirect international responsibility of the State which exerted it.

CHAPTER V

Circumstances precluding wrongfulness

1. PRELIMINARY CONSIDERATIONS

48. At the outset of the present drafting exercise, it was stated that the subject of part 1 of the draft would be the "*internationally wrongful* act"; in other words, that it would be concerned with defining the rules for establishing, under international law, the existence of an act which was to be characterized as wrongful and which, as such, constituted the source of a State's international responsibility. Accordingly, article 1[112] enuciates the basic principle attaching international responsibility to every internationally wrongful act of a State. Following on the enunciation of that principle, article 3 indicates in general terms the conditions which must be fulfilled in order for there to be an internationally wrongful act of a State; in other words, it establishes what are the constituent elements of an act which warrant its being so characterized. According to that article, there is an internationally wrongful act of a State when conduct is attributable to the State under international law (the subjective element) and when the conduct constitutes a breach of an international obligation of the State (the objective element). Next, the draft articles formulated in chapters II and III respectively analyse and expand on each of the two elements thus described, while those in chapter IV deal with certain special situations where, in one way or another, a State is implicated in an internationally wrongful act committed by another State. Lastly, chapter V, which completes and rounds off part 1 of the draft, is intended to define those cases in which, despite the apparent fulfilment of the two conditions for the existence of an internationally wrongful act, its existence cannot be inferred owing to the presence of a circumstance which stands in the way of such an inference. The circumstances which it is usually considered may have this effect are consent of the injured State, legitimate application of a sanction, *force majeure* and fortuitous event, self-defence, and state of necessity. Each of these circumstances will be dealt with in turn in the following sections.

49. Some writers, and also some draft codifications, prefer to speak of circumstances precluding *responsibility* rather than of circumstances precluding *wrongfulness*. The Commission has already had occasion to state its view that:

> the true effect of the presence of such circumstances is not, at least in the normal case, to preclude responsibility that would otherwise result from an act wrongful in itself, but rather to preclude the characterization of the conduct of the State in one of those circumstances as wrongful.[113]

We should now like to explain the reasons why we believe that position to be correct.

50. First of all, we are firmly of the view that it would be incorrect to regard the expressions "circumstances precluding responsibility" and "circumstances precluding wrongfulness" as mere synonyms. Such an idea could be considered valid only by those who define a wrongful act in terms of the responsibility resulting from that act or, to put it more plainly, who characterize an act as wrongful only because the law attaches responsibility to the act in question. That is the well-known argument of H. Kelsen.[114] According to the proponents of this argument, if no responsibility attaches to the commission of a given act, the act cannot logically be characterized as wrongful; thus, in speaking of circumstances precluding responsibility, one would be referring to the same notion as if one spoke of circumstances precluding wrongfulness. However, matters appear differently to those who regard the notion of the "wrongful act" as a notion which, although linked to that of "responsibility" nevertheless remains distinct from it. Throughout the draft articles, the Commission has made clear its conviction that a distinction must be drawn between the idea of wrongfulness, expressing the fact that certain conduct by a State conflicts with an obligation imposed on that State by a "primary" rule of international law, and the idea of responsibility, indicating the legal consequences which another, "secondary" rule of international law attaches to the act of the State that such conduct consists of. On the

[112] See footnote 2 above.

[113] *Yearbook ... 1973*, vol. II, p. 176, document A/9010/Rev.1, chap. II, sect. B, para. (12) of the commentary to article 1.

[114] See in particular "Unrecht ..." (*loc. cit.*), pp. 481 *et seq.* Since Kelsen does not accept the distinction between "primary" rules and "secondary" rules, it is logical for him to regard the concept of obligation itself as simply a derivative of the concept of responsibility. The inference is that subject X is "obliged" to adopt certain conduct only because the law attaches responsibility to any conduct contrary to the conduct in question.

basis of that conviction, there is no reason, at least in theory, why certain circumstances should not preclude responsibility without at the same time precluding wrongfulness.[115]

51. This, however, brings us to our first comment on the subject. It must be constantly borne in mind that the basic principle of the draft is, as we have already mentioned above, the principle enunciated in article 1, which affirms that every internationally wrongful act of a State entails the international responsibility of that State. If, therefore, in a given case, the presence of a particular circumstance were to have the consequence that an act of a State could not be characterized as internationally wrongful, that same presence would automatically have the consequence that no form of international responsibility could result from it. In other words, for the purposes of the draft, any circumstance precluding the wrongfulness of an act necessarily has the effect of also precluding responsibility. However, the converse does not apply with the same ineluctable logic. As was noted in the preceding paragraph, there is no reason why, from a purely theoretical standpoint, there should not be some circumstances which, while precluding responsibility, would not at the same time preclude the wrongfulness of the act which, by way of exception, did not give rise to responsibility. However, the problem confronting the Commission is not an abstract problem, but a concrete one: are there or are there not under international law circumstances in which an act of a State remains wrongful but does not give rise to the international responsibility normally linked to such an act?[116] To put it in even more concrete terms, when an act of a State is not in conformity with the terms of an international obligation incumbent on the State in question but is committed, for example, with the consent of the injured State, or in the legitimate application of a sanction, or in circumstances of *force majeure*, or in self-defence, etc., is this an act that, by reason of one of those circumstances, ceases to be an internationally wrongful act, and as a consequence—but solely as a consequence—does not entail the international responsibility of its author, or is it an act which remains wrongful in itself but no longer entails the responsibility of the State that committed it? That is the only pre-judicial question that needs to be answered in the context of these preliminary considerations applicable to the whole series of circumstances which will be dealt with individually in the rest of this chapter.

52. Even in theory, we find it difficult to imagine that international law could adopt so strange an attitude, and one so contrary to its own spirit, as to characterize an act as internationally wrongful without attaching to it disadvantageous consequences for its author.[117] It is difficult to see what would be the point of making such

[115] The *abstract* possibility that there are circumstances which would preclude responsibility but would in no way affect wrongfulness has been maintained by a number of writers. See in particular G. Sperduti, "Introduzione allo studio delle funzioni della necessità nel diretto internazionale", *Rivista di diritto internazionale* (Padua), XXVth year, 4th series, vol. XXII, Nos. 1–2 (1943), pp. 19 *et seq.*; G. Morelli, *Nozioni di diritto internazionale*, 6th ed. (Padua, CEDAM, 1963), p. 351; G. Gaja, *L'esaurimento dei ricorsi interni nel diritto internazionale* (Milan, Giuffrè, 1967), pp. 29 *et seq.* In advancing this argument, these writers on international law are, of course, referring only to cases of responsibility for "wrongful" acts, since the issue would be distorted if the argument were extended to cover cases where an "international responsibility" (actually nothing more than an obligation to make reparation for any injury that may result) is attached to activities which are considered "lawful" under international law. In such cases, the existence of circumstances precluding that particular form of responsibility is of course conceivable, whereas there can be no suggestion whatever of circumstances precluding a "wrongfulness" which, by definition, is precluded from the outset. See in this connection Gaja, *op. cit.*, pp. 33 *et seq.*

[116] It is necessary to distinguish clearly between circumstances which would have this effect and the circumstances discussed in chap. IV, sect. 2, where an internationally wrongful act committed by a State entails the responsibility of another State in place of the one which is the author of the act. When this happens, the responsibility resulting from the wrongful act is in no way precluded; it is simply placed on a different subject.

[117] Sperduti observes with good reason:

"The characterization of an act as wrongful results, of course, from the fact that it is contrary to a legal rule; however, an act cannot be considered wrongful if the legal order takes no specific position against it . . ., even if all that the non-existence of such a position does is to reveal, rather than to determine, that the act is not wrongful. In other words, it is inconceivable that a legal order should characterize an act as wrongful without making any provision against it; if the legal order makes no provision against an act, that means that the legal order does not characterize it as wrongful. Logically, it is in the non-existence of such a characterization that the why and wherefore of the non-existence of a position against the act must be seen, despite the fact that the process of interpretation involves starting from the position taken in order to arrive at a finding that the act in question is lawful." (Sperduti, *loc. cit.*, pp. 21–22.)

The same writer (*ibid.*) feels that, among the consequences of a wrongful act provided for by international law, a distinction might be made between those which would constitute responsibility in the strict sense and those which, rather, would allow the taking of measures (not otherwise legitimate) to prevent the occurrence or continuation of the wrongful act. On the basis of that distinction, he refers to the possibility that some special circumstance might have the effect of precluding consequences falling within the former category and not those falling within the latter. He concludes that, in that very special case, the wrongfulness might subsist without there being any responsibility in the strict sense of the term. We cannot, however, subscribe to the formulation of a hypothesis that seems to us far too abstract and, we might add, so improbable, as that of a situation in which, among the consequences of a wrongful act, international law would preclude those allowing the injured State to demand reparation for the injuries suffered or to apply a legitimate sanction against the State committing the act in question, but not those consisting of the taking of coercive measures against that State to prevent it from committing or continuing the wrongful act. In the real world of international affairs there are only two possible situations: either a given act of a State is characterized as wrongful, in which case it logically produces all the consequences provided for by law for an act of that kind—all of which are covered by the current notion of international responsibility—or, by reason of the presence of a certain circumstance, it is characterized as lawful, in which case it does not produce any of those consequences.

a characterization. Imposing an obligation while at the same time attaching no legal consequences to breaches of it would in fact amount to not imposing the obligation in question at all.[118] And to conceive of such a situation precisely in relation to a legal order so imbued with effectivity as the international order seems to us to be in glaring contradiction with one of the dominant characteristics of that system of law.

53. To the best of our knowledge, neither international judges and arbitrators nor State organs have expressly considered the question whether such circumstances as the fact that an act was committed with the consent of the injured party, in a case of *force majeure*, in self-defence, and so on, were circumstances which only precluded the responsibility of the State for the act or whether they precluded the wrongfulness of the act itself and hence, indirectly, responsibility for it. However, it is clear from their attitude that they did not by any means regard such circumstances as having only the effect of precluding responsibility for acts which in themselves remained wrongful. Some statements of position evidence that beyond any doubt, as do some of the replies from Governments on point XI of the request for information submitted to States by the Preparatory Committee for the 1930 Codification Conference, concerning "Circumstances in which a State is entitled to disclaim Responsibility". For example, the Austrian Government said in its reply:

> If the damage caused is not contrary to international law, there can be no ground for international responsibility.[119]

The reply from the British Government stated that:

> ... self-defence may justify action on the part of a State which would otherwise have been *improper*.*[120]

Even more clearly, the Norwegian Government stated, in connection with self-defence:

> ... only an act, performed in the defence of the rights of a State, that is authorised by international law should involve exemption from responsibility; but then the act would not be an *act contrary to international law*.*[121]

Many additional samples could be given.[122] It is true that not only in other replies to point XI of the request for information but also in statements of position on actual disputes, some Governments speak at times of circumstances "precluding responsibility". However, the use of such terminology is no proof at all of an intention on the part of these Governments to argue that the circumstances to which they are referring preclude responsibility but do not affect the wrongfulness of the act of the State in question. Since the issue in dispute is whether or not the international responsibility of the State exists in a specific case, the ultimate concern of the parties is to determine whether or not responsibility was incurred; it makes no difference, for that purpose, whether the circumstance invoked in its defence by the author of the act alleged to have given rise to responsibility bears directly on the existence of responsibility or whether it bears on the existence of the wrongful act, and solely as a consequence on the existence of responsibility. Accordingly, in simply stating the ultimate consequence, Governments sometimes assert that there is no State responsibility in a given case because the organ which adopted certain conduct acted in its private capacity, or because the person who acted was a private individual, and so on, instead of saying, as would be more correct, that in such cases there is no internationally wrongful act and therefore no responsibility. It is quite obviously not the intention of these Governments to say that the conduct of their organs does constitute a wrongful act of the State but does not entail its responsibility; in denying the consequence, they also denied the premise. It is therefore legitimate to conclude that international legal precedents and State practice confirm the validity of the assertion that the circumstances to which we are referring preclude the wrongfulness of the conduct of the State, and only indirectly the international responsibility which would otherwise result from it.[123]

54. As far as the literature is concerned, it is a fact that most writers who deal with the question under discussion use expressions implying that wrongfulness is precluded: "*circonstances excluant l'illicéité*", "*motifs d'exclusion de l'illicéité*", "circumstances which exclude the normal illegitimacy of an act", "*Ausschluss der Rechtswidrigkeit*", "*Gründe, die die Rechtswidrigkeit ausschliessen*", "*Unrechtausschliessungsgründe*", "*circostanze escludenti la illiceità*", and so on. However, it can also be said that writers who use the expression "circumstances precluding responsibility" never do so[124] with the intention of maintaining that those circumstances preclude responsibility but not the wrongfulness of the act which

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[118] Gaja observes: "To state that failure to comply with an obligation produces no consequence is tantamount, in practice, to stating that the party concerned is free to commit breaches of the obligation." (*Op. cit.*, p. 32). It could perhaps be argued that the State injured by an internationally wrongful act which gave rise to no responsibility could still obtain—provided that it and the State committing the act were bound to submit to compulsory jurisdiction—a declaratory judgement of the wrongfulness of the act. But it is difficult to see what value such a judgement would have, since it could not serve as a basis for placing any international responsibility on the State held to be in the wrong.

[119] League of Nations, *Bases of discussion ...* (*op. cit.*), p. 125. It is clear that the reason why the Austrian Government considered that there was no ground for responsibility in the cases referred to was that the international wrongfulness of the act of the State ceased to exist.

[120] *Ibid.*, p. 126.

[121] *Ibid.*, p. 127.

[122] For other examples, see Gaja, *op. cit.*, pp. 31–32.

[123] State practice in this matter was analysed by Gaja (*op. cit.*, pp. 31–32), who arrived at precisely the conclusion set forth here.

[124] Apart from the very special position of Sperduti (to which we referred above, in footnote 117).

exceptionally does not give rise to responsibility. Most of those who use this terminology are in fact writers who always think in terms of responsibility (responsibility for acts of organs lacking competence, of private individuals, etc.), without even considering the question of the relationship between the notion of wrongfulness and the notion of responsibility. There are also writers who entitle the chapter or paragraph dealing with this question "Circumstances precluding international responsibility" but, in the body of their text, speak of "circumstances *nullifying the illegality** of the act" ("*circonstances annihilant l'illégalité de l'acte*"),[125] or of "grounds *precluding** wrongfulness" ("*motifs qui excluent l'illicéité*").[126] This shows that, in their view, the fact that responsibility is precluded is simply a consequence of the elimination of the wrongfulness of an act that, but for the presence of a special circumstance, would have given rise to such responsibility.

55. To wind up this discussion of the question raised above,[127] we should like to add one last consideration which in our view would be decisive, if by now there were any need for that. The circumstances which we have mentioned and which we shall shortly be dealing with one by one have an essential aspect in common; it is that by their presence they impose a limitation on the effect of the international obligation a breach of which is alleged. Thus, they are not circumstances which would preclude the placing of international responsibility on the State whose organs have adopted certain conduct but would leave in existence the wrongfulness of that conduct. The conduct in question cannot be characterized as wrongful for the good reason that, owing to the presence in that particular case of a certain circumstance, the State which committed the act was not under any international obligation to conduct itself otherwise. In other words, there is no wrongfulness when one of the circumstances referred to is present, because as a result of its presence the objective element of the internationally wrongful act, namely, the breach of an international obligation, is lacking. For instance, in the case of the circumstance which we have called "consent of the injured party", the reason why there is no responsibility on the part of the State, even though it has adopted a line of conduct not in conformity with that normally required under an international obligation towards another State, is that in this particular case the obligation in question is avoided by mutual consent. There cannot have been any breach of that obligation, no wrongful act can have occurred, and there can therefore be no question of international responsibility. The same is true in the case of "legitimate application of a sanction"; the reason why there is no responsibility is that the international obligation to refrain from certain conduct towards another State does not apply when the conduct in question is a legitimate reaction to an internationally wrongful act committed by the State against which it is directed. Here again, the conduct adopted is not a breach of any international obligation incumbent on the State in the specific case concerned and does not therefore constitute, from the objective standpoint, an internationally wrongful act. Similar arguments could be advanced with respect to the other "circumstances" which may be involved.[128] In proceeding now to an individual consideration of the various circumstances mentioned above, we should start from the premise that each of them, by its presence, precludes the international wrongfulness of an act of a State which would otherwise be a breach of an international obligation towards another State. This in fact is how the very great majority of contemporary writers on international law proceed.[129]

2. Consent of the injured State

56. As we begin to consider one by one the various causes which may preclude the wrongfulness of an act of the State, the first question which arises is whether the wrongfulness of conduct of a State not in conformity with what would be required of it under an international obligation is precluded if such conduct is consented to by the State that would have the right to demand compliance with the obligation in question. In other words, does the principle *volenti non fit injuria* apply in international law?

57. It would appear, if only as a matter of simple logic, that—as a general principle, of course—the answer must be in the affirmative. If a State (or, needless to say, any other subject of international law)

[125] Spiropoulos, *op. cit.*, p. 286.

[126] L. Delbez, *Les principes généraux du droit international public*, 3rd ed. (Paris, Librairie générale de droit et de jurisprudence, 1964), p. 368.

[127] See para. 51 above, *in fine*.

[128] A number of writers have observed that "circumstances precluding wrongfulness" have this effect because, wherever they are present, they preclude the existence of the international obligation. See in particular Strupp, *loc. cit.*, p. 121; Scerni, *loc. cit.*, p. 476; Ross, *op. cit.*, p. 243; G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), vol. I, pp. 572–573; Gaja, *op. cit.*, pp. 32–33; B. Graefrath, E. Oeser and P.A. Steiniger, *Völkerrechtliche Verantwortlichkeit der Staaten* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977), p. 73. Guggenheim (*op. cit.*, p. 57), argues that in the case of acts committed with the consent of the injured party or as legitimate sanctions it is not even accurate to speak of circumstances precluding wrongfulness, since such acts are entirely legitimate; he considers that it would be more correct to use this expression only in reference to acts committed in self-defence or in state of necessity.

[129] See, in addition to the writers mentioned in footnote 128, Morelli, *op. cit.*, p. 351; Sereni, *op. cit.*, p. 1523; E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, ed. M. Sørensen (London, Macmillan, 1968), p. 541; Ténékidès, *loc. cit.*, p. 784; M. Giuliano, *Diritto internazionale* (Milan, Giuffrè, 1974), vol. I, p. 599; A. Favre, *Principes du droit des gens* (Paris, Librairie de droit et de jurisprudence, 1974), p. 643; Schlochauer, *loc. cit.*, pp. 268–269.

consents to conduct by another State which would otherwise constitute a breach of an international obligation towards the first State, the end-result of that consent is clearly the formation of an agreement between the two subjects whereby the international obligation ceases to have effect as between the two subjects, or, at least, is suspended in relation to the particular case involved. Since the obligation is therefore no longer incumbent on the State, its conduct is not contrary to any international obligation, and the wrongfulness of its act is accordingly precluded. This explains, in the first place, why only consent given by a subject of international law (whether or not a State) can have the effect of precluding the international wrongfulness of the conduct adopted in a given case, since the effectiveness of a rule of international law and of the obligations arising from it can be terminated or suspended only by consent articulated at the level of international law. This shows, in the second place, what might be the exception that would perhaps defeat the general principle: where there are rules of international law which allow of no derogation and which, accordingly, cannot be modified by agreement between the parties, the consent of the injured State cannot nullify or suspend the effectiveness of an obligation created by those rules. Having established these premises, let us now proceed to review the practice of States and international judicial precedents in order to ascertain whether or not they confirm these logical deductions.

58. The cases in which consent of the injured State has been invoked as precluding the existence of an internationally wrongful act are many in number; yet, in all the cases we have been able to scrutinize, the parties to the dispute—and any judges or arbitrators to whom it may have been submitted—agreed that the consent of the injured State precluded the possibility of characterizing the conduct to which it had consented as an internationally wrongful act.[130] The only points on which there may have been disagreement were whether consent had in fact been given and whether it had been validly expressed. In order to bring this out more clearly, we shall first consider cases involving a possible breach of a well-known international obligation, namely, the obligation incumbent on a State—except in certain circumstances—not to exercise its functions in the territory of another State, and in particular to refrain from sending its troops into such a territory. It is clear from international practice and the rulings of international judicial bodies that the entry of foreign troops into the territory of a State is considered a serious violation of State sovereignty and often, indeed, an act of aggression, but it is also clear that such action ceases to be so characterized and becomes entirely lawful if it occurred at the request or with the agreement of the State.

59. Let us consider first a typical case of occupation by troops of one State of the territory of another State: *the occupation of Austria by German troops in March 1938*. The question whether that occupation was internationally lawful or was wrongful was discussed by the International Military Tribunal at Nuremberg. To answer that question, the Tribunal found it necessary first of all to establish whether or not Austria had given its consent to the entry of German troops. The fact that Germany had exerted strong pressure on Austria to the end that its authorities should consent to, and indeed request, such action led the Tribunal to the logical conclusion that the consent given in those circumstances was not valid. An interesting point for our purposes, however, is that the Third Reich itself had felt that it needed Austria's consent to legitimize its action, which would otherwise have been flagrantly wrongful. There is also a further point: the Tribunal raised the question whether or not there had been consent by the States parties to the Treaties of Versailles and Saint-Germain-en-Laye, noting that consideration of that additional question was justified because the defendants were claiming that the acquiescence of those Powers had precluded the possibility of speaking of a breach of the international obligations imposed on Germany and Austria by those treaties.[131]

60. The consent—or, better yet, the request made by the Government—of the State whose sovereignty would otherwise have been violated has nearly always been cited as justification for the sending of troops into the territory of another State to help it to suppress internal disturbances, revolt or insurrection. This "justification" was invoked, for example, by the United Kingdom in connection with the dispatch of British troops to *Muscat and Oman in 1957*[132] and to *Jordan in 1958*,[133] by the United States of America with

[130] Provided at least that the conduct in question did not involve a derogation from a peremptory rule of international law. We shall revert to that specific point in paragraphs 75 and 76.

[131] See United Kingdom, *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, Cmd. 6964 (London, H.M. Stationery Office, 1946), pp. 17 *et seq.*

[132] In his statement to the House of Commons on 29 July 1957, the Secretary of State for Foreign Affairs said:

> "The decision of Her Majesty's Government to give help to the Sultan was made for two reasons. First, it was at the request of a friendly ruler who had always relied on us to help him resist aggression or subversion.' (United Kingdom, *Parliamentary Debates (Hansard), House of Commons, Official Report* (London, H.M. Stationery Office), 5th series, vol. 574 (29 July 1957), col. 872.)

[133] During the debate in the Security Council on 18 July 1958, the representative of the United Kingdom, after referring to the situation in Jordan, stated:

> "In these circumstances, what could be more natural than the appeal of His Majesty King Hussein and the Government of Jordan for assistance from friendly Governments in maintaining their country's independence? My Government was one of those to whom this appeal was made and we have responded to it" (*Official Records of the Security Council, Thirteenth Year*, 831st meeting, para. 28).

See also the statement by the British Prime Minister to the House of Commons (United Kingdom, *Parliamentary Debates*

(*Continued on next page.*)

regard to the dispatch of its troops to *Lebanon in 1958*,[134] by Belgium at the time of its two interventions in the *Republic of the Congo in 1960*[135] *and in 1964*[136] and by the Soviet Union on the occasion of the sending of troops to *Hungary in 1956*[137] and to *Czechoslovakia in 1968*.[138] During the debates in the Security Council and the General Assembly on these questions, no State contested the validity of the principle that the consent of the territorial State precluded—as a general rule—the wrongfulness of the sending of foreign troops into its territory;[139] the only points on which there were differences of opinion were whether or not there had been consent by the State, whether or not that consent had been validly expressed, and whether or not injury had been done to rights of other States.

61. Similar considerations are evident in the positions taken by States during debates on the continued stationing of troops of a State in foreign territory, where the lawfulness of such stationing was not originally contested. Attention may be drawn to three cases of this kind which occurred shortly after the end of the Second World War. The first concerned the *stationing of British troops in Greece in 1946*. In his statement to the Security Council on 30 January 1946, the representative of the Soviet Union said that the maintenance of British troops in Greece was no longer lawful because, in his view, the original justifications for their presence had ceased to exist.[140] In the ensuing debate, the representative of the United Kingdom rejected the Soviet argument and maintained that the presence of British troops in Greece was lawful, citing as what he considered a decisive argument the fact that it was the Greek Government that had requested his Government to keep its troops in Greece.[141] He added: "Surely an Allied country ... is entitled to have troops in a country if invited by that country's Government."[142] The Soviet representative did not contest the validity of such a principle as a general rule; he merely asserted that in the case in question, in his view, the consent given by the Greek Government was not valid.[143] One month later, *Syria* and *Lebanon* brought before the Security Council *the question of the presence of French and British troops in their*

(*Footnote 133 continued.*)

(*Hansard*), *House of Commons, Official Report* (London, H.M. Stationery Office), 5th series, vol. 591, 17 July 1958, cols. 1437–1439 and 1507).

[134] During the debate in the Security Council on this question, the representative of the United States of America said that:

"the President of Lebanon has asked, with the unanimous authorization of the Lebanese Government, for the help of friendly Governments so as to preserve Lebanon's integrity and independence. The United States has responded positively and affirmatively to this request in the light of the need for immediate action." (*Official Records of the Security Council, Thirteenth Year*, 827th meeting, para. 34.)

See also the statement by the President of the United States at the Third Emergency Special Session of the General Assembly on 13 August 1958 (*Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 733rd meeting, para. 7).

[135] Among the justifications for its intervention advanced by the Belgian Government at that time was the fact that the government of a region of the Congolese State had given its consent. During the debate in the Security Council (held on 13 and 14 July 1960), the representative of Belgium stated that "when we intervened we did so only because we learnt that rioters were advancing on the town in a threatening manner. The Belgian intervention took place with the full agreement of the head of the provincial government." (*Official Records of the Security Council, Fifteenth Year*, 873rd meeting, para. 186.)

[136] During the debate in the Security Council on this question, the representative of Belgium stated that paratroops had been sent to Stanleyville at the request of the central Government of the Congo, and added: "There is no interference in the domestic affairs of a country when the lawful Government of that country is given the assistance for which it asks." (*Ibid., Nineteenth Year*, 1173rd meeting, para. 73.)

[137] The representative of the USSR, speaking in the Security Council on 2 November 1956, read out an official statement by his Government which included the following: "At the request of the Hungarian People's Government, the Soviet Government agreed to move Soviet military units into Budapest with a view to assisting the Hungarian People's Army and the Hungarian authorities to restore order in the city." The statement went on to say that if the Hungarian Government requested it to withdraw those troops the Soviet Government was prepared to negotiate their withdrawal. Lastly, it stated: "In this, the Soviet Government proceeds from the general principle that the troops of any State party to the Warsaw Pact are stationed on the territory of another State Party to the Pact by agreement between all the parties thereto, and only with the consent of the State on whose territory such troops are, or are to be, stationed at its request ...." (*Ibid., Eleventh Year*, 752nd meeting, para. 136). See also the views expressed by the representative of the USSR at the 746th meeting of the Security Council (*ibid.*, 746th meeting, paras. 20 and 156–157).

[138] In a letter dated 21 August 1968 to the President of the Security Council, the representative of the USSR stated: "As you are aware, military units of the socialist countries have entered the territory of the Czechoslovak Socialist Republic pursuant to a request by the Government of that State ..." (*Official Records of the Security Council, Twenty-third Year, Supplement for July, August and September 1968*, document S/8759).

[139] The validity of this principle was reaffirmed, implicitly or explicitly, by several of the States which spoke in the debates. See, for example, with respect to the United States intervention in Lebanon and the British intervention in Jordan, the statements made in the General Assembly by the USSR (*Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 734th meeting, para. 7), Australia (*ibid.*, 735th meeting, paras. 60–61), Greece (*ibid.*, 738th meeting, paras. 95–96), Pakistan (*ibid.*, 740th meeting, paras. 53–54), Canada (*ibid.*, 741st meeting, para. 42), Ethiopia (*ibid.*, 742nd meeting, paras. 73–76), Cuba (*ibid.*, 744th meeting, paras. 40 *et seq.*), Portugal (*ibid.*, 744th meeting, para. 109), Bulgaria (*ibid.*, 737th meeting, paras. 31–34), Albania (*ibid.*, 739th meeting, para. 75), Poland (*ibid.*, 740th meeting, para. 82), Ghana (*ibid.*, 744th meeting, para. 94) and Nepal (*ibid.*, 745th meeting, para. 71). With respect to Belgium's intervention in the Congo in 1964, see the statements of Bolivia (*Official Records of the Security Council, Nineteenth Year*, 1183rd meeting, para 69), Nigeria (*ibid.*, 1176th meeting, para. 6) and Algeria (*ibid.*, 1172nd meeting, para. 22).

[140] *Official Records of the Security Council, First Year, First Series*, No. 1, 6th meeting.

[141] *Ibid.* The representative of Greece confirmed that point (*ibid.*).

[142] *Ibid.*

[143] *Ibid.*, 6th and 7th meetings.

territories. They claimed that the maintenance of those troops in their territories after the end of the war with Germany and Japan constituted a serious violation of their sovereignty; they further stated that their Governments had repeatedly requested the withdrawal of the troops.[144] What the two Governments were trying to do was to counter the idea that they had given their consent, which they too agreed would have precluded the possibility of speaking of any alleged violation and hence of any wrongfulness in the maintenance of the foreign troops in their territories. Lastly, during the debate in the Security Council on *the stationing of British troops in Egypt*, the representative of Egypt stated that the maintenance of British troops in the territory of his country was continuing without the consent of his Government and had therefore become "contrary to the principle of sovereign equality."[145]

62. Another case which comes to mind in this context is the sending of troops into foreign territory to free hostages taken by terrorists; examples include the actions by Israeli troops at *Entebbe* (Uganda) in 1976, by troops of the Federal Republic of Germany at *Mogadishu* in 1977, and by Egyptian troops at *Larnaca* (Cyprus) in 1978. Various arguments have, of course, been advanced for and against the lawfulness of these "raids", and this is not the place to take a position on that point. What should be noted is that even States which in principle consider such "raids" to be "wrongful" concede their lawfulness if they were consented to by the State whose sovereignty was violated. It is significant that, at the time of the Larnaca raid, the Government of Egypt sought to justify the operation on the ground that it had requested and obtained the prior consent of the Government of Cypus and that the latter, in order to deny the lawfulness of the operation, denied having given such consent.[146]

63. Mention should also be made, again in the context of acts committed by organs of a State in the territory of another State, of cases in which arrests are made by the police of a State on foreign soil. There is no doubt that such arrests or abductions normally constitute a breach of an international obligation towards the territorial State. But it is clear from international practice and judicial precedents that these same acts cease to be wrongful if the territorial State consents to them. Attention may be drawn in this connection to the decision of the Permanent Court of Arbitration of 24 February 1911 in the *Savarkar* case between France and Great Britain. Savarkar, an Indian revolutionary, was being sent to India on board the British vessel *Morea* to stand trial. When the *Morea* put in at Marseilles, Savarkar managed to escape ashore, but he was immediately stopped by a French gendarme and taken back towards the ship. Three British police officers then went ashore and helped the gendarme to bring Savarkar on board. On the following day, after the *Morea* had sailed from Marseilles, the French Government disavowed the conduct of the French gendarme and demanded the return of Savarkar. An arbitral tribunal, composed of five members of the Permanent Court of Arbitration, ruled that the British authorities were under no obligation to return him. The Tribunal found that the action of the British police had not constituted "a violation of French sovereignty" because France, through the conduct of its gendarme, had consented to it, or at least had allowed the British police to believe that it had so consented.[147]

64. A case similar to but the reverse, so to speak, of the one referred to above occurs when persons on board a foreign ship lying in harbour in a State are arrested. Here again, the question of the effect of the consent of the injured subject arises. One example was the "*Aunis*" case (1863). The Prefect of Genoa, having learnt that five persons wanted by the Italian police were on board the French vessel *Aunis*, which was lying in the harbour of Genoa, asked the French Consul in Genoa for permission to arrest them. The Consul gave permission, whereupon the arrest was made, but on the following day the Consul reversed himself and requested the return of the arrested

[144] During the Security Council debate, the representative of Lebanon stated on 15 February 1946 that it was "well to repeat" that the presence of foreign troops in the territories of Lebanon and Syria was "against the will of the Governments of these States" (*ibid.*, 20th meeting). In a later statement, the representative of Lebanon recalled that, at the time of the debate on the question of the maintenance of British troops in Greece, the representative of the United Kingdom had cited as one of the causes precluding the wrongfulness of the presence of troops of a State in the territory of another State the fact that the latter State had consented to it, and went on to say: "But, you will agree that ... we have not requested such troops to remain on our territory." (*Ibid.*, 21st meeting.) For the similar statement of the representative of Syria: *ibid.*, 20th meeting. On that occasion, the representatives of Australia and Mexico expressed support for the principle that consent of the territorial State precluded the wrongfulness of conduct such as the maintenance of troops in foreign territory (*ibid.*, 21st and 22nd meetings).

[145] *Official Summary Records of the Security Council, Second Year*, 175th meeting.

[146] See *The New York Times* of 20, 21, 22, and 23 February 1978. It is hardly necessary to point out that where an operation of this kind is not justified, from the standpoint of international law, by the fact that the State possessing sovereignty over the territory in which it occurs has given its consent, its wrongfulness may nevertheless be precluded if the case in question should involve any of the other circumstances precluding wrongfulness which will be discussed in the following sections of this chapter.

[147] "... the British police might naturally have believed that the brigadier had acted *in accordance with his instructions**, or that *his conduct had been approved**" (*The Hague Court Reports*, J.B. Scott, ed. (New York, Oxford University Press, 1916), p. 279).

More recently, the District Court in New York was guided by the same principle in the *Sobell* case. In its decision of 20 June 1956, the Court ruled that a person arrested in Mexican territory by United States law enforcement agents need not be returned to Mexico, because the arrest had been made with the consent of the Mexican State (United States of America, *Federal Supplement* (St. Paul, Minn., West, 1956), vol. 142, pp. 515 *et seq.*).

persons. The Italian Government refused to return them, on the ground that the arrest had taken place in circumstances which rendered that act completely lawful. The Italian Minister for Foreign Affairs, Visconti Venosta, observed:

> The Prefect acted on his own initiative, but I believe correctly, having obtained the assent of the French Consul.[148]

And he later stated:

> The fact that the Consul-General of France agreed to the arrest ... should, in our view, have sufficed to obviate any suggestion of a breach of international law ... Whether or not Mr. Huet exceeded his authority, the Prefect of Genoa could in good faith consider himself justified in proceeding with an act which would have become injurious only if performed in the face of a formal protest or objection. The Italian authorities took care to refrain from any action until the consent of the Consul had been given.[149]

65. Again, it has been ruled that wrongfulness of the conduct adopted by a State is precluded where the injured State explicitly or implicitly gave its consent to such a derogation from an international obligation, in cases relating to the payment of moratory interest on a debt imposed by an international instrument. A relevant example is the decision of the Permanent Court of Arbitration of 11 November 1912 in the *Russian Indemnity* case between Russia and Turkey. Under the Treaty of 27 January (8 February 1879), Turkey was required to pay an indemnity to Russia in reparation for damage suffered by the latter during the Russo-Turkish war. Since Turkey was not in a position to make immediate payment of the entire amount, it spread the payment over a period of more than 20 years, with the result that it did not complete the payments until 1902. In 1891, the Russian Government had made to the Ottoman Government a formal demand for payment of the principal plus interest, but when the subsequent instalments were paid the creditor Government made no reservation as to interest and did not apply any part of the amounts received to interest. It was only in 1902, upon completion of the payments, that Russia demanded the payment of moratory interest, which the Ottoman Government refused to make. The Permanent Court of Arbitration, to which the dispute was submitted, took the view that:

> in principle the Imperial Ottoman Government was liable to moratory indemnities to the Imperial Russian Government from December 31, 1890/January 12, 1891, the date of the receipt of the explicit and regular demand for payment.
>
> But that, in fact, the benefit to the Imperial Russian Government of this legal demand having ceased as a result of the subsequent relinquishment by its Embassy at Constantinople, the Imperial Ottoman Government is not held liable to pay interest-damages by reason of the dates on which the payment of the indemnities was made.[150]

Thus the Court found that Russia's consent had rendered the conduct of Turkey lawful, although it would otherwise have constituted a breach of an international obligation incumbent on Turkey.

66. We may therefore conclude from the above analysis of cases that there is a consensus in international practice and in the decisions of international judicial bodies to the effect that consent of the subject in which is vested the subjective right that suffers injury precludes the wrongfulness of an act of a State which, in the absence of such consent, would constitute a breach of an international obligation.

67. A similar consensus can be seen in the literature; all writers who have dealt with the question agree that where the injured subject consents to the adoption, by the subject committing the act, of conduct not in conformity with what would normally be required of it under an international obligation, that conduct cannot be characterized as an internationally wrongful act.[151] We have already mentioned, under the preliminary considerations in section 1 of this chapter, that some of these writers[152] take the view that "consent of the

[148] Telegram of 11 July 1863 to the Italian Minister in Paris (S.I.O.I.–C.N.R., *op cit.*, vol. II, p. 870.) [Translation by the Secretariat.]

[149] Note dated 19 July 1863 to the Italian Minister in Paris (*ibid.*, pp. 870–871). [Translation by the Secretariat.]

[150] Scott, *op. cit.*, p. 323.

[151] This is especially true of those writers who have dealt with the question of internationally wrongful acts in general. Mention should be made in particular of the following: F. von Liszt, *Le droit international*, translation (into French) of the 9th German ed. (1913) by G. Gidel (Paris, Pedone, 1927), p. 201; Strupp, *loc. cit.*, p. 121; Ago, "Le délit international", *Recueil des cours ... 1939-II* (Paris, Sirey, 1947), vol. 68, pp. 533 *et seq.*; Ross, *op. cit.*, pp. 243–244; Guggenheim, *op. cit.*, p. 57; Balladore Pallieri, *op. cit.*, p. 246; Morelli, *op. cit.*, p. 351; A. Schüle, "Ausschluss der Rechtswidrigkeit", *Wörterbuch des Völkerrechts*, 2nd ed. (Berlin, de Gruyter, 1962), vol. III, p. 85; Dahm, *op. cit.*, p. 215; Sereni, *op. cit.*, pp. 1523–1524; Jiménez de Aréchaga, *loc. cit.*, p. 541; Ténékidès, *loc. cit.*, p. 785; P. A. Steiniger, "Die allgemeinen Voraussetzungen der völkerrechtlichen Verantwortlichkeit der Staaten", *Wissenschaftliche Zietschrift der Humboldt-Universität zu Berlin* (Berlin, Gesellschafts- und Sprachwissenschaftliche Reihe), vol. XXII, No. 6 (1973), p. 444; Favre, *op. cit.*, p. 643; Giuliano, *op. cit.*, p. 599.

However, it is also true of writers who have made specific studies of some of the cases referred to in paras. 57–58 above, such as intervention in the internal affairs of another State, abductions within the territory of another State, or non-payment of a debt. For the first of those cases, see, for example, A. Van Wynen Thomas and A.J. Thomas, Jr., *Non-Intervention: The Law and its Import in the Americas* (Dallas, Texas, Southern Methodist University Press, 1956), pp. 91 *et seq.*; E. Lauterpacht, "The contemporary practice of the United Kingdom in the field of international law: Survey and comment, V", *International and Comparative Law Quarterly* (London), vol. 7, part 1 (January 1958), p. 108; Q. Wright, "Subversive intervention", *American Journal of International Law* (Washington, D.C.), vol. 54, No. 3 (July 1960), p. 529; J.E.S. Fawcett, "Intervention in international law: A study of some recent cases", *Recueil des cours ..., 1961-II* (Leyden, Sijthoff, 1962), vol. 103, pp. 366 *et seq.* With regard to the second case, see, for example, M.H. Cardozo, "When extradition fails, is abduction the solution?", *American Journal of International Law*, vol. 55, No. 1 (January 1961), p. 132; see also V. Coussirat-Coustère and P.M. Eisemann, "L'enlèvement de personnes privées, et le droit international", *Revue générale de droit international public* (Paris), 3rd series, vol. XL, No. 2 (April–June 1972), pp. 361 *et seq.*; M.C. Bassiouni, *International Extradition and World Public Order* (Leyden, Sijthoff/Dobbs Ferry, N.Y., Oceana, 1974), pp. 127 *et seq.* With regard to non-payment of a debt, see Fauchille, *op. cit.*, p. 532.

[152] See, among the works mentioned in the preceding footnote, those of Strupp, Guggenheim and Steiniger.

injured State" should not even be presented as a "circumstance precluding wrongfulness", because that would presuppose the existence of a wrongful act which, by way of exception, becomes lawful, whereas if there is consent by the State towards which certain conduct is adopted, then there is no obligation to act otherwise and it follows as a matter of course that there is no breach whatever of any such obligation. The fact that there is no wrongful act, they observe, results from the application of the general rule and is not an exception to it. As we have noted, these writers do not seem quite to grasp the actual working mechanism of what are called "circumstances precluding wrongfulness". When any of those circumstances is present in a given case—and not only when that circumstance is consent of the injured State—wrongfulness of the conduct of the other State is precluded precisely because, in that case, and by reason of the special circumstance which exists, the State committing the act in question *is no longer obliged* to act otherwise. From this standpoint, we repeat, there is no difference between consent of the injured State and the other circumstances to be discussed in this chapter. The *exceptionality* is due precisely to the fact that the circumstance which is found to be present in the particular case renders ineffective in that case an international obligation which, but for that circumstance, would be incumbent on the State and would make any conduct not in conformity with what was required thereunder wrongful. There is an obvious difference between conduct which is generally lawful and conduct which is generally wrongful and would remain wrongful if there were not, in a particular case, a special circumstance that took away its wrongfulness. However, these observations aside, the important point for our purposes is that nowhere in the writings on international law is there any dissent from the view that consent of the injured party precludes characterizing as wrongful the conduct in respect of which such consent was given. The conclusions reached through a study of scholarly works are identical with those to which our analysis of international practice and judicial precedents had already pointed.

68. We may therefore state without fear of contradiction that there exists in international law a firmly established principle whereby consent of the State in which is vested the subjective right that would, in the absence of such consent, be wrongfully injured by the conduct of another State is indeed a circumstance precluding the wrongfulness of the conduct in question. Let us immediately add that this is so as a general rule; we shall see later why provision must be made for a limitation on the scope of the principle, as an integral part of the very enunciation of it. However, before going on to discuss this limitation, we feel that there are a few more points that must be made on the question of determining the *validity* and the actual *existence* of the consent of the "injured" State.

69. In the first place, we should emphasize that the consent in question must have been *validly expressed.* In saying this, we are merely enunciating the application of a general principle. No special condition as to form is required for its expression; like all manifestations of the will of a State, such consent can be *expressed* or *tacit, explicit* or *implicit,* provided, however, that it is *clearly established.*[153] For example, in the *Russian Indemnity* case (1912), as we have seen,[154] the Permanent Court of Arbitration held that Russia had waived payment of the moratory interest due from Turkey and that the latter was therefore under no obligation to pay it. It will be noted that this waiver—this consent to conduct by Turkey which would otherwise have been wrongful—was not made expressly, but that, according to the Court, it was an unquestionable consequence of the fact that the Russian Ambassador in Constantinople had:

> time and again accepted without objection or reservation, and repeatedly reproduced in his own diplomatic correspondence, the outstanding balance of the indemnity as being identical with the outstanding balance of the principal. In other words, the correspondence in later years establishes that the two Parties in fact interpreted the 1879 instruments as implying that payment of the principal amount would constitute payment of the amount to which the recipients of the indemnity were entitled, which in turn implied a waiver of moratory interest.[155]

Similarly, in the cases discussed above involving the arrest by organs of a State of persons who were within the territory of another State, it was held that the action of the local police in co-operating in the arrest constituted a form of consent, tacit but incontestable, by the "territorial State" and that, as a result, there had been no violation of the territorial sovereignty of that State.[156] On the other hand, it does not seem acceptable to us that the consent in question may be merely *presumed.*[157] Presumed consent should not be confused with tacit consent. In the case of "presumed" consent, there is actually no consent by the injured party; it is simply presumed that the State concerned would have consented to the conduct adopted in the

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[153] See in this connection Ago, "Le délit international" (*loc. cit.*), p. 534; Schüle, "Ausschluss . . ." (*loc. cit.*) p. 85; Dahm, *op. cit.*, p. 215.

On the subject of acquiescence in international law, see I. C. MacGibbon, "The scope of acquiescence in international law", *The British Year Book of Law, 1954* (London), vol. 31 (1956), pp. 143 *et seq.*; A. C. Kiss, "Less actes unilatéraux dans la pratique française du droit international", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXII, No. 2 (April–June 1961), pp. 325 *et seq.*; J. Bentz, "Le silence comme manifestation de volonté en droit international public", *ibid.*, vol. XXXIV, No. 1 (January–March 1963), pp. 86 *et seq.*

[154] See para. 65 above.

[155] United Nations, *Reports of International Arbitral Awards*, vol. XI (*op. cit.*), p. 446. [Translation by the Secretariat.]

[156] See the decision of the Permanent Court of Arbitration in the *Savarkar* case (1911), referred to in para. 63 above.

[157] See in this connection Ago, "Le délit international" (*loc. cit.*), pp. 535–536, and Schüle, "Ausschluss . . ." (*loc. cit.*), p. 85; for a contrary view, although in relation to exceptional cases, see Dahm, *op. cit.*, p. 215.

case in question if it had been possible to request its consent. The justification usually advanced for this presumption is that the conduct in question was adopted solely in the pressing interest of the State whose right was formally injured and which, it is said, would certainly have consented if circumstances had not made it impossible to wait until it could signify its consent.[158] However, we find it impossible to accept, even *de lege ferenda*, that such a circumstance could be regarded under international law as precluding the wrongfulness of the conduct; cases of abuse would be too common.

70. Again, it goes without saying that the kind of consent under discussion here must be *internationally attributable to the State*; in other words, it must issue from a person whose will is considered, at the international level, to be the will of the State and, in addition, the person in question must be competent to manifest that will in the particular case involved.[159] In the practice of States, the validity of consent has frequently been questioned from this standpoint. At the time of the *intervention of Belgian troops in the Republic of the Congo in 1960*, for example, there arose the question whether consent expressed by a regional authority could legitimize the intervention of foreign troops or whether such consent could be given only by the central Government.[160] In other cases, the question was raised of the "legitimacy" of the Government which had given consent, either in the light of the constitutional rules in force in the State, or on such grounds as that the Government in question did not have the support of the people, or that it was a puppet Government backed by the State to which consent had been given.[161] Reference may be made, for example, to the statements of some government representatives—although others disagreed—on the occasions of the *intervention of United States troops in Lebanon and of British troops in Jordan* in 1958[162] and of *United States and Belgian troops at Stanleyville* in 1964.[163] Another reason sometimes advanced for considering the consent given to be invalid is that it was expressed in violation of the relevant provisions of domestic law. This was the argument of some speakers in the General Assembly during the debate on the first of the two cases mentioned above.[164] In any event, it seems clear that the question whether the consent expressed by a given person should or should not be considered to constitute consent of the State is not within the scope of any convention on State responsibility; the answer to that question must be found in the existing rules concerning the attribution of declarations of will.

71. As for the substantive conditions which must be fulfilled in order for the consent of the "injured" State to be valid and capable of rendering lawful the conduct not in conformity with what is required under an international obligation adopted towards that State, a further prerequisite is that that consent, like any manifestation of the will of a State, should not be vitiated by "defects" such as error, fraud, corruption or violence. The principles which apply to the determination of the validity of treaties also apply with respect to the validity of consent to an action which would, in the absence of such consent, be internationally wrongful.[165] Cases of consent vitiated by violence

[158] In this case, the circumstance which might, perhaps, preclude wrongfulness would be the fact that the conduct was adopted solely in the pressing interest of the injured State, rather than the "consent" of that State.

[159] See Schüle, "Ausschluss . . ." (*loc. cit.*), p. 85.

[160] See the Security Council debates on this question on 13 and 14 July 1960 (*Official Records of the Security Council, Fifteenth Year*, 873rd meeting), and particularly the statement of the representative of Belgium (paras. 186–188 and 209).

[161] Some writers (Van Wynen Thomas and Thomas, *op. cit.*, pp. 93–94) have even questioned the validity of the consent given by a "legitimate" Government to the entry of foreign troops into the territory of a State during a civil war in that State. In such cases, in the view of these writers, the "legitimate" Government is not necessarily still the "legal representative" of the State.

[162] During the debates at the Third Emergency Special Session of the General Assembly and in the Security Council on the interventions in Lebanon and Jordan, a number of representatives stated that consent to the entry of foreign troops into the territory could validly be given by the "legal" or "lawfully constituted" Government of the State (see *Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 741st meeting, para. 42 (Canada); 744th meeting, paras. 40 and 44 (Cuba) and para. 109 (Portugal); and 745th meeting, para. 71 (Nepal)). However, some of them questioned the legitimacy of the Governments of the countries in question, which in their view were simply political puppets of a foreign Government, and maintained that in giving their consent to the entry of foreign troops those Governments had acted against the expressed wishes of their peoples; this was the argument advanced by the USSR (*Official Records of the Security Council, Thirteenth Year*, 827th meeting, para. 114), Bulgaria (*Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 737th meeting, para. 32), Albania (*ibid.*, 739th meeting, para. 77) and Poland (*ibid.*, 740th meeting, para. 83). Others argued that the Governments of Lebanon and Jordan were entirely legitimate and could therefore express valid consent; see the statements made by the United States of America (*ibid.*, 733rd meeting, para. 7) and Cuba (744th meeting, para. 44).

[163] Belgium and Bolivia (*Official Records of the Security Council, Nineteenth Year*, 1173rd meeting, para. 73, and 1183rd meeting, para. 69) affirmed the validity of consent expressed by a legitimate Government, which they considered the Government of the Congo to be. Ghana argued that the consent expressed by that Government was not valid because it was not a constitutionally lawful Government (*ibid.*, 1170th meeting, para. 118, and 1175th meeting, para. 66) and did not have popular support (*ibid.*). Algeria (*ibid.*, 1183rd meeting, paras. 16–17) also maintained that the consent given by the Congolese Government was not valid, on the ground that that Government had been imposed by foreigners and repudiated by the Congolese people.

[164] See *Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, particularly the statements of the representatives of the USSR (733rd meeting, para. 72), Czechoslovakia (735th meeting, para. 112), Bulgaria (737th meeting, para. 32) and Albania (739th meeting, para. 75). For a contrary view, see the statements of the representatives of Jordan (735th meeting, para. 45) and Pakistan (740th meeting, para. 58).

[165] See Ago, "Le délit international" (*loc. cit.*), p. 534; Ross, *op. cit.*, pp. 243–244; E. Jiménez de Aréchaga, *loc. cit.*, p. 541; Ténékidès, *loc. cit.*, p. 758; M. Giuliano, *op. cit.*, p. 599.

occur particularly where the action to which a State is required to consent is the entry of foreign troops into its territory. As has already been mentioned,[166] the Nuremberg Tribunal, for example, considered whether or not there had been explicit or implicit consent to the entry of German troops into Austria. The consent supposedly given was found by the Tribunal to be without effect because it had been expressed under threat of invasion.[167]

72. The second point we must make is that consent of the "injured" State can constitute a circumstance precluding the wrongfulness of the conduct adopted by a State in a particular case, provided that such consent was given *prior to or at the time of the conduct in question*. If it was given only after the act was committed, it will simply amount to having forborne to pursue the consequences arising out of the wrongful act (including a claim to reparation). In this case, however, consent obviously does not efface the international offence which occurred before it was given.[168] For example, when United States marines landed in Cuba in 1912, the Cuban Government's consent to such an action was apparently given after the event.[169] Assuming that such a landing was not in itself an internationally lawful act, the consent given by the Cuban Government to the presence of United States troops in its territory could make that presence lawful only from the time when consent was given. Between the date of the landing and the date on which consent was expressed, the wrongful act subsisted, even if the Cuban State waived its right to assert the responsibility of the United States for the act in question.

73. One last point that must be made is that sometimes the consent which takes away the wrongfulness of the conduct of a State may in itself constitute a separate wrongful act. This is so, for example, where State A consents to the entry into its territory of troops of State B, even though it has a commitment to State C not to allow this. The conduct of B becomes lawful as a result of the consent given by A, but the conduct of A constitutes a wrongful act towards C.[170]

74. It now remains for us to consider whether or not there are any exceptions to the principle that the consent of the "injured" subject precludes the wrongfulness of conduct which, in the absence of such consent, would constitute a breach of an international obligation. The first point to be noted in this connection is that if, in a given situation, there is more than one "injured" subject (or, to express it more accurately, more than one subject towards which the State committing the act should have adopted a different conduct), then the consent of only one of the subjects involved—even if it is the one whose right is most directly affected—cannot take away the wrongfulness of the conduct in question so far as the other subjects are concerned. Such individual consent precludes the existence of an internationally wrongful act only in relation to the subject which gave it. For example, if State A is under an obligation to States B, C and D to respect the neutrality of B, and if B subsequently gives its consent to the entry of A's troops into its territory, A will not have committed any breach of the obligation or any internationally wrongful act so far as B is concerned, but the breach of the obligation to C and D will subsist. Similarly, if a State party to an international labour convention (concerning, for example, the weekly rest period) subjects a national of another State party—with the agreement of the latter State—to treatment not in conformity with the obligations under the convention, that act will not be internationally wrongful so far as the State which gave its consent is concerned, but it will remain internationally wrongful vis-à-vis the other States parties.[171] It must be said, however, that this does not involve any exception to the principle enunciated in the preceding paragraphs. We have indicated[172] that, in our view, the consent of the injured subject is in fact merely part of an agreement between the subject on which the obligation rests and the subject in which the corresponding subjective right is vested, an agreement

[166] See para. 59 above.

[167] United Kingdom, *Judgment of the International Military Tribunal*... (*op. cit.*), pp. 18–19.

[168] See in this connection Ago, "Le délit international" (*loc cit.*), p. 534; Ross, *op. cit.*, p. 243; Morelli, *op. cit.*, p. 351; Schüle, "Ausschluss ..." (*loc. cit.*), p. 85; Sereni, *op. cit.*, p. 1524; Jiménez de Aréchaga, *loc. cit.*, p. 541; Ténékidès, *loc. cit.*, p. 758; Giuliano, *op. cit.*, p. 598. For a contrary view, see Dahm, *op. cit.*, p. 215.

If the wrongful act is a continuing act, it naturally ceases to be wrongful from the time when the consent of the injured subject is obtained.

[169] Hackworth, *op. cit.* (1941), vol. II, pp. 328–329.

[170] See Ago, "Le délit international" (*loc. cit.*), p. 535; Ross, *op. cit.*, p. 244.

[171] In some of the cases referred to above (paras. 59 and 60), the question whether conduct of a State might constitute a breach of that State's obligations to subjects other than the one which had given its consent arose more than once. For instance, in the case of the occupation of Austria by German forces in 1938, Austria's consent to that operation, if it had existed, would have precluded the wrongfulness of the operation in relation to Austria but not in relation to the other States which had had the right, under the Treaty of Versailles, to see the independence of Austria respected. We noted (in para. 59) that the Nuremberg Tribunal itself was in fact concerned about determining whether or not the occupation of Austria had been consented to by the other Powers. Again, in connection with such disputes as those relating to the maintenance of British troops in Greece in 1946, the United States intervention in Lebanon in 1958 and the Belgian intervention in the Congo in 1964, there arose the question whether a possible breach of obligations embodied in the Charter of the United Nations concerning the maintenance of international peace and security was a matter only for the State in whose territory there were foreign troops, or whether that also constituted a breach of obligations to the other States Members of the United Nations. If so, the consent of the State in whose territory there were foreign troops—assuming that it had been valid—could not preclude the wrongfulness of such conduct in relation to the other States Members of the United Nations.

[172] See para. 57 above.

whereby, in the particular case in question, the obligation ceases to have effect or its application is suspended. Obviously, however, such an agreement, like any other, has effect only as between the parties. Consequently, if the obligation subsisted in relation to other subjects it could, as a result of the agreement between two States alone, have ceased to have effect only as between those two States. So far as the other subjects are concerned it continues to exist, and so far as they are concerned the conduct not in conformity with the obligation in question must be characterized as an internationally wrongful act. This, of course, is simply a case in which the principle enunciated in the preceding paragraphs is applied, and not in any way an exception to that principle.

75. The situation is different, however, if the "injured" subject gives its consent to conduct by another subject which is contrary to an obligation imposed by a rule of *jus cogens*. We have already indicated above[173] that this would be the only possible exception which might defeat the general principle. So far as we are aware, writers on international law have not yet considered the question of the effect of the existence of rules of *jus cogens* on the validity of consent of the "injured" State as a circumstance precluding wrongfulness. Yet there is no doubt in our mind that the formation of such rules does have an effect. If one accepts the existence in international law of rules of *jus cogens* (in other words, of peremptory rules from which no derogation is allowed), one must also accept the fact that conduct of a State which is not in conformity with an obligation prescribed by one of those rules must remain an internationally wrongful act even if the injured State has given its consent to the conduct in question. As we pointed out, rules of *jus cogens* are rules whose applicability to some States cannot be avoided by means of special agreements. In other words, by their very nature they defeat any attempt to replace them by others, even in the relations between two States. Consequently, they can also not be affected by the special type of agreement concluded between the State which adopts conduct not in conformity with an obligation created by a peremptory rule and the State which consents to it. Notwithstanding any such agreement, the obligation remains incumbent on the parties which concluded the agreement, and the conduct not in conformity with what is required under the obligation therefore constitutes a breach of the obligation and produces an internationally wrongful act, the wrongfulness of which subsists even vis-à-vis the State which has consented to it. These logical deductions therefore lead us to the categorical conclusion that there is one exception to the basic principle enunciated in the preceding paragraphs: the consent given by the State in which is vested the subjective right corresponding to an obligation imposed on another State by a peremptory rule of general international law does not have the effect of making lawful an act, not in conformity with that obligation, committed by that other State and of relieving the latter of the resulting responsibility.

76. It would appear, however, that the emergence of a clear and widespread recognition of the existence in international law of rules of *jus cogens* was too recent for us yet to find in State practice or international judicial decisions any support, in terms of specific situations, for the conclusion to which we have been guided by logical principles. For the time being, we do not know of any cases providing a loud and clear affirmation of the fact that the consent of the "injured" State does not preclude the wrongfulness of an act of a State that is not in conformity with what is required of it under an obligation arising out of a rule of *jus cogens*. After all, it is not often that a State will freely consent to conduct by another State which contravenes, in relation to the first State, a rule allowing of no derogation. Consequently, the most one can hope for is to find in certain statements some mere indications of a belief which has not yet had occasion to be openly expressed.[174] But this in no way detracts from the logically incontestable nature of the exception which the existence of *jus cogens* compels us to accept to a principle whose otherwise general validity has been demonstrated in this section of the report.[175]

77. In the light of the considerations expounded in the preceding paragraphs and the conclusions to which they have led us as regards both the basic principle and the sole exception to the principle, we believe that we may propose to the Commission the adoption of the following text for the article defining the rule of international law relating to the subject-matter of this section:

Article 29. Consent of the injured State

The consent given by a State to the commission by another State of an act not in conformity with what the first State would have the right, pursuant to an international obligation, to require of the second State

[173] *Ibid.*

[174] Some Governments have at times expressed doubts as to the exculpatory effect of consent given by a Government to action by a foreign Government which would constitute "interference with the fundamental right of every people to choose the kind of Government under which it wants to live" or intervention "to support and maintain [unpopular Governments] in power against the wish of a majority of their people and thus deny to the people the elementary right ... of self-determination." (*Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 745th meeting, para. 72, and 742nd meeting, para. 6.)

[175] Would it, for example, be an acceptable proposition today that the consent of the Government of a sovereign State to the establishment *ex novo* of a protectorate over that State or of some other system making it dependent on another State could have the effect of precluding the wrongfulness of the act of establishing such a system? In our view, the generally recognized peremptory nature of the prohibition of encroachment on the independence of other States and on the right of self-determination of peoples would clearly rule out any such acceptance.

precludes the wrongfulness of the act in question. Such an effect shall not, however, ensue if the obligation concerned arises out of a peremptory rule of general international law.

3. Legitimate application of a sanction

78. The next circumstance to be considered among the grounds for precluding the wrongfulness of an act of the State is what is customarily called the "legitimate application of a sanction". In its simplest terms, the idea intended to be conveyed by this expression is the following: an act of the State, although not in conformity with what would be required of it by a binding international obligation towards another State, is not internationally wrongful if it constitutes the application, with respect to that other State, of a measure admissible in international law as a sanction in response to an international offence committed by the latter.

79. In the title of this section, we use the term "sanction" as synonymous with an action the object of which is to inflict punishment or to secure performance and which takes the form of an infringement of what in other circumstances would be an international subjective right, requiring respect, of the subject against which the action is taken. That is, in our opinion, the proper meaning of "sanction", the meaning most in keeping with international law. It differs both from what we consider to be the excessively narrow meaning attached to the term by those who hold that it comprises only action involving the use of armed force, and from what we consider to be the excessively broad interpretation which goes so far as to include within this single term all the various legal consequences that might flow from internationally wrongful acts. In our view, the authorization of an action such as the application of economic reprisals in no sense involves the use of armed force, but its object is none the less punitive, and this seems to us to be one of the typical attributes of a sanction. Conversely, the sole object of the attribution of the right to obtain reparation for damage suffered is indemnification, which can hardly be described as a sanction. In any event, it is obvious that even for those who would generally prefer to attach a broader meaning to the term "sanction", the only type of sanction that can be considered for the purposes of the question under consideration is the type involving an action which, as has just been stated, would in other circumstances constitute a breach of an international obligation, an infringement of an international subjective right of another. Only where conduct of this nature is a reaction to an international offence by another party can it have the effect of removing its otherwise undeniably wrongful character.

80. The adjective "legitimate" might seem superfluous to those who hold that in international law a non-legitimate reaction to another's internationally wrongful act cannot rightfully be described as a sanction. Nevertheless, in this writer's opinion the adjective seems necessary in order to stress, in the actual description of the situation in question, that certain conditions must be present in order that the situation can in fact be said to have occurred and to produce the effects to be attributed to it. If a State—or another subject of international law—takes action which it claims to justify as a sanction against the State accused of a breach of an international obligation, the wrongfulness of such action cannot be ruled out in cases where the breach, although it has occurred, is not one of those for which international law admits the possibility of reacting by a sanction in the proper sense of the term. There are different kinds of offences, and what is more, different kinds of situations. Only in specific cases does international law grant to a State—and sometimes also to other subjects of international law—injured by an internationally wrongful act the possibility of resorting, against the State guilty of that act, to action which, as stated earlier, is an infringement of an international subjective right of that State. If according to international law the only consequence of an offence is that it gives rise to the right on the part of the injured State to demand reparations, any act consisting of a reaction to the offence in question in a manner that is not in conformity with what is required by an international obligation is clearly an internationally wrongful act, an act not justified by the situation existing in the particular case. The same holds true, of course, in cases where international law, while not in principle ruling out the possibility of applying a sanction against the State which has committed a breach of a particular international obligation, requires the State that is the victim of that breach not to resort to such action until it has first tried to obtain adequate reparations. In other words, the fact that it has suffered a breach of an international obligation committed by another State by no means invariably or automatically authorizes the injured State in its turn to breach an international obligation towards the State which has committed the initial breach. What is legitimate in some cases does not become legitimate in others.

81. What is more, we know that modern international law does not normally place any obstacles of principle in the way of the application of certain forms of sanctions (reprisals of an economic nature, for example). However, other forms that were admissible under "classical" international law, such as armed reprisals, are no longer tolerated in peace-time, or at any rate are tolerated only within strict limits. Moreover, in general, as regards forms of sanctions involving recourse to armed force, the tendency is decidedly to restrict their application to the most serious cases and, in any event, to leave the decision as to their use to subjects other than the injured State. In many cases, therefore, recourse to the use of force by a State injured by an internationally wrongful act of another State would still be wrongful, for it could not be viewed as a

"legitimate" application of a sanction. Again, even where the internationally wrongful act calling for a reaction would justify a sanction involving the use of force, whatever the subject responsible for applying it, the action taken in the guise of a sanction certainly could not include, for instance, a breach of obligations of international humanitarian law. Such a step could never be legitimate, and such conduct would remain wrongful.

82. An additional point is that even conduct—reprisals or other measures— which in certain circumstances would be admissible as a reaction to an international offence committed by another party would cease to be a legitimate form of sanction if it should cease to be commensurate with the injury suffered as a result of the offence in question. Here likewise, the justification pleaded by the State under the pretext of applying a sanction would cease to be a justification. A sanction which in its application goes beyond the limits prescribed by international law is no longer legitimate, and the conduct adopted by the State that is not in conformity with an international obligation in that case does not cease to be wrongful.

83. We have considered it useful to enter into some detail simply to provide a better explanation for the use, in this context, of the expression "legitimate application of a sanction". The point we wish to stress is that only an application that can be characterized as legitimate (because occurring in certain circumstances) can validly be held to be a circumstance precluding the wrongfulness of State conduct not in conformity with what in other circumstances would be required by an international obligation. Nevertheless, we have no intention of anticipating at this stage the tasks that clearly come within the purview of part 2 of the draft articles on State responsibility. It is not the task of the Commission at the present time to determine at what point the consequences envisaged in international law for an internationally wrongful act include the possibility for the injured State or other subjects to apply a sanction against the guilty State, or to identify definitively the distinctive features of a sanction within the general context of the legal consequences of internationally wrongful acts, or to define the instances in which the one or the other of these forms is applicable. The Commission will deal with these matters when it begins the actual consideration of the content, forms and degrees of international responsibility, for it is then that it will have to determine the various new legal situations brought about by the commission of these internationally wrongful acts, which will have been defined in part 1 of the draft. For the purposes of the particular object of this section, our concern is to indicate that the "circumstance precluding wrongfulness" we are dealing with here is represented by what international law considers admissible as a legitimate application of a sanction in response to an internationally wrongful act—by what the Commission itself will in fact have defined as constituting such "legitimate application".

84. In connection with the "legitimate application of a sanction", we can only reiterate the remark we made in the preceding section in dealing with the topic of the "consent of the injured State". On grounds of logic alone, a positive answer must also be given here, and with all the more reason, to the question whether or not the circumstance that the action of a State constitutes legitimate application of a sanction in response to the internationally wrongful act of another party removes any trace of wrongfulness from that action, even where the action consists of conduct that is not in conformity with what in other circumstances would be required of the State by an international obligation. It can hardly be otherwise, for in the circumstances in which it is carried out the action in question is admissible in international law, and may at times even be required by international law, for example, when the decision to apply a sanction is taken by an international organization. Once again, the mechanism that leads to the result in question is the same. The lawfulness of the act of the State, although conflicting with the terms of an international obligation, lies in the fact that the circumstance found to exist in the particular situation as an exception cancels out that obligation. There is no wrongfulness because in the case in point the obligation is not operative, and consequently there is no breach of the obligation.

85. In international practice and international legal precedents, we can hardly expect to find pronouncements by statesmen or conclusions by judges which explicitly and specifically affirm the principle that an act by a State towards another State that is not in conformity with an international obligation ceases to be internationally wrongful if the State taking the action, because it is the victim of an infringement of its rights, is simply reacting to the offence by applying a legitimate sanction against the perpetrator of the offence. This is not the principle on which the differing views of parties to inter-State disputes clash. Generally, the issues that are the subject of discussion or of rulings are of another kind, namely, whether or not in particular cases recourse to sanctions—notably, reprisals—was a measure admissible as a reaction to an infringement of rights having a specific content; whether or not the adoption of such measures should in any case have been contingent on failure of a prior attempt to secure reparations; whether or not, in taking reprisals, even legitimately, it was admissible to disregard obligations relating to a particular field; whether or not proportionality between the injury suffered and the particular reaction should be or had in fact been respected, etc. But this does not mean that, behind the positions adopted on these different issues, cannot be seen the implicit conviction of diplomats or arbitrators that in principle wrongfulness is precluded when an act, although not in conformity with the terms of an international obligation, constitutes the "legitimate" application of a sanction in response to an offence committed by another.

86. So far as international legal precedents are concerned, reference should be made here to two awards by the Portugal/Germany Arbitration Tribunal, set up by virtue of paragraph 4 of the annex to articles 297 and 298 of the Treaty of Versailles.[176] In the first award, relating to *Responsibility of Germany for damage caused in the Portuguese colonies in the South of Africa* (*Naulilaa incident*), handed down on 31 July 1928, the Tribunal, before deciding *in concreto* on the international lawfulness or wrongfulness of certain acts by the German authorities—and justified by the latter as reprisals for internationally wrongful conduct adopted earlier by the Portuguese authorities in Angola—deems it necessary to establish as a general principle when and in what circumstances reprisals are to be deemed legitimate. The award contains the following passage, which is particularly interesting in that it ascribes specifically to the temporary suspension of the force of the rule between the parties the reason why an action which is not in conformity with the rule, and which is a reaction against another's wrongful act, is not itself wrongful:

> The latest doctrine, and more particularly German doctrine, defines reprisals in these terms:
>
> "*Reprisals* are an act of taking the law into its own hands (*Selbsthilfehandlung*) by the injured State, an act carried out—*after an unfulfilled demand*—in response to an act contrary to the law of nations by the offending State. *Their effect is to suspend temporarily, in the relations between the two States, the observance of a particular rule of the law of nations.** They are *limited* by the experiences of mankind and the rules of good faith, applicable in the relations between States. *They would be illegal if an earlier act, contrary to the law of nations, had not furnished the motive.*"[177]

The award then goes on to note that the opinions of learned writers are divided on the issue whether or not the reprisals must be proportionate to the wrong. Having made these remarks, the Tribunal proceeds to deal with the specific case and says:

> The first requirement—the *sine qua non*—of the right to take reprisals is a *motive* furnished by an earlier act contrary to the law of nations. This requirement—which the German side concedes must be satisfied—is missing, and that fact would be sufficient grounds for dismissing the claim of the German Government.[178]

Yet the Tribunal deems it necessary to add that, even if it were admitted that the conduct of the Portuguese authorities had been internationally wrongful, the German reprisals would still have been wrongful, for they had not been preceded by an unfulfilled demand and moreover they were disproportionate to the alleged wrong. At the same time, however, it is clear from the Tribunal's statements that if the twofold requirement of a prior demand and proportionality between the offence and the sanction had been satisfied it would have regarded the German "sanction" against Portugal's possible international offence as not being wrongful.

87. In the second award, handed down on 30 June 1930 and relating to the *Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered into the war* (*"Cysne" case*), the Tribunal states the following:

> With regard to the theory of reprisals, the arbitrators refer to the award of 31 July 1928, in which the matter is discussed in detail. As the respondent maintains, *an act contrary to international law may be justified, by way of reprisals, if motivated by a like act.** The German Government was able, therefore, without breaching the rules of the law of nations, to respond to the Allied additions which were contrary to article 28 D.L. [article 28 of the London Declaration (see paragraph 96 below)] by an addition contrary to article 23.[179]

The Tribunal thus clearly shows—and here almost spells it out—that in its opinion, an act performed by a government as a sanction in response to an international offence against it is on that account to be considered lawful, even though intrinsically "contrary to the law of nations".

88. So far as State practice is concerned, the positions adopted by official bodies reveal, explicitly or implicitly, a firm belief in the international lawfulness of a course of conduct which is not in conformity with the terms of an international obligation and has been adopted in certain circumstances by a State towards another State which has previously breached an international obligation towards it. Particularly revealing in this connection are the replies of States to the request for information addressed to them by the Preparatory Committee for the Codification Conference of 1930. Point XI of the request bore the heading: "Circumstances in which a State is entitled to disclaim Responsibility"; its paragraph (*b*) envisaged the following cases:

> What are the conditions which must be fulfilled when the State claims to have acted in circumstances which justified a policy of reprisals?[180]

The very formulation of this request presupposed the existence of cases in which a "policy of reprisals" would be lawful, and none of the Governments that replied debated the point. In their replies, the Governments merely indicated in what cases and under what conditions they would regard reprisals as internationally lawful.[181] In doing so, they implicitly acknowledged the principle that in a number of cases the State was free to react, in the form of sanctions, to an internationally wrongful act committed by another State, by means of conduct which would otherwise be

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[176] *British and Foreign State Papers, 1919* (London, H.M. Stationery Office, 1922), p. 7.

[177] United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), pp. 1025–1026. [Translation by the Secretariat.]

[178] *Ibid.*, p. 1027. [Translation by the Secretariat.]

[179] *Ibid.*, p. 1056. [Translation by the Secretariat.]

[180] League of Nations, *Bases of discussion . . .* (*op. cit.*), p. 128.

[181] *Ibid.*, pp. 128 *et seq.*, and League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee, Supplement to Vol. III* (C.75(*a*).M.69(*a*).1929.V), pp. 4 and 22.

characterized as wrongful and would entail its international responsibility. On the basis of the replies received, the Preparatory Committee drew up the following "Basis of discussion" for the Conference:

A State is not responsible for damage caused to a foreigner if it proves that it acted in circumstances justifying the exercise of reprisals against the State to which the foreigner belongs.[182] (Basis of discussion No. 25.)

89. After the Second World War and in consequence of the definitive affirmation, as a fundamental principle of modern international law, of the ban on recourse to force, the *opinio juris* of States on the legitimacy of reprisals marked the culmination of an evolution that had been discernible more and more in the successive stages of the acceptance of this fundamental principle[183] and that had long been advocated by certain scholars.[184] Unquestionably, this *opinio* has thus become much more restrictive.[185] The United Nations has frequently discussed the international legitimacy of certain actions undertaken by way of reprisals, and more specifically cases where such actions involved the use of armed force.[186] The opportunity for giving tangible expression to this conviction of the members of the international community regarding the question of principle of the lawfulness or wrongfulness of armed reprisals arose between the late 1960s and the early 1970s in connection with the elaboration of the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.*[187] The Declaration, adopted on 24 October 1970 proclaims (Principle I) that:

States have a duty to refrain from acts of reprisal involving the use of force.

Without wishing to discuss here the general question of the mandatory or non-mandatory force of the principles embodied in the Declaration, we may take it for granted that the ban on the use of armed reprisals[188] found a place in the Declaration simply as a reflection of the principle which had previously become part of international custom. As stated above,[189] we are inclined to think, therefore, that action taken as a "sanction" against an internationally wrongful act but involving the use of armed force cannot in most cases be considered even under general international law, as a "legitimate" sanction; the wrongfulness of such an action cannot therefore be ruled out.

[182] League of Nations, *Bases of Discussion* ... (*op. cit.*), p. 130. For reasons mentioned several times, the Conference ended before it had the opportunity to discuss a number of the Bases of discussion, including Basis No. 25.

[183] An early restriction of the legitimacy of recourse to armed reprisals was introduced by article 1 of the Hague Convention (II) of 1907 respecting the Limitation of the Employment of Force for the Recovery of Contract Debts. Subsequently, recourse to armed reprisals became implicitly conditional on the prior exhaustion of the procedures for peaceful settlement provided for in many bilateral treaties (Bryan Treaties between the United States of America and various Latin American countries, other treaties of the same kind) and multilateral treaties (Locarno Pact of 1925, etc.). The question of the legitimacy of armed reprisals was raised in connection with the partial ban on war laid down in the Covenant of the League of Nations, more particularly on the occasion of the bombardment and occupation of Corfu by Italy in 1923, after the massacre of the Tellini mission at Jamina, but in practice the question remained open, despite certain statements in support of a ban on recourse to this form of reprisal. The discussion was resumed in 1928 in connection with the Kellogg–Briand Pact and the outlawing of wars of aggression. We may prudently infer from these discussions, as does I. Brownlie (*International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), p. 222) that "the controversy as to whether the Covenant and the Pact prohibited reprisals indicated that their status as measures of self-help was far from secure."

[184] Article 4 of the resolution concerning the "Regime of reprisals in peace-time" adopted by the Institute of International Law at its thirty-fourth session (*Annuaire de l'Institut de droit international, 1934* (Brussels), vol. 38, part 2, p. 709) stated:

"Armed reprisals are prohibited in the same way as recourse to war."

[185] In international legal precedents, one of the first manifestations of this new attitude can be found in the judgment of the International Court of Justice of 9 April 1949 in the *Corfu Channel* case (Merits). The Court denied the lawfulness of the minesweeping operation—called "Operation Retail"—carried out on 12 and 13 November 1946 by the British Navy in Albanian territorial waters. The Court considered the operation as the "manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law", even though the Court recognized that Albania had completely failed to carry out its duty of carrying out the minesweeping itself after the explosions on 22 October 1946, which had caused serious damage and loss of human life to two British warships (*I.C.J. Reports 1949*, p. 35.)

[186] See the list of cases considered and decisions taken by the Security Council drawn up by D. Bowett, "Reprisals involving recourse to armed force", *American Journal of International Law* (Washington, D.C.), vol. 66, No. 1 (January 1972), pp. 33 *et seq.* For example, in its resolution 188 (1964) of 9 April 1964, the Council indicates in general terms that it:

"*Condemns* reprisals as incompatible with the purposes and the principles of the United Nations."

The term "reprisals" in that text refers exclusively to armed reprisals.

The incompatibility of reprisals involving the use of armed force has been maintained by virtually all writers on this question. See Brownlie, *International Law* ... (*op. cit.*), p. 281, and the references given by him. Only recently has there been renewed discussion of this principle, in consequence of the difficulties encountered by the Security Council in performing the function assigned to it by the Charter. See in this connection the debate which took place in 1969–1972 in the *American Journal of International Law*, and particularly the articles therein by: R. A. Falk, "The Beirut raid and international law of retaliation" (vol. 63, No. 3 (July 1969), pp. 415 *et seq.*); Y. Blum, "The Beirut raid and the international double standard. A reply to Professor Richard A. Falk" (vol. 64, No. 1 (January 1970), pp. 73 *et seq.*); Bowett (*loc. cit.*, pp. 1 *et seq.*); R. W. Tucker, "Reprisals and self-defence: the customary law" (vol. 66, No. 3 (July 1972), p. 587). Even those writers who consider the use of force justifiable in the cases in question are none the less inclined to base such justification on concepts other than that of reprisals.

[187] General Assembly resolution 2625 (XXV), annex.

[188] It has been argued that in such cases the explanation for legitimacy of recourse to armed reprisals lies in the notion of self-defence.

[189] See para. 81 above.

90. However, this is not the point of prime concern here. What we mean to stress is that, during the drafting of the 1970 Declaration, the legitimacy of other forms of reprisals in the form of sanctions applied against States that had committed international offences was by no means denied by the representatives of Governments participating in that drafting exercise. On the contrary, it was explicitly recognized. The conviction generally shared by Governments on this point seems to be aptly expressed in the statement made by the representative of the Netherlands in the Sixth Committee of the General Assembly on 13 December 1968:

> I would like to stress that any State, no matter to what region of the world [it] belongs, may find itself in the position of suffering damage from illegal acts on the part of another State and that such a State, for that reason, would be justified in taking measures of non-violent reprisal.[190]

The most recent statements by Governments confirm, therefore, that if the necessary conditions are fulfilled,[191] there is nothing to prevent the State which has suffered an international wrong from reacting against the State which committed the wrong by action consisting of unarmed reprisals. Even though not involving the use of armed force, however, such action nevertheless constitutes conduct not in conformity with what would be required under an international obligation towards the State against which it is directed.[192] The fact that the conduct adopted in this case constitutes the legitimate application of a sanction on the part of the State injured by an international offence committed by another State is therefore considered, even now, by the spokesmen of the members of the international community as cause for precluding the wrongfulness of such conduct.

91. Reference is made above to an instrument adopted within the framework of the United Nations and to views expressed in the course of the debates taking place at that time within the Organization. That provides us with an opportunity to consider for a moment an aspect already touched upon in earlier paragraphs. We noted in passing that the former monopoly of the State directly injured by the internationally wrongful act of another State, as regards the possibility of resorting against that other State to sanctions which would otherwise be unlawful, is no longer absolute in modern international law. It probably still subsists in general international law, even if, *in abstracto*, some might find it logical to draw certain inferences from the progressive affirmation of the principle that some obligations—defined in this sense as obligations *erga omnes*—are of such broad sweep that the violation of one of them is to be deemed an offence committed against all members of the international community, and not simply against the State or States directly affected by the breach. In reality, one cannot underestimate the risks that would be involved in pressing recognition of this principle—the chief merit of which, in our view, is that it affirms the need for universal solidarity in dealing with the most serious assaults on international order—to the point where any State would be held to be automatically authorized to react against the breach of certain obligations committed against another State and individually to take punitive measures against the State responsible for the breach. It is understandable, therefore, that a community such as the international community, in seeking a more structured organization, even if only an incipient "institutionalization", should have turned in another direction, namely towards a system vesting in international institutions other than States the exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and thereafter, for deciding what measures should be taken in response and how they should be implemented.

92. Under the United Nations Charter, those responsibilities are vested in the competent organs of the Organization. These organs—and this is the point which interests us in the context of the subject matter of this section—are empowered not only to authorize, but even to direct a Member State other than the one directly injured by a particular international offence, or a group of Member States,[193] or at times, all Member States, to apply certain sanctions not involving the use of force against a State which has committed an offence of a specified content and gravity. One must not, of course, be misled by the terminology. In the language of the United Nations, as previously in that of the League of Nations, the use of the word "sanction" is less strict: it does not mean exclusively comportment injurious to what, in other circumstances, would constitute a genuine right—and therefore a right which must be respected—of the State

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[190] K. Swan Sik, "Netherlands State practice for the parliamentary year 1968–1969", *Netherlands Yearbook of International Law, 1970* (Leyden), vol. I, p. 171.

The same representative added that, in the view of his delegation: "the respectable and laudable object of preventing the abuse of reprisals would be served, better than by their abolition, by underscoring the conditions to which their exercise [is] subject". (*Ibid.*)

For the summary record of the statement of the representative of the Netherlands, see *Official Records of the General Assembly, Twenty-third Session, Sixth Committee*, 1095th meeting, paras. 9–10.

[191] Namely, as mentioned earlier, that the offence to which the reprisals are intended to be a response must not be such as to entail any consequence other than to give rise to the right of the injured party to obtain reparation; that, if such is the case, a prior attempt to obtain reparation must have been made; and that, in any event, the reaction must not have been disproportionate to the offence. An additional condition, referred to in article 5 of the Resolution of 1934 of the Institute of International Law, would be that there must not be any provision previously agreed between the parties for peaceful settlement (see footnote 184 above).

[192] If it were otherwise, the action would amount to mere retorsion, and would not constitute reprisals in the strict sense.

[193] Either directly, or through the regional agencies referred to in Article 53 of the Charter.

suffering the sanctions in question. The sanctions (as, for example, some of those enumerated in Article 41 of the United Nations Charter and some of those provided for earlier in Article 16, paragraph 1, of the Covenant of the League of Nations) may constitute measures no doubt harmful to the interests of the State against which they are directed, but not necessarily and in all situations involving a breach of the provisions of international obligations towards that State. Nevertheless, the situation can often be otherwise. For example, the severance of economic relations with a State to which the State applying the measure is bound by an economic or trade co-operation treaty is an act which, in other circumstances, would probably be regarded as internationally wrongful. The same would be true of the interruption of rail, sea or air communications with a State with which there exists one of the many agreements for co-operation in those fields, or—and the case is by no means purely theoretical—of such measures as the embargo on the supply of arms or other material to a State when there is a treaty obligation to provide such material.[194]

93. In these and other conceivable cases, it is beyond doubt that sanctions applied in conformity with the provisions of the Organization's constituent instrument would not, in the legal system of the United Nations, be wrongful, even though possibly conflicting with other treaty obligations owed by the State applying them. Indeed, this conclusion has never been contested. It is justified precisely because, under the rules laid down in the treaty containing the Charter and subscribed to by both the subject which may apply and the subject which may suffer the measures in question,[195] the applicability of such measures is provided for in the form of the "legitimate" or even "mandatory" enforcement of sanctions against a State recognized, within the same system, as guilty of certain specific unlawful acts.

94. Thus far, we have considered sanctions not involving the use of force, the application of which would be entrusted to Member States by the competent organs of the United Nations. The measures would therefore be legitimate, even though their implementation should take the form of conduct not in conformity with the terms of an international obligation owed by the implementing State towards the State suffering them. It is by no means impossible, however, that the Organization itself, as such, might in applying a sanction directly against a State find itself in the position of acting in a manner not in conformity with the requirements of an obligation binding it to that State. Without necessarily going so far as to visualize the somewhat extreme case of an act committed in the application of a sanction involving—in this case legitimately—the use of armed contingents under the direct authority of the United Nations, we might hypothesize the simpler case where the Organization, or the International Labour Organisation, or some other organization, denies to a State which has seriously and persistently violated an obligation towards the organization itself, the financial or technical assistance which the latter has pledged to provide under the terms of an agreement. In such a situation, it is surely beyond doubt that such measures would not be wrongful. Nevertheless, we do not believe that we should pursue the consideration of a question which involves discussion of the wrongfulness or preclusion of the wrongfulness of the action of an international organization: such problems are beyond the scope of this draft, which is devoted exclusively to internationally wrongful acts committed by States and the responsibility deriving from such acts.

95. Learned authors are practically unanimous in recognizing that the conduct of a State should not be considered as wrongful if adopted in the legitimate application of a sanction against another State as a result of an internationally wrongful act committed by the latter, even though the same conduct, seen outside the special situation leading to its adoption, would be considered as not in conformity with the terms of an international obligation in effect between the two States, and hence as wrongful. A number of writers on international law, in considering the circumstances excluding wrongfulness, refer specifically to the application of a sanction,[196] others to the sanction or the

[194] The examples of the sanctions ordered in 1935 by the League of Nations against Italy at the time of its action against Ethiopia and in 1977 by the United Nations against South Africa for its policy of *apartheid* are only too well known.

[195] This clarification seems necessary, as the situation might be different in the—admittedly exceptional—event that the passive subject of the sanctions which a State Member of the United Nations is called upon to apply was not also a Member State. In such a case, it would still seem indisputable that the Member State could not claim to be debarred from action by a treaty binding it to the non-member State, for every Member State has a duty to give precedence to the obligations provided for in the Charter over those that it has accepted in other conventions. In fact, as early as the League of Nations period, the Legal Sub-Committee of the Council, in determining the sanctions to be applied against Italy for the action taken against Ethiopia, pointed out that friendship and non-aggression treaties existing between Italy and other Member States, as well as most-favoured-nation clauses, must be interpreted as subordinate to Articles 16 and 20 of the Covenant. However, it could be validly argued that with respect to the State not a Member of the United Nations—and earlier of the League of Nations—against which the sanctions are to be applied, the treaty in effect with that State could not be considered as either voided or suspended by decisions or measures adopted within a system set up by a convention to which that State is not a party. Action taken against that State in contravention of the treaty in question would not necessarily cease to be wrongful by virtue of the fact that within the said system the action is treated as a "sanction".

[196] See for example, H. Kelsen, *loc. cit.*, p. 561, and *Principles of International Law* (New York, Rinehart, 1952), p. 23; Ago, "Le délit international" (*loc. cit.*), p. 536 *et seq.*; E. Zellweger, *Die völkerrechtliche Verantwortlichkeit des Staates für die Presse* (Zurich, Polygraphischer Verlag, 1949), pp. 37–38; Morelli, *op. cit.*, p. 352; R. Monaco, *Manuale di diritto internazionale pubblico*, 2nd ed. (Turin, Unione tipografico-editrice torinese, 1971), p. 574.

reaction to a prior internationally wrongful act,[197] and still others—more numerous—to the legitimate recourse to reprisals,[198] or, more generally, to measures of self-protection.[199] The lawfulness of conduct adopted by way of sanction is, *a fortiori*, supported by writers who maintain that, in the case of the application of known sanction with the "consent of the injured State",[200] it would even be misplaced to speak of a circumstance precluding, *by way of exception*, the wrongfulness of the act of the State.[201] Lastly, the conduct considered in this section is implicitly acknowledged as lawful by those writers who, without dealing expressly with this particular issue, recognize, in respect of the consequences of the internationally wrongful act, the right, or even in some cases the duty, to adopt a conduct other than that which would be required under an international obligation, either by referring explicitly to sanctions,[202] or by referring to reactions to an internationally wrongful act that take the form of reprisals and other coercive or non-coercive measures.[203]

96. There is one final question to be dealt with before concluding consideration of this topic. International legal precedent, the practice of States and juridical literature confirm incontestably the proposition that a State's conduct is not internationally wrongful if that conduct, while not in conformity with the requirements of an obligation binding that State to another State, is justified as the legitimate application of a sanction in response to an internationally wrongful act previously committed by that other State. But what happens if, in the legitimate application by State A of a sanction against State B, the action of A has the effect of infringing the rights of State C, towards which no application of sanctions is justified? Once again, it is logic itself which, in our view, provides the answer to this question. There is no doubt that while the existence of the earlier internationally wrongful act by State B may preclude the wrongfulness of A's reaction towards B, it cannot, however, in any way preclude the wrongfulness of the injury caused to C in connection with this reaction. This answer is corroborated by the award, referred to earlier, of the Portugal/Germany Arbitral Tribunal in the case concerning the *Responsibility of Germany for acts committed after 31 July 1914 and prior to Portugal's entry into the war ("Cysne" case)*. Claiming that Great Britain had violated international obligations laid down in the Declaration concerning the Laws of Naval War,

[197] See, for example, Scerni, *loc. cit.*, p. 476 and Sereni, *Diritto internazionale* (*op. cit.*), pp. 1524, 1554.

[198] See, among others, de Visscher, *loc. cit.*, pp. 107, 109 *et seq.*; W. van Hille, "Etude sur la responsabilité internationale de l'Etat", *Revue de droit internationale et de législation comparée* (Brussels), 3rd series, vol. X, No. 3 (1929), p. 566; Spiropoulos, *op. cit.*, p. 286; J. Basdevant, Règles générales du droit de la paix", *Recueil des cours . . ., 1936-IV* (Paris, Sirey, 1937), vol. 58, p. 550; A. Sánchez de Bustamante y Sirvén, *Droit international public* (Paris, Sirey, 1936), vol. III, p. 526; Verdross, *Völkerrecht* (*op. cit.*), p. 411; Ross, *op. cit.*, pp. 243, 245 *et seq.*; R. Redslob, *Traité de droit des gens* (Paris, Sirey, 1950), pp. 242, 252; M. Sørensen, "Principes de droit international public", *Recueil des cours . . ., 1960-III* (Leyden, Sijthoff, 1961), vol. 101, p. 218; Schüle, *loc. cit.*, *Wörterbuch . . .*, vol. III, pp. 84–85; Dahm, *op. cit.*, p. 213; von Münch, *op. cit.*, pp. 142 *et seq.*; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 404; Ténékidès, *loc. cit.*, pp. 785–786; N.A. Maryan Green, *International Law, Law of Peace* (London, MacDonald and Evans, 1973), p. 259; Favre, *op. cit.*, p. 643; Schlochauer, *loc. cit.*, pp. 273 *et seq.*; H. Thierry *et al.*, *Droit international public* (Paris, Montchrestien, 1975), p. 658.

[199] See for example, D. Anzilotti, *Corso di diritto internazionale*, 4th ed.: S.I.O.I., *Opere di Dionisio Anzilotti*, vol. 1, (Padua, CEDAM, 1955), pp. 419 *et seq.*, and Quadri, *op cit.*, pp. 264 *et seq.*, p. 584. Naturally, self-protection as a circumstance precluding wrongfulness is relevant in this context only in so far as it represents the reaction to an internationally wrongful act.

[200] See para. 67 above.

[201] See Strupp, *loc. cit.*, p. 121; Guggenheim, *op. cit.*, p. 57; Steiniger, *loc. cit.*, pp. 444–445; Graefrath, Oeser and Steiniger, *op. cit.*, pp. 72, *et seq.* As mentioned earlier, these writers take the view that in such cases the wrongfulness of the conduct adopted by the State would in any case be precluded by virtue of the same rule which provides for the obligation in question. In their view, it is axiomatic that the obligation to refrain from a given conduct would not cover a situation in which the conduct in question represented the legitimate application of a sanction. In this particular case, the presence of a circumstance exceptionally precluding wrongfulness would not be necessary in order to support the conclusion that the conduct in question does not violate any obligation and consequently cannot constitute an internationally wrongful act.

[202] For example, State and Law Institute of the Academy of Sciences of the Soviet Union, *Kurs Mezhdunarodnogo Prava* (International Law Course), gen. ed. F.I. Kozhevnikov *et al.* (Moscow, Nauka, 1969), vol. V. pp. 434 *et seq.*; L.A. Modzhorian, "Otvetstvennost v sovremennom mezhdunarodnom prave" (Responsibility in modern international law), *Soviet Yearbook of International Law, 1970* (Moscow, Nauka, 1972), pp. 143 *et seq.*

[203] For example, L. Oppenheim, *International Law: A Treatise*, 8th ed. [Lauterpacht] (London, Longmans, Green, 1955), vol. II, pp. 135 *et seq.*; Y. de la Brière, "Evolution de la théorie et de la pratique en matière de représailles", *Recueil des cours . . ., 1928-II* (Paris, Hachette, 1929), vol. 22, pp. 241 *et seq.*; E. [Speyer] Colbert, *Retaliation in International Law* (New York, King's Crown Press, 1948), pp. 60 *et seq.*; C.G. Fenwick, *International Law*, 4th ed. (New York, Appleton–Century–Crofts, 1965), pp. 636–637; Balladore Pallieri, *op. cit.*, pp. 249–250; Cheng, *op. cit.*, pp. 97–98; J.C. Venezia, "La notion de représailles en droit international public", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXI, No. 1 (January–March 1960), pp. 471 *et seq.*; K.J. Partsch, "Repressalie", *Wörterbuch des Völkerrechts*, 2nd ed. (Berlin, de Gruyter, 1962), vol. III, p. 103; C. Cepelka, *Les conséquences juridiques de délit en droit international contemporain* (Prague, Charles University, 1965), pp. 42 *et seq.*, 61 and 62; M.B. Akehurst, *A Modern Introduction to International Law* (London, Allen and Unwin, 1970), pp. 14–15; F. Kalshoven, *Belligerent Reprisals* (Leyden, Sijthoff, 1971), pp. 20 *et seq.*, 22 *et seq.* The writers referred to in footnote 186 above express the same views; even those among them who rule out entirely the legitimacy of the use of armed reprisals recognize the legitimacy of reprisals not involving the use of force.

As regards draft codifications prepared by learned writers, see articles 7 to 10 of the draft agreement on international responsibility drafted by B. Graefrath and P.A. Steiniger: "Kodifikation der völkerrechtlichen Verantwortlichkeit", *Neue Justiz* (Berlin), No. 8 (1973), pp. 227–228.

signed in London on 26 February 1909 [called the "London Declaration" ("D.L.")], Germany had unilaterally added to the list of items to be included under the heading of "absolute contraband" items which, according to article 23 of the Declaration, could not be added to that list, since they were not "*exclusively** used for war". Germany thereupon destroyed the Portuguese vessel *Cysne*, which was carrying such items. The Portugal/Germany Arbitral Tribunal's award, after agreeing with Germany that "an act contrary to international law can be justified, by way of reprisals, if motivated by a similar act",[204] proceeded to add:

> However, the German argument, which is sound up to this point, overlooks an essential question which can be put in the following terms: *Could the measure which the German Government was entitled to take, by way of reprisals, against Great Britain and its allies, be applied to neutral vessels and, specifically, to Portuguese vessels*?
>
> The answer must be in the negative, even according to the opinion of German scholars. This answer is the logical consequence of the rule that reprisals, which constitute an act in principle contrary to the law of nations, are defensible only in so far as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible.* Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible. By contrast, the measures taken by the German State in 1915 against neutral merchant vessels were aimed directly and deliberately against the nationals of States innocent of the violations of the London Declaration attributed to Great Britain and its allies. Consequently, not being in conformity with the Declaration, they constituted acts contrary to the law of nations, unless one of the neutral States had committed, against Germany, an act contrary to the law of nations that could make it liable to reprisals. There is no evidence of any such act having been committed by Portugal, and the German claim relies exclusively on the acts committed by Great Britain and its allies. Hence, in the absence of any Portuguese provocation warranting reprisals, the German State must be held not to have been entitled to violate article 23 of the Declaration in respect of Portuguese nationals. Accordingly, it was contrary to the law of nations to treat the cargo of the *Cysne* as absolute contraband.[205]

97. The correctness of the principle affirmed by the Tribunal and the soundness of its application in the particular case seem to us so obvious as not to need any further supporting evidence.[206] It would be worthwhile to comment on the distinction which, at first sight, the Tribunal apparently wished to draw between two hypotheses. In its reasoning, it places on one side the "macroscopic" cases in which the action implementing the reprisals against the State guilty of prior breaches is an action immediately and deliberately directed against the innocent third State, precisely as in the case where goods were prevented from reaching enemy territory by the destruction of the neutral vessel carrying them. On the other side, it places cases in which, conversely, the action is aimed directly only at the State against which the reprisals are being taken and it is only in the context of this action that the rights of a third State are also infringed. In actions of the second type, it happens frequently that State A, having applied sanctions against State B, claims to be acting justifiably vis-à-vis State C—whose rights are unduly infringed by the measures in question—on the grounds that it would have been very difficult, if not physically impossible, in the specific case, to inflict the sanction which it was necessary to inflict on the guilty State without at the same time causing regrettable injury to a third State. History has shown this to be so in cases where the sanction applied involved the use of force. It has been argued, for example, that in the course of the bombardment of a town or port of an aggressor State by way of reprisal, it was not always possible to avoid personal or material injury to aliens. It has also been argued that the aircraft of the State called on to implement the sanction might, in the circumstances, find themselves practically forced to cross the air space of State C, in violation of its sovereignty, in order to reach the targets designated for the enforcement of the punitive action in the territory of B. However, it is hardly necessary to add that an infringement of the rights of a third State may just as easily occur in cases of the application of sanctions in no way involving the use of armed force.

98. It is surely beyond doubt, however, that the principle to be followed in respect of all such situations remains that applied by the Portugal/Germany Arbitral Tribunal in the "*Cysne*" case. It should again be noted that the fact that the right of the third State was infringed in connection with the application of a legitimate sanction directed against a State guilty of a prior international offence can by no means be considered as a circumstance precluding the wrongfulness of the injury caused unlawfully to the right of a State which had done nothing to justify the application of sanctions against it. This does not mean, of course, that even so, in some circumstances, the wrongfulness may not be precluded—but that would be because of other factors for the preclusion of wrongfulness which had a bearing on the particular case, and not of a cause which can render blameless only the action taken against the State which is the object of the sanctions. For example, the consent of the injured State can be pleaded as a justifying circumstance in cases of the overflight of the territory of a State to which the sanction is to be applied. In some—admittedly rare—cases, necessity can be

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[204] See para. 87 above.

[205] United Nations, *Reports of International Arbitral Awards*, vol. II, *op. cit.*, pp. 1056–1057.

[206] For the legal literature, see, among others, Strupp, *loc. cit.*, pp. 188–189 and the authors cited by him; J. Hatschek, *Völkerrecht* (Leipzig, Scholl, 1923), pp. 405 *et seq.*; Cheng, *op. cit.*, p. 98; J. Stone, *Legal Controls of International Conflict* (London, Stevens, 1959), p. 290; Venezia, *loc. cit.*, pp. 495 *et seq.*; Partsch, *loc. cit.*, p. 104; Schlochauer, *loc. cit.*, pp. 273–274. See also art. 6, para. 3, of the 1934 Resolution of the Institute of International Law (*Annuaire de l'Institut de droit international, 1934* (*op. cit.*), p. 710).

pleaded to the same effect. In cases of injury caused to third parties by action carried out in the territory of the State against which the sanction is directed, fortuitous event or *force majeure* may sometimes be taken into account. This is probably what the Portugal/Germany Arbitral Tribunal had in mind in speaking of cases of injury to the nationals of an innocent State as constituting "an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible". But these various contingencies have no bearing on the question which concerns us here. What matters, in the present context, is the fact that the legitimate application of a sanction against a particular State can in no case constitute, as such, a circumstance precluding the wrongfulness of an injury caused to the subjective international right of a third State against which the application of sanctions is in no way justified. Only the wrongfulness of the conduct adopted towards the State whose action warrants the sanction can be eliminated.

99. We believe that this completes the consideration of the various aspects of the problem of the legitimate application of a sanction as a circumstance precluding the wrongfulness of an act by a State which would otherwise not be in conformity with the requirements of an international obligation owed by that State. Consequently, our conclusions must now be embodied in an article establishing the rule on the subject dealt with in this section. As to actual wording, we propose to the Commission the following text:

Article 30. Legitimate application of a sanction

The international wrongfulness of an act not in conformity with what would otherwise be required of a State by virtue of an international obligation towards another State is precluded if the act was committed as the legitimate application of a sanction against that other State, in consequence of an internationally wrongful act committed by that other State.

4. *Force majeure* and fortuitous event[207]

100. *Force majeure* and fortuitous event are circumstances frequently invoked in international life as precluding the wrongfulness of an act of a State. In learned works too, they are often given priority in any analysis of such grounds. This does not mean that the terms "*force majeure*" and "fortuitous event" are always used in the same sense by various authors, international arbitrators and judges, and government pleaders.[208] The different meanings given them are a source of confusion, which is accentuated on some occasions by the use of the expression "*force majeure*" as a synonym of "state of necessity". Before raising the question of the validity of the circumstances envisaged as precluding the wrongfulness of an act of State, we should say what we understand by the terms which form the title of this section. It is important to establish the distinction to be drawn between the circumstances taken up for study in this section and those that were considered in previous sections of this chapter. It is then important clearly to specify the scope of the two notions we intend to use here, since "*force majeure*" and "fortuitous event" are two expressions each of which, despite the links between them, describes separate categories of situations.

101. The distinction to be drawn between *force majeure* and fortuitous event, on the one hand, and the circumstances dealt with in the preceding sections (Consent of the injured State, Legitimate application of a sanction), on the other, is easy and poses no real problem. The circumstance which precludes the wrongfulness of an act committed by the State in those situations is the existence, in the particular case, of conduct by the State suffering the act in question. That conduct consists either in the expression of consent to the commission by another State of an act otherwise contrary to an international obligation of that State, or in the prior perpetration of an international offence rendering legitimate the use of a measure of reaction or sanction against the perpetrator. A situation similar to the latter occurs, again, when the circumstance invoked is the one to be dealt with in another section of this chapter, namely self-defence. But this is not so in the case of *force majeure* or fortuitous event. The State suffering an act committed in such conditions is not then involved: it has neither given its consent to the commission of the act nor previously engaged in conduct which constitutes an international offence. In any case, whatever its conduct, it is irrelevant in determining the existence of the circumstance in question. It is arguable however that the notions of *force majeure* and fortuitous event are similar in certain aspects to another notion, namely "state of necessity". In the next section we shall examine whether this other notion may or may not be invoked, at least in certain cases, as a circumstance precluding the wrongfulness of an act of a State. But it cannot be denied that at first sight the notions of *force majeure* and fortuitous event—particularly the first—and the notion of state of necessity may appear to have points in common, starting, in particular, with that of the irrelevance of the prior conduct of the State against which the act to be justified has been committed. It is

[207] Section 4 of this report, which was circulated in mimeographed form as document A/CN.4/318/Add.4 of 15 June 1979, was presented by Mr. Ago when he was no longer a member of the International Law Commission.

[208] See in this connection the information furnished in the study prepared by the Codification Division of the Office of Legal Affairs of the United Nations Secretariat, "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine" (*Yearbook ... 1978*, vol. II (Part One), p. 61, document A/CN.4/315). This document, hereinafter called "Secretariat Survey", was circulated in 1977 in a provisional mimeographed version under the symbol ST/LEG/13.

therefore necessary to devote a few lines at this point to delimiting the scope of these various notions.

102. In language which, it must be admitted, often lacks conceptual rigour, the terms "*force majeure*" and "fortuitous event" on the one hand and "state of necessity", on the other, are all three used to indicate a situation facing the subject taking the action, as a result of an additional and unforeseen factor which leads it, as it were *despite itself*, to act in a manner not in conformity with what is required of it by an international obligation incumbent on it. This basic analogy is of course the root of the uncertainty observed with regard to the delimitation of these different notions.[209] The criteria proposed in this connection vary considerably. It may be noted, however, that the tendency is to refer to a "state of necessity" ("*necessité*", "*Notstand*", "*stato di necessità*", etc.) where there is an attempt to justify conduct which conflicts with an international obligation and is engaged in with the alleged intention of saving the very existence of the State from grave and imminent danger in no way attributable to that State and not preventable by any other means. The notion of state of necessity is also often invoked—despite the existence of divergent opinions, and the fact that some prefer to apply the notion of *force majeure* to such cases—to justify conduct engaged in to safeguard, if not the State itself, at least some of its vital interests: ensuring the survival of part of its population afflicted by a natural disaster by requisitioning foreign means of transport or supply; preventing the State's bankruptcy by deferring payment of its debt; preventing the outbreak of a civil war by seizing, on foreign territory, those preparing to provoke it; preventing massive pollution of its coasts by sinking on the high seas a foreign vessel leaking oil, etc. Let it be clear, in order to avoid any misunderstanding, that our purpose in drawing attention to these attempted justifications is not to subscribe unquestioningly to the ideas advocated by their authors; when the time comes, that question will be examined with considerable prudence and critical judgement, for under cover of "necessity", attempts have often been made to hide the gravest abuses. For the time being, our only purpose is to clarify as far as possible those situations which most frequently come to mind when one talks of a state of necessity, so that we can, by contrast, define more satisfactorily the notions with which we are concerned in the present context, namely *force majeure* and fortuitous event. We therefore merely wish to emphasize that in the minds of most of those who see it as a circumstance precluding wrongfulness, a state of necessity comprises two elements: first, the impossibility of otherwise preserving the State or its vital interests from a grave and imminent danger; and, secondly, the undeniably intentional nature of the conduct engaged in to this end. In other words, and this is the commonest opinion, anyone invoking a state of necessity is perfectly aware of having deliberately chosen to act in a manner not in conformity with an international obligation.

103. In contrast, *force majeure*—and *a fortiori*, fortuitous event—are generally invoked to justify conduct for the most part *unintentional*. If the organs of a State which are responsible for the observance of an international obligation are led not to observe it, this is said to be due to an external and often totally unforeseen circumstance, to the occurrence of which those organs have in no way contributed and which they are incapable of resisting, with the result that it is materially impossible for them to act in conformity with the obligation, be it an obligation to do or not to do. We speak, for example, of "*force majeure*" ("*fuerza mayor*", "*forza maggiore*", "*nepreodolimaya sila*", "*höhere Gewalt*", etc.) if a pilot loses control of his aircraft as a result of damage or atmospheric disturbance and is obliged to violate the airspace of another State knowingly but involuntarily. The same is true of the destruction through uncontrollable natural causes of property which a State was required to hand over to another State, etc. Obviously, alongside these so to speak unquestionable cases, there are others which are more arguable, whose attribution to the notion of "*force majeure*" rather than to that of "necessity" is not so easy—and in this connection, practice and doctrine hesitate more noticeably.[210] Let us take, for example, situations in which, under the impetus of unforeseen events, an organ of the State engages in conduct not in conformity with an international obligation without being ineluctably led to do so by forces beyond its will. It may, for example, be driven to it by the perception of grave risks, which it would otherwise run, of its life or of that of persons placed in its charge. We do not believe, however, that such cases can be advanced as cases of "state of necessity" in the accepted sense of the term.[211] In the

[209] There are other reasons for this confusion. As the Secretariat points out in the study mentioned in footnote 208 above, the choice of one expression rather than another to characterize a given case is influenced by the nationality of the author, and hence by the meaning attributed to these expressions in the legal language of his country. The choice is also influenced by whether or not, depending on the author, the absence of "fault" or "negligence" is presented as a separate circumstance precluding the wrongfulness of an act of the State. Moreover, some authors betray a prejudice in favour of the existence of a single circumstance, either *force majeure* or "state of necessity", etc. For further details, see Secretariat Survey (see footnote 208 above), paras. 20–24.

[210] Government practice is generally broader than the doctrine in characterizing certain cases as cases of *force majeure*. We do not of course feel it necessary to take into consideration the opinion of those few authors who make no distinction between the two notions involved here: that of Sereni, for example, who in dealing with state of necessity places the term "*force majeure*" in parenthesis (*op. cit.*, p. 1528). Other writers sometimes speak of *force majeure* in connection with situations which seem to us to come clearly within the framework of a state of necessity.

[211] Some authors—they too are quite few—are of another opinion: see Quadri, *op. cit.*, p. 226; P. Lamberti Zanardi, "Necessità (Diritto internazionale)", *Enciclopedia del diritto* (Milan, Giuffrè, 1977), vol. 27, p. 905.

first place, it does not seem correct to speak of a real "choice", or "free choice", in respect of the decision to be taken by State organs which know that they and those who share their fate would perish unless they acted in a given manner, such as the captain of a warship in distress seeking refuge in a foreign port without authorization or the pilot of a State aircraft landing without authorization on foreign soil to avoid an otherwise inevitable disaster. But what is important is that, in the cases envisaged, the choice that theoretically arises is not between honouring the international commitments of the State and safeguarding a superior interest of the State in question. The grave and imminent danger which determines the action committed is a personal danger to the State organs carrying out the action, and not a danger to the life of the State itself or to one of its vital interests. In our opinion, these cases should therefore be classified under the heading of situations of *force majeure*, and it is under the present section that they will be dealt with.

104. It should be added, to complete the preliminary task of defining these terms, that the expression "fortuitous event" ("*cas fortuit*", "*sluchay*", "*Zufall*", "*caso fortuito*", etc.), when not wrongly used as a mere synonym of "*force majeure*", is normally used to describe an unforeseen situation which makes it impossible for the State organ taking the action to act otherwise than contrary to an international obligation of the State, but at the same time, impossible for it to realize that it is engaging in conduct different from that required by an international obligation of the State. This is the case, for example, when because of fog a frontier guard, despite precautions which have been taken, finds himself on foreign territory without realizing it. It is also the case, for instance, when a storm and its effects on an aircraft's equipment cause the pilot to enter the airspace of another State without realizing the fact.[212]

105. One final point must be made: the fact that we have so far mentioned various situations advanced as possible cases of *force majeure* does not mean that in our opinion each of them is definitely to be regarded as a circumstance precluding the wrongfulness of the State act in question. Only a critical analysis of situations actually revealed by State practice will enable us to establish when and in what conditions the wrongfulness of an act of a State is precluded with real justification.

106. Having said that, we shall now embark on a thorough investigation of our subject, beginning with the most important hypothesis, that of *force majeure*. In the light of the above considerations, we shall reserve this term for cases in which the State organ (or, obviously, any other person whose conduct is attributable to the State under articles 5 to 9 of the draft articles on State responsibility)[213] is placed by an external circumstance in a situation which makes it *impossible* for it to act otherwise than it does, although it realizes that it is engaging in conduct not in conformity with what is required by an international obligation incumbent on its State. In this connection, we have also shown that this hypothesis could arise in two separate forms: that of a real *absolute* impossibility of acting otherwise, and that of a *relative* impossibility, i.e., a situation in which the State organ could theoretically comply with the obligation but at the cost of a sacrifice that could not reasonably be required of it (for example, by jeopardizing its life or that of the persons entrusted to it). In the first case, the conduct in question is entirely *involuntary*; in the second, the will of the organ exists *in theory* but in practice is nullified by a perilous situation. We shall deal first with the former case, that of *the absolute impossibility of fulfilling the international obligation.*

107. The external factor that makes it impossible for the State to act in conformity with its obligation may be a *natural* event, such as a catastrophe or natural disaster of any kind.[214] But this external factor may also be attributable to human action, loss of sovereignty, or quite simply loss of control over a portion of State territory, for example.[215] This same factor may have the effect of rendering the performance of the international obligation *definitively* impossible,[216] but it may also have the effect of rendering it only *temporarily* impossible;[217] it may prevent the State from honouring an obligation "*to do*"[218] or an obligation "*not to do*".[219] In short, all kinds of

[212] Unlike what happens in cases of *force majeure*, where the State organ taking the action is aware of breaching an international obligation but does so against its will, in a case of "fortuitous event" the organ in question acts of its own free will but is not aware of doing so in breach of an international obligation.

[213] See footnote 2 above.

[214] We have already cited examples (in para. 103 above): atmospheric disturbance resulting in a State aircraft being diverted from its normal course, against the will of the pilot, into the airspace of another State; an earthquake destroying property (a work of art, for example) which a State is required to have over or restore to another State. There are also cases such as a flood or drought destroying products to be delivered to a foreign State under a trade agreement.

[215] For instance, where a State has undertaken to hand over to another State products to come from the soil or subsoil of a specific region and this region has subsequently passed into the sovereignty of a third State, or been devastated by military operations carried out by a third State, or been removed from the control of the State by an insurrectionary movement, etc.

[216] This would be the case, for example, in the event of the total destruction of property to be handed over to a given State, or the perpetration of a frontier violation.

[217] This would be the case if the unforeseen destruction of the means of transport to be used made it temporarily impossible to transfer particular foodstuffs to another State.

[218] This would be so if an earthquake destroyed property to be handed over to another State, or if an insurrection removed part of a State's territory from the control of that State and thus prevented it, in that part of its territory, from adopting the necessary measures to protect foreign agents or other aliens.

[219] A sufficient example is that already given of damage or a storm driving a State aircraft into foreign airspace.

circumstances may operate, but they all have one aspect in common: the State organs are involuntarily placed in a situation which makes it *materially impossible* for them to engage in conduct in conformity with the requirements of an international obligation of their State. The question therefore arises whether an act of the State committed in such conditions should or should not be considered as effecting a "breach" of the obligation in question, in other words, as constituting an internationally wrongful act giving rise to responsibility. We propose to seek the answers given to this specific question in State practice, international jurisprudence and the scholarly works of publicists.[220] Needless to say, our analysis will take into consideration those cases, and only those cases, which, in the light of the observations made so far, we feel can be characterized as cases of *force majeure*; we shall not allow ourselves to be influenced by the differing terminology which may have been used in connection with them.

108. Let us first consider the positions taken by States at international codification conferences and, in the first instance, in the preparatory work of the Conference for Codification of International Law (The Hague, 1930). This does not give us as much help on the present point as we have found it to do on other matters. That is because the request for information submitted to States by the Preparatory Committee of the Conference did not specifically raise the question whether or not *force majeure* was a circumstance precluding the wrongfulness of an act of the State or entailing responsibility engendered by such an act in some other way. It is interesting to note, however, that the Swiss Government, in its particularly detailed reply on Point V of the request for information, concerning State responsibility for acts of the executive organ, was careful to specify that the two reservations should be made regarding that responsibility. In the first place, it said that an exception should be made where the act of the State was committed in exercise of the right of "lawful defence" against unjust aggression; and in the second place:

> An exception to international responsibility should also be allowed *in the case of purely fortuitous occurrences or cases of* vis major,* it being understood that the State might nevertheless be held responsible if the fortuitous occurrence or *vis major* were preceded by a fault, in the absence of which no damage would have been caused to a third State in the person or property of its nationals.[221]

A similar view emerged, either explicitly or implicitly, from the positions taken by other Governments in connection with cases in which the State might incur international responsibility through having failed to forestall acts of private individuals which caused damage to foreign States or to the person or property of their nationals. A study of Governments' replies to the request for information and of representatives' statements in the Third Committee of the Conference reveals that the disagreement which subsisted as to whether, with regard to aliens, the State ought to adopt preventive measures equal to or in some cases much stronger than those it had adopted for the protection of its own nationals, or "normal" preventive measures, etc., did not prevent the advocates of the two opposed views from agreeing that the State should not bear any responsibility where reasons of *force majeure* had rendered it absolutely impossible for the State to take the requisite preventive measures.[222]

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[220] The situations describable as cases of *force majeure* may be relevant for reasons other than the possibility that they preclude the wrongfulness of an act of the State—for instance, because they satisfy a condition giving rise to a specific obligation of the State. There are international agreements which link the creation of international obligations "to do" to the existence of a situation of *force majeure*. For example, the Agreement on Co-operation with regard to Maritime Merchant Shipping, done at Budapest on 3 December 1971, requires the State to assist foreign vessels driven towards its ports by bad weather. Similarly, the Agreement on the Rescue of Astronauts, of 22 April 1968, imposes on the State on whose territory the astronauts land unintentionally an obligation to assist them and return them promptly to the representatives of the launching State. Art. 40 of the 1961 Vienna Convention on Diplomatic Relations requires the State on whose territory a foreign diplomatic agent proceeding to a third State finds himself for reasons of *force majeure* to accord certain immunities to that agent. In other cases, *force majeure* may be at the origin of an obligation of the State "not to do"—for instance, an obligation not to confiscate enemy vessels remaining in its ports for reasons of *force majeure* after hostilities have broken out: art. 2 of the Convention (VI) Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, done at The Hague on 18 October 1907. (See Secretariat Survey, paras. 5 *et seq.*, 81, 99 and 100.) Clearly, however, these provisions must not be taken as evidence that *force majeure* is to be regarded as a circumstance precluding the wrongfulness of an act of the State. As we shall see, they can do no more than provide indirect confirmation that such is the case.

[221] League of Nations, *Bases of Discussion* ... (*op. cit.*), p. 241. Reproduced in Secretariat Survey, para. 61.

[222] See the replies to Points V, No. 1, (*c*) and VII, (*a*) and (*b*), of the list of points submitted to States by the Preparatory Committee of the Conference: League of Nations, *Bases of Discussion* ... (*op. cit.*), pp. 62 *et seq.* and pp. 93 *et seq.*, and *Supplement to vol. III* (*op. cit.*), pp. 13, 14, 18 and 19. For representatives' statements in the Third Committee of the Conference on Bases of Discussion Nos. 10, 17 and 18, see: League of Nations, *Acts of the Conference for the Codification of International Law* (The Hague, 13 March–12 April, 1930), *vol. IV. Summary Records of the Third Committee* (C.351(*c*).M.145(*c*).1930.V), pp. 143 *et seq.* and pp. 185 *et seq.* For a detailed analysis of these replies and statements, see Secretariat Survey, paras. 69 and 70.

It should be noted in particular that the representative of China, in criticizing the view that a State should be held responsible where it had omitted to take "the measures which should normally have been taken", remarked:

> "... this is a test to which no country could subject itself. Take even the most highly organized countries in point of peace and order; even in those countries there must be times of stress—whether human, whether of *force majeure**—there must be abnormal times in which it cannot be expected to take measures such as would be taken normally." (League of Nations, *Acts of the Conference* ... (*op. cit.*), p. 186.)

The representative of Finland, who spoke on behalf of Latvia and Estonia as well, criticized for different reasons the proposal by a sub-committee of the Conference that the State should be held responsible "if it has manifestly failed to take such preventive or

109. The positions taken by States in the preparatory work of the 1969 Vienna Convention on the Law of Treaties[223] are even more enlightening for our present purposes. Article 58 of the draft articles adopted in 1966 by the Commission stipulated that the permanent disappearance or destruction of an object indispensable for the execution of a treaty could be invoked as a ground for terminating the treaty or suspending its operation if it rendered that execution permanently or temporarily impossible. The Commission specified in the commentary to that article:

> The Commission appreciated that such cases might be regarded simply as cases where *force majeure could be pleaded as a defence exonerating a party from liability** for non-performance of the treaty. But it considered that, when there is a continuing impossibility of performing recurring obligations of a treaty, it is desirable to recognize, *as part of the law of treaties*, that the operation of a treaty may be suspended temporarily.[224]

Thus, as early as 1966, the Commission regarded *force majeure*, in the sense of a *real impossibility* of fulfilling an obligation, as a circumstance precluding the responsibility of the State. What is more, at least in the case of *force majeure* represented by the destruction or disappearance of the object indispensable for the fulfilment of the obligation, it imputed this preclusion of responsibility to the termination or the suspension of the obligation. It is therefore clear that in the opinion of the Commission, since the international obligation in question had ceased to operate in that particular case, there was no responsibility because there was no internationally wrongful act.

110. At the United Nations Conference on the Law of Treaties, Mexico submitted a proposal to extend the scope of article 58 to all situations in which the result of the *force majeure* would be to render impossible the fulfilment of the obligation.[225] In support of this proposal, the representative of Mexico asserted that article 58 of the Commission's draft referred only to a particular and, in his view, rare case of impossibility of performance of a treaty for reasons of *force majeure*, whereas there were many other more frequent cases, such as the impossibility of delivering a particular article owing to a strike, the closing of a port, or a war, or the impossibility of making certain payments because of serious financial difficulties, etc.[226] Some of these examples, particularly the last, were such as to give rise to doubts. Many representatives were not prepared to regard them in all circumstances as cases of *absolute impossibility* of fulfilling the obligation laid down by the treaty, cases which would justify not only preclusion of the wrongfulness of conduct by a State not in conformity with the requirements of the treaty, but also the right of invoking them as grounds for terminating or suspending the treaty. In their view, that would seriously have endangered the security of treaty relations among States.[227] As a result, the Mexican proposal was eventually withdrawn and the Conference, in article 61, paragraph 1 of the text it adopted, stipulated as the sole ground for terminating or suspending a treaty the case of the "permanent disappearance or destruction of an object indispensable for the execution of the treaty". It seems none the less certain, however, that the discussions which took place on this point revealed a general belief that the impossibility—at the very least, the *material and absolute impossibility*—of complying with a treaty obligation constituted a condition of *force majeure* precluding the wrongfulness of the conduct adopted in the case in question by the State having the obligation.

111. There are innumerable practical cases in which States have invoked *force majeure* as a circumstance which they consider justifies their engaging in conduct not in conformity with that required of them by an

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punitive measures as in view of the circumstances might properly be expected of it". Such a solution, he said, ignored:

> "... one special case—namely that of a State which is not by accident placed in an irregular position, but which intentionally applies at home a general régime incompatible with the proper application of preventive or punitive measures.
>
> "In such a case, there would be no question of *force majeure*,* nor would the circumstances be abnormal; the whole structure of the State would be such that foreigners might not be able to claim proper measures of protection." (*Ibid.*, p. 185.)

The supporters of the two divergent views therefore agreed that in cases of *force majeure*, and particularly when this expression denotes situations in which it is absolutely impossible to engage in a specific conduct, the State does not incur responsibility.

[223] For an analysis of this preparatory work, see Secretariat Survey, paras. 77–80.

[224] *Yearbook ... 1966*, vol. II, p. 256, document A/6309/Rev.1, part 2, chap. II, para. (3) of the commentary to article 58.

[225] The proposal first provided that a country might invoke *force majeure* as ground for terminating a treaty when the result of the *force majeure* was to render permanently impossible the fulfilment of its obligations under the treaty. It then provided that *force majeure* might be invoked only as ground for suspending the operation of the treaty when impossibility of fulfilment was purely temporary. (*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), pp. 182–183, document A/CONF.39/14, para. 531 (*a*).)

[226] The representative of Mexico therefore concluded that:

> "*Force majeure* was a well-defined notion in law: the principle that 'no person is required to do the impossible' was both a universal rule of international law and a question of common sense. Its application had not caused courts any special difficulties and it was unnecessary to draw up a list of the situations covered by that rule.
>
> "According to paragraph (3) of the International Law Commission's commentary to the article, such cases might be regarded simply as cases in which *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance of the treaty. But not to incur responsibility for an act or its omission was to have the right of performance or non-performance of an act. *If in the case of* force majeure *a State did not incur any responsibility, that was because so long as* force majeure *lasted, the treaty must be considered suspended.*" (*Ibid., First Session, Summary records of the plenary meetings and the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), pp. 361–362, 62nd meeting of the Committee of the Whole, paras. 3–4.)

[227] See Secretariat Survey, para. 79.

international obligation incumbent on them. But in few of these cases have they pleaded a circumstance of *force majeure* consisting unquestionably of an *absolute impossibility* of engaging in different conduct. This is easy to understand: while a State frequently finds itself in a situation in which it has even great difficulty in engaging in conduct in conformity with an international obligation in force for it, it is uncommon for it to be in a real and *insurmountable situation of being materially unable* to act in conformity with the obligation. Further, if such a case occurred and if the impossibility were obvious, it is unlikely that the State towards which the obligation existed would persist in arguing that the obligation had been breached and in invoking the consequences. What is beyond any doubt, however, is that when a party was able to prove the existence of a situation of "absolute" *force majeure*, the legal effects of that situation were not contested by the other party to the dispute. If there was contention, it generally centred on the factual existence of the situation invoked, and not on its validity as a circumstance precluding the wrongfulness of an act of the State in the event that its existence was established.

112. "Absolute" impossibility of fulfilling an international obligation sometimes occurs in relation to an *obligation "not to do"*, in other words, to refrain from committing a certain act. Among examples of a situation of this kind, we mentioned above[228] the one which springs most readily to mind, that of a State aircraft which, because of damage, loss of control of the aircraft or a storm, is forced into the airspace of another State without the authorization of the latter and despite the pilot's efforts to prevent it. The recognition in such a case of a circumstance precluding the wrongfulness of the act is clearly apparent from an exchange of notes between the Yugoslav Government and that of the United States of America which took place in 1946 following certain cases of United States aircraft entering the airspace of Yugoslavia. In a note dated 30 August 1946 from the Yugoslav Chargé d'Affaires to the American Department of State, the United States Government was asked "to prevent these flights, *except in the case of emergency or bad weather*,* for which arrangements could be made by agreement between America and Yugoslav authorities".[229] In his reply of 3 September 1946, the Acting Secretary of State of the United States stated:

> The Yugoslav Government has already received assurances from the United States Government that the United States planes will not cross Yugoslav territory without prior clearance from Yugoslav authorities, *except when forced to do so by circumstances over which there is not control, such as bad weather, loss of direction, and mechanical trouble.**[230]

113. The principle relating to a maritime situation corresponding to the aerial situation envisaged in the preceding paragraph has even been the subject of international codification. After affirming the right of innocent passage of ships of all States through the territorial sea of a foreign State, article 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone provides in paragraph 3 that:

> Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.[231]

Moreover, article 18, paragraph 2 of the "Informal Composite Negotiating Text/Revision 1" drawn up in April 1979 by the President of the Third United Nations Conference on the Law of the Sea and by the chairmen of the main committees of the Conference provides that:

> ... [innocent] passage [through the territorial sea] includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure or distress** or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.[232]

There are also other conventions in which *force majeure* is treated as a circumstance capable of precluding the application of an obligation "not to do" and, consequently, the wrongfulness of an act of the State not in conformity with such an obligation. Article

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[228] See para. 103.

[229] United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XV, No. 376 (15 September 1946), p. 502. Reproduced in Secretariat Survey, para. 144.

[230] *Ibid.*, p. 504; Secretariat Survey, para. 145.

We have already mentioned (see footnote 220 above) that situations describable as cases of *force majeure* might be relevant for reasons other than the possibility that they preclude the wrongfulness of an act of the State. We pointed out that in situations of *force majeure* a State may be regarded as having an obligation in respect of the treatment of aliens, or particularly foreign aircraft or vessels, such as an obligation not to punish the pilot of an aircraft which for reasons of *force majeure* has entered the airspace of the State, not to destroy such an aircraft in flight, to assist it, etc. As we said, the positions taken by Governments in such circumstances can provide only indirect confirmation, on occasions, of the validity of *force majeure* as a circumstance precluding the wrongfulness of an act of the State. In our view, an example of such a position is to be found in the Memorial submitted to the International Court of Justice by the United States of America on 2 December 1958 in the case of the Aerial Incident of 27 July 1955. The Memorial contains the following passage:

> "The case of an aircraft off its proper course in the air is similar to a ship off its course on the sea. It is, therefore, assimilated to the cases at sea. *Particularly relevant are cases of an act of God or force majeure driving a ship off its proper course.** The law and practice have long been established at sea that a ship in such a plight should be aided, not ensnared or held for piratical aims of salvage, ransom, or enslavement of the crew. The ancient laws of the sea are pertinent." (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, p. 217.)

As a logical consequence of this reasoning we are led inevitably to conclude that, in the opinion of the complainant Governments, if the aircraft that had entered foreign airspace for reasons of *force majeure* had been a State aircraft, its involuntary intrusion could not have been regarded as an internationally wrongful act.

[231] United Nations, *Treaty Series*, vol. 516, p. 213. It is interesting to note that in the English text the term "*relache forcée*" has been rendered by "*force majeure*". This term was clearly intended to describe a situation in which it was absolutely impossible to avoid stopping or anchoring, whereas the term "distress" referred instead to one of those situations of *relative* impossibility which we shall deal with later.

[232] A/CONF.62/WP.10/Rev.1, p. 27.

7, paragraph 1 of the Convention of Transit Trade of Land-Locked States, done at New York on 8 July 1965, provides that:

> Except in *cases of force majeure* all measures shall be taken by Contracting States to avoid delays in or restrictions on traffic in transit.[233]

It is hardly necessary to point out that such provisions of treaty law in no way constitute an exception to some other principle of general international law; they are evidently none other than express confirmation, in relation to a particular case, of a general principle of customary international law.

114. The "absolute" impossibility of fulfilling an international obligation may also occur in connection with an *obligation "to do"*, to engage in conduct of commission. We gave an example above:[234] the case of the destruction of goods or property which the State was required to deliver or restore to a foreign State. International practice provides a typical example of an international dispute concerning the existence or the non-existence of a situation in which it was materially impossible to fulfill an obligation under the Treaty of Versailles in respect of delivery of goods. The treaty, amended on this specific point by a subsequent agreement, required Germany to deliver a certain quantity of coal annually to France. In 1920, however, the amount of coal supplied by Germany was considerably less than that provided for in the instruments in force. Reporting the situation to the French Parliament and announcing his intention of taking appropriate measures, the President of the Council and Minister for Foreign Affairs, Mr. A. Millerand, stated on 6 February 1920:

> Moreover, it is impossible for Germany to claim that, if it had not fulfilled its commitment, it is because *it would have been materially impossible for it to do so.** Precise information made available to us shows that, during this month of January, Germany consumed over eight million tons of coal for a population of 60 million, whereas during the same month, for a population of 40 million, France did not have even half that amount: it had only 3,250,000 tons. In other words, every German had more coal for heating than every Frenchman. We cannot accept such a situation.[235]

In emphasizing later that Germany could not, in that particular case, "shelter behind a *de facto* impossibility", Mr. Millerand was implicitly recognizing, *a contrario*, that if it really had been "materially impossible" for Germany to fulfil its commitment, there would have been no breach of the obligation.[236]

115. As a concrete example of the impossibility of fulfilling an obligation to restore property for reasons of *force majeure*, we might refer to what happened in connection with the application of articles 3 and 4 of the Treaty of Sèvres. These provisions gave the Bulgarian minorities residing in the territories of the Ottoman Empire ceded to Greece the right to choose Bulgarian nationality. In that event they had to leave Greek territory, but remained the owners of any immovable property they possessed in Greece and were entitled to return there. At one time, many persons who had departed to Bulgaria in those circumstances exercised their right to re-enter Greece and return to their properties. In the meantime, however, large numbers of Greek refugees arrived in Greece from Turkey, and the Greek Government had no other possibility than to settle them in the area previously inhabited by the Bulgarians and on the lands of those who had left Greece when they took Bulgarian nationality. There were incidents on the frontier between the two countries, and a League of Nations commission of enquiry was set up. In its report, it expressed the opinion that:

> ... under the pressure of circumstances, the Greek Government employed this land [the ex-Bulgarian district] to settle refugees from Turkey. To oust these refugees now in order to permit the return of the former owners would be impossible.[237]

The commission therefore proposed that the Greek Government should compensate the Bulgarian nationals who had been deprived of their property;[238] the Bulgarian representative to the Council of the League of Nations endorsed the commission's proposal and recognized that the application of articles 3 and 4 of the Treaty of Sèvres had been rendered impossible by events.[239]

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[233] United Nations, *Treaty Series*, vol. 597, p. 52.

[234] See para. 103 above.

[235] See A.C. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1962), vol. I, p. 128.

[236] In connection with the effects of *force majeure* on obligations to deliver certain products, it may be recalled that a number of commodity agreements give the States parties to these agreements the possibility of withdrawing from the agreement or suspending its operation in respect of themselves if circumstances beyond their control prevent them from fulfilling the obligations of the agreement. See, for instance, the 1956 (modified in 1958) and 1963 International Olive Oil Agreements (art. 39, para. 2(*a*)) and the other agreements cited in Secretariat Survey, paras. 54–56.

[237] Report of the Commission of Enquiry into the Incidents on the Frontier between Bulgaria and Greece (League of Nations, *Official Journal*, 7th year, No. 2 (February 1926), annex 815, pp. 208–209); Secretariat Survey, paras. 124–125.

[238] *Ibid.*

[239] *Ibid.*, p. 111. This case appears to us to be a good example of the application of the principle with which we are concerned, although we consider that to regard it as a genuine case of the "material impossibility" of fulfilling an obligation might exaggerate its significance somewhat. We may add that the State having the obligation had unquestionably contributed by its action to creating the situation of impossibility of fulfilment, and this obviously led the Commission of Enquiry to propose that the dispute be settled by compensating the injured persons.

The problem of the repercussions of *force majeure* on an obligation to restore property was also discussed by the Permanent Court of Arbitration in its award on 24/27 July 1956 in the Ottoman Empire Lighthouse Concession case. The Court rejected Claim No. 15, by France, for compensation for the French company which owned a lighthouse requisitioned by the Greek Government in 1915. The lighthouse had been destroyed during the First World War by Turkish bombardment; because of this occurrence, which the Court deemed to be a case of *force majeure*, the Greek Government had found it impossible to restore the lighthouse to the state it was in before the requisition. Secretariat Survey, para. 484.

116. The role of *force majeure* as a circumstance precluding the wrongfulness of conduct not in conformity with the requirements of an international obligation has received special consideration in connection with failure to *pay a State debt*, both at conferences for the conclusion of major multilateral conventions and in connection with individual disputes. In the work of the 1907 Conference for the revision of the system of arbitration established by the 1899 Hague Convention for the Pacific Settlement of International Disputes, the representative of Haiti stated that disputes concerning the appreciation of circumstances of *force majeure* putting a State into a condition momentarily of being unable to pay a debt should come within the jurisdiction of the arbitration court. He gave the following reason for this:

> For the circumstances of *force majeure, that is to say, of the facts independent of the will of man, may, in paralysing the will to do, frequently prevent the execution of obligations.**
>
> ... I cannot imagine a great creditor nation which, in virtue of the arbitral decision, would forget to consider as "of bad faith" the debtor State unable to meet its obligations as the result, say, of an inundation, of a volcanic eruption, of failure of crops, etc. The testimony of contemporaneous history is against any such admission....[240]

The representative of Romania challenged his Haitian colleague's assertion that these situations of *force majeure* were frequent and therefore needed to be mentioned specifically in the revised Convention.[241] Apart from that, however, no one disputed the principle that when a genuine situation of *force majeure* occurred, i.e. a situation in which it was *absolutely impossible* to fulfil the obligation, the State rendered materially insolvent should not be considered "in breach" of its obligation.

117. Failure to pay a public debt of the State has led to many international disputes in which *force majeure* has been invoked by the debtor State as a circumstance justifying its conduct. It might of course be pointed out that the obligation involved in that conduct was actually an obligation of internal public law rather than an international obligation proper. There was a case, however, in which failure to make due payment gave rise to an international dispute; the State of which the creditors were nationals took steps for their diplomatic protection and, with the agreement of the debtor country, the dispute was brought before the Permanent Court of International Justice. In its Judgement, the Court treated *force majeure* as a general principle which was valid in relation to any system of law, and not as a principle defined by a specific internal legal order. Accordingly, its Judgment on the question of *force majeure* constitutes a precedent which certainly applies in determining the validity of *force majeure* as a circumstance precluding the wrongfulness of a State's conduct which is not in conformity with an international obligation.

118. In the *case concerning the payment of various Serbian loans issued in France*, the French Government, which had taken proceedings on behalf of its creditor nationals, maintained that the Kingdom of the Serbs, Croats and Slovenes was obliged to pay the sums due to the creditors of the Serbian loans on the basis of the gold franc, whereas the Kingdom maintained that it could pay those sums on the basis of the paper franc. To support its argument, the Serb–Croat–Slovene State first invoked the argument of equity, namely, that the treatment of Serbia's French creditors had never been any different from the treatment of French creditors by France itself. It then invoked an argument of law, that of the existence of a circumstance of *force majeure* consisting in the "material impossibility" of making a payment in gold francs. In his statement to the Court on 22 May 1929, Mr. Devèze, counsel for the Serb–Croat–Slovene State, asserted that:

> ... *force majeure* ... frees the debtor of his obligation by reason of the impossibility of his performing it, when this impossibility results from an *unforeseen circumstance for which he is not responsible; the typical situation of* force majeure *being what the English call an act of God.**[242]

As to the specific case referred to the Court for judgement, the situation of *force majeure*, according to Mr. Devèze, had been caused by the war. He therefore invited the Court to consider whether:

> ... the circumstances show that Serbia is seeking to obtain an unlawful gain or whether on the contrary it is governed by a force beyond its control, the *force majeure* of a war, in resisting a claim that the French Government itself would be unable to accept if an attempt were made to impose a similar burden on it ...[243]

In its Judgment handed down on 12 July 1929, the Court ruled as follows:

> *Force majeure*—It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State, although they may present equities which doubtless will receive appropriate consideration in the negotiations and—if resorted to—the arbitral determination for which article II of the Special Agreement provides.
>
> It is contended that under the operation of the forced currency régime of France, pursuant to the law of August 5th, 1914, payment in gold francs, that is, in specie, became *impossible.** But if the loan contracts be deemed to refer to the gold franc as a standard of value, *payments of the equivalent amount of francs, calculated on that basis, could still be made.** Thus, when the Treaty of Versailles became effective, it might be said that "gold francs", as stipulated in article 262, of the weight and fineness as

[240] See J.B. Scott, *The Proceedings of The Hague Peace Conference, The Conference of 1907*, vol. II (New York, Oxford University Press, 1921), pp. 296; Secretariat Survey, para. 105.

[241] "It has been said that there are cases of *force majeure*, of great economic crisis that might, at a given moment, shake the solvency of the State.... such eventualities are too rare to make it necessary to foresee their consequences in international stipulations." (*Ibid.*, p. 299 and p. 76 respectively; Secretariat Survey, para. 105.)

[242] Serbian Loans, *P.C.I.J., Series C, No. 16*(III), p. 211 [translation by the Secretariat]; Secretariat Survey, para. 266.

[243] *Ibid.*, pp. 211–212 [translation by the Secretariat]; Secretariat Survey, para. 266.

defined by law on January 1st, 1914, were no longer obtainable, and have not since been obtainable as gold coins *in specie. But it could hardly be said that for this reason the obligation** of the Treaty was discharged in this respect on the ground of *impossibility of performance.** That is the case of a treaty between States, and this is a case of loan contracts between a State and private persons or lenders. But, viewing the question, not as one of the source of basis of the original obligation, but as one of impossibility of performance, it appears to be quite as impossible to obtain "gold francs" of the sort stipulated in article 262 of the Treaty of Versailles as it is to obtain gold francs of the sort deemed to be required by the Serbian loan contracts.[244]

In short, the Court took the view that the war had undoubtedly made it difficult for Serbia to perform its obligation, but had not placed it in a situation of "absolute impossibility" with regard to so doing. The Court pointed out that the content of the contractual obligation was not to pay in gold francs but to pay at its discretion either the amount of its debt in gold francs or the equivalent in paper francs of the sum as calculated in gold francs. There was accordingly no material impossibility of performing the obligation in question. But the Court implicitly acknowledged—and this is what is relevant for our purposes—that if the obligation to pay *in specie* had been explicitly provided for, there would have been *a genuine material and absolute impossibility of performance*, and in that case non-performance could not have constituted a "breach" of that obligation.

119. The Permanent Court of International Justice took the same attitude in the case concerning the payment in gold of the *Brazilian loans* issued in France. Entering the lists once again in support of its nationals, the French Government maintained that the loans contracted by the Brazilian State should be paid on the basis of their gold franc amount, whereas the Brazilian Government maintained that they should be paid on the basis of their paper franc amount. In that connection, the Government of Brazil too referred to the "*force majeure*" and "impossibility" which it considered prevented it from paying the sum due as calculated in gold francs. In its case dated 2 July 1928, it stated:

When Brazil contracted these loans in 1909, 1910 and 1911, the régime applicable was that of the simple *legal currency*, the debtor being in a position to obtain from the Bank of France the *gold francs* he need to settle his obligations.

As a result of the subsequent institution of the *forced currency régime*, under which the *paper franc* continues to have the same status as legal tender for the payment of debts in currency, the debtor found himself unable to obtain the gold francs needed for the service of the contracts from the issuing bank.

This change in the legal regulations governing French currency constitutes a case of *force majeure*, of the kind called in doctrine a *sovereign act* (*fait de prince*); hence the impossibility for the debtor of satisfying the obligation entered into under the strict terms of the contract.

...

The foregoing considerations lead to the following conclusions:

...

4) The inconvertibility of the paper franc into gold francs, under the law of 1914, must be considered a case of *force majeure* (*fait de prince*), which has made payment in the agreed specie impossible.

5) Given the impossibility of obtaining gold francs, for reasons beyond its control, the debtor may settle the debt by paying, in paper francs at the legal currency rate, as many units as he owed in gold francs, the creditor not having the right to demand a greater number of francs than that shown in the certificates of indebtedness (Civil Code, article 1895).[245]

The French Government's reply to this in its counter-case of 1 October 1928 was as follows;

A. *The law on the mandatory exchange of Bank of France notes does not constitute a case of* force majeure.

It should be noted, first, that a circumstance that does not prevent the performance of an obligation but merely renders its performance more difficult or more burdensome does not constitute a case of *force majeure*. This is true of the law providing for the forced currency of banknotes of the Bank of France. The Brazilian Government can of course no longer obtain from the Bank of France the old French gold coins which were in circulation before 1914 and were abolished by the law of 25 June 1928. But that does not prevent it from obtaining anywhere in the world the amount of gold that it needs to service its loans. Still less does this prevent it, in the absence of gold, from paying its creditors the equivalent value of this gold, on the date of payment, in the currency of the place where the payment is effected. The gold payment clause in fact generally results in payment in the currency of the place of payment but calculated in terms of gold.[246]

In its Judgment of 12 July 1929, the Permanent Court of International Justice endorsed the French Government's argument on that point, stating:

"*Force majeure*".—The economic dislocation caused by the Great War has not, in legal principle, released the Brazilian Government from its obligations. As for gold payments, *there is no impossibility because of inability to obtain gold coins*,* if the promise be regarded as one for the payment of gold value. The equivalent in gold value is obtainable.[247]

This means that the French Government and the Court did not deny the soundness of the argument that the existence of a circumstance making the performance of the obligation "absolutely impossible" precluded the wrongfulness of conduct not in conformity with the requirements of the obligation; on the contrary, by implication but beyond any doubt, they recognized it. All they failed to recognize was that such an absolute impossibility had existed in the case in question.

120. The effect to be attributed to circumstances making it "impossible" for a State to fulfil its obligation to repay a debt to aliens was again the subject of a

[244] *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, Nos. 20/21, Case No. 41*, pp. 39–40; Secretariat Survey, para. 268.

[245] *Brazilian Loans, P.C.I.J., Series C, No. 16* (IV), pp. 153 and 158. See also the Brazilian counter-case of 30 September 1928 (*ibid.*, p. 240) [translation by the Secretariat]; Secretariat Survey, para. 271.

[246] *Ibid.*, p. 255 [translation by the Secretariat]. See also the case of the French Government dated 29 June 1928 (*ibid.*, p. 186) and the oral statement by the counsel, Mr. Montel (*ibid.*, p. 109) [translation by the Secretariat]; Secretariat Survey, para. 272.

[247] *Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, Nos. 20/21*, p. 120 [translation by the Secretariat]; Secretariat Survey, para. 273.

dispute before the Permanent Court of International Justice, between the Greek Government and the Belgian Government in the case of the *Société Commerciale de Belgique*. The Greek Government argued that the reason why it had not yet complied with an arbitral award of internal law requiring it to pay a sum of money to the Belgian company was not its unwillingness to do so but solely impossibility arising out of the country's budgetary and monetary situation. In its rejoinder of 15 December 1938, the Greek Government stated:

> In these circumstances, it is evident that it is impossible for the Hellenic Government, without jeopardizing the country's economic existence and the normal operation of public services, to make the payments and effect the transfer of currency that would be entailed by the full execution of the award . . .[248]

Also, in his oral statement of 16 May 1939, counsel for the Greek Government, Mr. Youpis, confirmed the Government's intention of complying with the arbitral award and the fact that, if it had not complied with it in full and immediately, it was because of its budgetary situation and its lack of foreign currency. Mr. Youpis then said:

> For these reasons, it is *impossible** for the Hellenic Government to *execute the award without delay and in full;** they constitute a case of *force majeure* which exonerates the Government from all responsibility.[249]

In speaking of "*force majeure*" and the "impossibility" of engaging in the conduct required by the obligation, the pleader for the Greek Government probably did not have in mind an actual *absolute impossibility*, but rather an impossibility of engaging in such conduct without thereby injuring a fundamental interest of the State, i.e. a situation which, in our opinion, might be subsumed under the hypothesis of a state of necessity rather than under that of *force majeure*.[250] That having been said, the statement in defence of the Greek argument might suggest that in his opinion an "absolute impossibility" of paying, if established, would in itself relieve the debtor State of its obligation. It was primarily on that point that the counsel for the Belgian Government, Mr. Sand, considered it necessary to oppose the view which he thought he detected in his adversary's statements. Replying to a question from Judge Anzilotti, Mr. Sand acknowledged that "if the resources needed to pay are lacking, there is no fault calling for international sanction".[251] He pointed out, however, that "incapacity to pay can entail only a full or partial suspension of payment, which may moreover be modified and terminated, but it will not entail release from the debt, even in part".[252] As to the concrete situation constituting the subject of the dispute, he concluded as follows in his statement of 19 May 1939:

> . . . *the factual impediment resulting from the financial situation of a State does not, in the present case, constitute a situation of "force majeure".**
>
> In fact, *in the case of obligations relating to fungible things,** such as a sum of money, *there is never "force majeure",** there can only be a more of less prolonged state of insolvency which does not affect the legal obligation to pay *by which the debtor State continues to be bound, for the obstacle is not insurmountable.**
>
> The debt subsists in its entirety, pending the return of more prosperous times.[253]

It can therefore be concluded from this case that, despite their opposition, there was a point of agreement between the two Governments. Both admitted in principle that a genuine situation of *force majeure*—or at least a situation of "absolute impossibility" of performing an obligation—constituted a circumstance precluding the wrongfulness of the non-performance. For one of them, however, a mere temporary—and in its opinion necessarily temporary—impossibility of performing an obligation to pay a sum of money could not constitute a case of *force majeure*. That impossibility could justify non-payment only as long as it subsisted, the obligation then being only suspended.[254]

121. In concluding our consideration of jurisprudence and State practice concerning the question before us, we may observe that *force majeure* has also been invoked as a circumstance precluding the wrongfulness of the conduct of the State in connection with the special category of international obligations to do known as obligations "of prevention": the obligation, for example, to prevent the occurrence in the State's territory of events injurious to foreign States or aliens. Reference may be had on this point to the *Corfu Channel* case and the conflicting views expressed by the majority of the Court in its Judgment of 9 April 1949 and by Judge Krylov in his dissenting opinion. In its Judgment, the Court stated that although it had not been proved that Albania had itself laid the mines in the waters of the Channel, the fact was nonetheless certain that it could not have been ignorant of their existence. Accordingly, Albania at least had the obligation to notify foreign vessels of their presence; it could and should have done so immediately, even if the mines had been laid a short time before the disaster which they caused the British warships. That grave omission therefore involved Albania's international responsibility.[255] Judge Krylov, on the other hand, in

[248] *P.C.I.J., Series C, No. 87*, p. 141 [translation by the Secretariat]; Secretariat Survey, para. 278.

[249] *Ibid.*, p. 190 [translation by the Secretariat]; Secretariat Survey, para. 281. Mr. Youpis cited numerous precedents in support of his argument.

[250] It should be observed that the counsel for the Belgian Government, referring to Mr. Youpis' contention that "a State is not obliged to pay its debt if in order to pay it it would have to jeopardize its essential public services admitted that "so far as that principle is concerned, the Belgian Government would no doubt be in agreement". (*Ibid.*, p. 236 [translation by the Secretariat]; Secretariat Survey, para. 284.)

[251] *Ibid.*, p. 260 [translation by the Secretariat]; Secretariat Survey, para. 285.

[252] *Ibid.*, p. 239; Secretariat Survey, para. 284.

[253] *Ibid.*, p. 270 [translation by the Secretariat] (Secretariat Survey, para. 287).

[254] The Court did not see fit to rule on this point in its Judgment of 15 June 1939.

[255] See *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 23 (Secretariat Survey, para. 303).

his dissenting opinion, denied that Albania had breached the obligation to warn the British ships of the danger they ran. Even if Albania had known of the existence of the minefield before the date of the incident, the Albanian coastal guard service could not, he claimed, have warned the British ships on that day since it had neither the time nor the technical means to do so.[256] The opinion of the majority of the Court and the dissenting opinion therefore differed only on the point of fact of whether it was materially possible for the Albanian authorities to warn the British ships of their danger in time. They agreed, however, that if it had really been "materially" and therefore "absolutely impossible" for Albania to warn the British vessels, that country could not have been charged with any breach of the obligation and, consequently, with any internationally wrongful act.

122. In connection once more with international obligations of prevention, *force majeure* in the sense of "material" and "absolute impossibility" has also been invoked as a justification for non-performance of the obligation to prevent acts injurious to foreign States or aliens by private individuals. One instance of this was the existence of situations in which the State having the obligation had lost control—as a result of an insurrection or for other reasons—over the territory in which the acts in question occurred. Among many examples we might mention the *Prats* case. In 1862, during the American Civil War, an English ship and its cargo were burned by the Confederates. The cargo belonged to a Mexican citizen, Salvador Prats, who brought a claim against the United States of America; this was referred to the Mexico/United States Mixed Commission created under the Convention of 4 July 1868. The American and Mexican Commissioners concurred in dismissing the claim. The United States Commissioner, Mr. Wadsworth, argued that his country's Government could not be required to protect aliens and their property in territory withdrawn from its control and subject to that of the insurgents, so long as that state of affairs continued.[257] The Mexican Commissioner, Mr. Palacio, particularly stressed "possibility" as limiting the obligation of protection and, in that connection, commented as follows:

> ...
>
> Possibility is, indeed, the last limit of all the human obligations; the most stringent and inviolable ones cannot be extended to more. [To exceed] this limit would be equivalent to [attempting] an impossibility, and so the jurists and law writers, in establishing the maxim *ad impossibile nemo tenetur*, have merely been the interpreters of common sense.
>
> ...
>
> Under such a state of things [state of war] it is not in the power of the nation to prevent or to avoid the injuries cause or intended to be caused by the rebels ... and as nobody can be bound to do the impossible, from that very moment the responsibility ceases to exist. There is no responsibility without fault (*culpa*) and it is too well known that there is no fault (*culpa*) in having failed to do what was impossible. The fault is essentially dependent upon the will, but as the will completely disappears before the force, whose action can not be resisted, it is a self-evident result that all the acts done by such force ... can neither involve a fault nor an injury nor a responsibility.
>
> It must not appear strange to speak of violence (*vis major*) when the question is of nations, and even of very powerful ones.[258]

123. Having considered State practice and international jurisprudence, we can now turn to the opinions expressed by the authors of scholarly works and codification drafts on this subject. In the opening paragraphs of the present section we drew attention to the divergencies existing among the various authors as to use of terms and definition of notions. However, despite these points of disagreement, or more often of misunderstanding and confusion, a careful analysis[259] reveals that the authors concerned are practically unanimous that the wrongfulness[260] of the State's conduct is precluded if the State finds it *absolutely impossible* to adopt conduct different from that which it did adopt in a given concrete case and which was not in conformity with its international obligation. Some writers expressly state that an actual impossibility of fulfilling the obligation precludes the wrongfulness of conduct which is not in conformity with the obligation;[261] others—and this virtually amounts to the same thing—stress the need for the conduct to have been "voluntary", "freely adopted", etc., for there to be wrongfulness and, consequently, responsibility.[262]

[256] *Ibid.*, p. 72 (Secretariat Survey, para. 306).

[257] J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. III, p. 2889; Secretariat Survey, para. 341.

[258] *Ibid.*, pp. 2893 *et seq.*; and *ibid.*

Among the many cases in which similar views are expressed, we shall limit ourselves to mentioning the Egerton and Barnett case, the British Claims in the Spanish Zone of Morocco case and the Home Insurance Co. case; Secretariat Study, paras. 354, 412–420, and 426–429 respectively.

Statements of position which are of interest for our present purposes can also be found in the case of German Reparations under article 260 of the Treaty of Versailles, which involved the effect of *force majeure* on Germany's obligation to take possession of certain undertakings or concessions owned by German nationals; Secretariat Survey, paras. 409–411.

[259] See in particular the treatment of the subject in the Secretariat Survey, paras. 487–560.

[260] Some speak of "responsibility" being "precluded"; on this point we shall simply refer the reader to the comments in the "Preliminary considerations" forming section 1 of the present chapter.

[261] To cite a significant example, Cheng (*op. cit.*, p. 223) writes:

> "An unlawful act must be one emanating from the free will of the wrongdoer. *There is no unlawful act** if the event takes place independently of his will and in a manner incontrollable by him, in short if it results from *vis major; for the obligation, the violation of which constitutes an unlawful act, ceases when its observance becomes impossible.**"

See also Ténékidès, *loc. cit.*, p. 785.

[262] For instance, G. Sperduti ("Sulla colpa in diritto internazionale", Istituto di Diritto internazionale e straniero della Università di Milano, *Comunicazioni e studi* (Milan, Giuffrè, 1950), vol. III, p. 103) states that *force majeure* precludes wrongfulness. He adds the following comment:

> "*Force majeure* exerts, with respect to an abstract entity's responsibility ... an influence analogous to violence against the

(Continued on next page.)

Many authors mention *force majeure* as a circumstance precluding wrongfulness and, whatever meaning and scope they may give to that expression, they undoubtedly introduce into *force majeure* the hypothesis of a situation making it absolutely impossible for the State to comply with the obligation.[263] In conclusion, we may note that preclusion of the wrongfulness of the conduct adopted by the State in conditions which make it absolutely impossible for it to fulfil its obligation is implicitly but necessarily accepted by those writers who, while not expressly invoking the notions of "*force majeure*" and "impossibility of performance", exclude the possibility of the State being held responsible in cases in which it cannot be charged not only with any malice but also with any negligence. For negligence can scarcely be attributed to a State whose conduct is adopted in circumstances of absolute impossibility, and independently of its willingness, to act otherwise.[264]

124. If we take a look at *codification drafts*, we shall see that two of them expressly mention *force majeure* as a circumstance precluding in international law either the wrongfulness of an act committed by a State or the international responsibility deriving from that act,[265] namely the drafts prepared by García Amador, for the Commission, and by Graefrath and Steiniger. Article 17, paragraph 1 of the revised preliminary draft submitted to the Commission in 1961 by García Amador reads:

> An act or omission shall not be imputable to the State if it is the consequence of *force majeure* which makes it impossible for the State to perform the international obligation in question and which was not the consequence of an act or omission of its own organs or officials.[266]

Article 10, paragraph 6 of Graefrath's and Steiniger's draft reads:

> Die Entschädigungspflicht entfällt bei höherer Gewalt sowie im Falle eines Staatsnotstandes. (The obligation to indemnify does not apply in cases of *force majeure* or of a state of emergency.)[267]

Even though the term "*force majeure*" seems to be used in these drafts in a wider sense than that of a circumstance making the performance of the obligation materially and *absolutely* impossible,[268] it necessarily includes the situation of absolute impossibility which concerns us at present.

125. We can conclude from the body of considerations set out in the preceding paragraphs that in international law it is a well-established and unanimously recognized principle that conduct not in conformity with what is required by an obligation does not constitute a wrongful act if it was *absolutely impossible* for the subject to act otherwise. One or two further remarks may be useful, however, to clarify the conditions in which this conclusion is justified. First, as long as the situation is of the kind we have dealt with so far, the *force majeure* or *vis major* must, as the English-language writers say, be "irresistible" or "inescapable"; in other words, the State must have no real possibility of avoiding it.

(*Footnote 262 continued.*)

person of organs with regard to the validity of legal instruments; in both cases, in view of the psychological impossibility of determining (*vis absoluta*) or freely determining (*vis compulsiva*) to act as one should, the activity originated by the individual organ either may not be regarded as an activity of the entity or, in any event, because of the unusual circumstances, does not give rise to the consequences ensuing from the activities of the entity" [translation by the Secretariat].

Similarly, Jiménez de Aréchaga (*loc. cit.*, p. 544) writes that "there is no responsibility if a damage ensues independently of the will of the State agent and as a result of *force majeure*". In the opinion of M. Sibert (*Traité de droit international public* (Paris, Dalloz, 1951), vol. II, p. 311), if the injurious act is to be imputed to its author "it must result from his free determination". Similarly, in the view of G. Schwarzenberger ("The fundamental principles of international law", *Recueil des cours ..., 1955-I* (Leyden, Sijthoff, 1956), vol. 87, p. 351 if there is to be responsibility "the illegal act" must be "voluntary". See also Quadri, *op. cit.*, p. 589, and Brownlie, *Principles ...* (*op. cit.*), p. 423.

[263] See, for example, Basdevant, *loc. cit.*, p. 555; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, Sirey, 1939), pp. 62–63; Delbez, *op. cit.*, p. 368; R. Luzzatto, "Responsibilità e colpa in diritto internazionale", *Rivista di diritto internazionale* (Milan), vol. 51, No. 1 (1968), p. 93; D. Ruzié, *Droit international public*, 3rd ed. (Paris, Dalloz, 1978), p. 56; Giuliano, *op. cit.*, p. 601.

Very many authors have referred to "*force majeure*" as a circumstance justifying conduct not in conformity with the State's obligations concerning the treatment of aliens; see Secretariat Survey, paras. 538 *et seq.* The position taken by J. Goebel deserves attention for the following statement: "The concept of *vis major* is a doctrine of municipal law which has been transferred to international jurisprudence to enable a State to escape liability where it otherwise would be responsible." ("The international responsibility of States for injuries sustained by aliens on account of mob violence, insurrections and civil war", *American Journal of International Law* (New York), vol. 8, No. 4 (October 1914), p. 813.)

[264] On the other hand, some authors (Quadri and Sperduti, for example) see no justification for the converse proposition, namely that the requirement that the State's act be committed voluntarily necessarily implies that the State has not been negligent. Some supporters of the argument that *force majeure* is a circumstance precluding wrongfulness are at the same time, like Personnaz, Delbez and Ruzié, supporters of the argument that the absence of "fault" or "negligence" is not sufficient to preclude wrongfulness.

[265] It may be noted that the fact that the other codification drafts do not mention this as a circumstance precluding international wrongfulness should by no means be interpreted as an argument against the validity of "*force majeure*" as a circumstance precluding the wrongfulness of an act of the State. Concerning this, see the analysis in Secretariat Survey, paras. 561 *et seq.*

[266] *Yearbook ... 1961*, vol. II, p. 46, document A/CN.4/134 and Add.1, addendum. Although the wording of this text is open to misunderstanding, it seems clear to us that the concluding part of the sentence can only refer to the occurrence of the circumstance of *force majeure* and not to the commission of the act imputable to the State.

[267] *Loc. cit.*, p. 228.

[268] In the commentary to article 13 of his 1958 preliminary draft (which became article 17 of the revised draft of 1961), García Amador cites examples which show that in his view the concept of *force majeure* includes cases in which there was no real absolute impossibility of the State performing its obligation (*Yearbook ... 1958*, vol. II, pp. 51 *et seq.*, document A/CN.4/111). We have no means of knowing the exact meaning which Graefrath and Steiniger give to the term "*höherer Gewalt*".

126. Secondly, it seems obvious to us that the *force majeure* (by which we continue to mean a situation of "absolute impossibility of performing a given international obligation") must exist at the very moment when the State engages in the conduct which is not in conformity with the obligation. One consequence of this, in cases in which the act of the State extends in time—in which, for example, it has a continuing character—is to raise the question as to what the effect will be if the situation of *force majeure* which existed at the commencement of the act ceases during its continuance. In our view, whether the State's conduct consists of an action or an omission, it will undoubtedly, if it remains unchanged, become an internationally wrongful act as soon as the situation of *force majeure* ceases to exist.[269]

127. The two conditions we have just mentioned are in a sense implicit in the very notion of "*force majeure*". But a third condition must also be considered: the situation which prevents the obligation from being performed must not have been caused by the State that has the obligation, whether through an intentional act or through negligence. For example, a State may not invoke the destruction of the property it was required to hand over to another State as justification for not having done so if it has itself knowingly destroyed the property or concurred in its destruction, or has negligently failed to prevent it from being destroyed. Likewise, it may not use engine damage as a justification for its aircraft having entered the airspace of another State if the damage is attributable to its own action or its negligence. Admittedly, in a case of that kind, no other course is open to it at the moment when it engages in the conduct which is not in conformity with its international obligation, but its being in that situation is its own doing, and it cannot use the situation to justify or excuse the conduct.[270] It is sometimes maintained in connection with the situation of *force majeure* that if it is to be valid as a circumstance precluding the wrongfulness of an act of the State it must have been "unforeseeable" to the State committing the act in question. This obviously cannot mean that if the State had been able to foresee the occurrence of a situation which in itself was absolutely unavoidable, that situation could not be considered as a circumstance of *force majeure*. What is true, though, is that if the State had been able to foresee the situation and take steps to prevent it, or its consequences, the situation could not be considered as a case of *force majeure* because it would then have originated in the State's negligence.

128. If, therefore, the conditions specified in the preceding paragraphs are met, the undoubted effect of the situation of *force majeure* consisting in the "absolute impossibility" of the State performing its obligation is to preclude the wrongfulness of the conduct adopted by the State in those conditions, even though that conduct is not in conformity with what is otherwise required of the State by the obligation. The obligation rendered unperformable at a given moment for reasons of *force majeure* is an obligation which—as we have already indicated[271]—is made inoperative, definitively or temporarily, in the case in point. No breach of that obligation can occur in such circumstances. The objective element of a wrongful act is therefore non-existent, and there is no internationally wrongful act.

129. As we stated above,[272] we have so far dealt exclusively with the kind of situation in which *force majeure* consists in an *absolute material impossibility*, for the State having the obligation, to conduct itself in the manner thereby required. We shall now take up the other kind of situation, the one in regard to which we used the expression "*relative impossibility*".[273] There we described the circumstances in which it can occur and defined in principle the characteristics by which it can be recognized. Let us now see how it is treated in turn in practice, jurisprudence and doctrine. It should be noted at the outset that although this situation too, more often than not, is defined as one of *force majeure*, in some instances it is called "emergency", or, in French, "*détresse*".

130. The circumstance of serious peril to the very life of the organ which is required to observe an international obligation of its State has been invoked mainly

[269] In the case of an obligation "not to do"—to refrain from discharging oil at sea, for example—any such discharge which is due to *force majeure* and is therefore not wrongful will become wrongful if it continues once the situation of *force majeure* has ceased. In the case of an obligation "to do"—to supply coal or some other product of the subsoil, for instance—a failure to supply which is excusable if due to a calamity or other natural cause will become wrongful as soon as conditions allow the extraction and supply of the product to be resumed. This is clearly the principle which the Belgian Government had in mind in the case of the *Société commerciale de Belgique*, cited in paragraph 120 above. Counsel for the Belgian Government incorrectly maintained that "in obligations relating to fungible things, such as a sum of money *there is never any force majeure**"; there can only be a more or less prolonged state of insolvency, which does not affect the legal obligation to pay". On the contrary: there very well may be a situation of *force majeure* which prevents payment at a given moment, but by its very nature that situation is temporary; once it has ceased, the obligation automatically revives, and if the State having the obligation then continues in breach of its obligation it is acting wrongfully.

[270] This is the condition to which the Swiss Government was referring (see para. 108 above) when, in its reply to Point V of the request for information submitted to States by the Preparatory Committee of the 1930 Codification Conference, it expressly mentioned "fortuitous occurrences" and "*vis major*" as circumstances precluding international responsibility, but with the proviso "*that the State might nevertheless be held responsible if the fortuitous occurrence or vis major were preceded by a fault, in the absence of which no damage would have been caused to the third State in the person or property of its nationals**". A similar position was taken in a note from the Netherlands Government to the German Government following the destruction in 1916 of a German zeppelin airship. See Hackworth, *Digest* ... (*op. cit.*), vol. VII (1943), p. 552, and Secretariat Survey, para. 252.

[271] See para. 55 above.

[272] See para. 107 above.

[273] Paras. 103 and 106.

in connection with violations of the frontier of another State, as justification for particular conduct not in conformity with the obligation but adopted by the organ in question. Cases of violations of airspace are especially numerous.[274] At this point we shall confine ourselves to the particularly significant case of the *incidents which took place in 1946 between the United States of America and Yugoslavia*, a case we have already had occasion to cite above.[275] We mentioned it there in order to draw attention to certain assertions in which the two parties concerned expressed general agreement that an act committed in circumstances of *force majeure* precluded wrongfulness; obviously, this held true primarily in cases of genuine "absolute impossibility" of performance of the obligation in question. For our present purposes the case deserves further consideration. On 9 and 19 August 1946 respectively, two United States military aircraft penetrated Yugoslav airspace without authorization and were attacked by the Yugoslav air defences. The first aircraft managed to make a forced landing and the second crashed. The United States Government maintained that the two aircraft had penetrated Yugoslav airspace solely in order to escape serious danger, and it lodged a protest with the Yugoslav Government against the attack on the aircraft. The response of the Yugoslav Government was to denounce the systematic violation of Yugoslav airspace, which it claimed could only be intentional in view of the frequency with which it happened. In a note dated 30 August 1946, however, the Yugoslav Chargé d'Affaires informed the United States Department of State that Marshal Tito had forbidden any firing on aircraft flying over Yugoslav territory without authorization, and presumed that:

> for its part the Government of the United States of America would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities.[276]

In his reply dated 3 September 1946, from which we have already quoted, the Acting Secretary of State of the United States reiterated the assertion that:

> No American planes have flown over Yugoslavia intentionally without advance approval of Yugoslav authorities *unless forced to do so in an emergency.** I presume that the Government of Yugoslavia recognizes that in case a plane and its occupants are jeopardized, the aircraft may change its course *so as to seek safety** even though such action may result in flying over Yugoslav territory without prior clearance.[277]

Hence the two Governments did in fact agree that crossing of air boundaries was justified when such conduct was necessary in order to save the aircraft and its occupants.[278]

131. These principles are confirmed by cases of violation of a sea boundary. Let us take a recent example. On the night of 10–11 December 1975, British naval vessels entered Icelandic territorial waters. According to the United Kingdom Government, the vessels in question had done so in search of "*shelter from severe weather, as they have the right to do under customary international law.**"[279] Iceland, on the other hand, maintained that British vessels were in its waters for the sole purpose of provoking an incident. But—and this is what concerns us here—Iceland did not contest the point of law that if the British vessels had been in a situation of "distress", they would have been authorized by right to enter Icelandic territorial waters.

132. The conventions codifying the law of the sea also provide for "distress" as a circumstance justifying conduct which would otherwise be wrongful. We have already cited article 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone,[280] which, as a consequence of the right of innocent passage through foreign territorial seas, permits "stopping and anchoring" in so far as they are rendered necessary by *force majeure* or distress. A similar provision appears in article 18, paragraph 2, of the 1979 "Informal Composite Negotiating Text/Revision 1" on the law of the sea; this too provides for stopping or anchoring in order to save persons, ships or aircraft

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[274] In addition to the cases mentioned in paras. 141, 142 and 252 of Secretariat Survey, see those cited by O.J. Lissitzyn, "The treatment of aerial intruders in recent practice and international law", *American Journal of International Law*, vol. 47 (October 1953), pp. 559 *et seq.*; and *Revue générale de droit international public* (Paris), 3rd series, vol. 32, No. 1 (January–March 1961), pp. 97 *et seq.* Lissitzyn (*loc. cit.*, p. 588) rightly observes that in certain cases:

> "the entry may be 'intentional' in the sense that the pilot knows he is entering foreign airspace without express permission, but the probable alternatives, such as a crash landing or ditching, expose the aircraft and its occupants to such unreasonably great risk that the entry must be regarded as forced by circumstances beyond the pilot's control (*force majeure*)."

See also the case cited by Hackworth, *Digest* ... (*op. cit.*), vol. II (1941), p. 305.

[275] See para. 112 above.

[276] See footnote 229 above.

[277] See footnote 230. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to the International Court of Justice in connection with the aerial incident of 27 July 1955 (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 225 *et seq.*

[278] This principle has also been recognized in the other cases (which we do not consider it necessary to reproduce here) mentioned in footnote 274 above.

[279] *Official Records of the Security Council, Thirtieth Year*, 1866th meeting. See Secretariat Survey, para. 136. So far as private vessels are concerned, the principle has been recognized in a number of cases, more particularly in the famous case of the *Enterprise* (see Secretariat Survey, paras. 328–331). Again with regard to private vessels, see the position adopted by the United Kingdom Government in its Memorial of 28 August 1958 to the International Court of Justice in connection with the Aerial Incident of 27 July 1955 (*I.C.J. Pleadings* (*op. cit.*), pp. 358–359).

[280] See para. 113 above.

in distress.[281] Other conventions or draft conventions also provide for distress as a circumstance that may justify conduct different from what would be required normally. Similar provisions appear, for example, in the international conventions on the prevention of pollution of the sea.[282]

133. The conclusion to be drawn on the point under discussion is therefore that a body of State practice exists on the matter, as revealed by the positions adopted by States in particular disputes and when concluding international agreements. In accordance with this practice, if a State organ adopts conduct that is not in conformity with an obligation not to violate the land, sea or air frontier of another State without the latter's authorization, or that is not in conformity with other specific obligations of the law of the sea, that conduct is not an internationally wrongful act if the organ in question has been compelled to adopt it in order to save its own life or that of other persons, in particular persons for which it is responsible. Accordingly, three questions may be asked: (1) Is there a rule of general application, valid for conduct not in conformity with an international obligation regardless of the content of the obligation, or is there a rule whose application must be regarded as limited to the context in which it has been expressly accepted in practice? (2) Is it only danger to the life of the organ and of the other persons mentioned that can preclude the wrongfulness of conduct not in conformity with a particular obligation, or does that possibility exist, as well, in cases of danger to another paramount interest of those persons? (3) Should the interest safeguarded by adopting conduct not in conformity with an international obligation be proportionate to the interest protected by the obligation—an interest which is then sacrificed?

134. Doctrine is divided on the answer to the first of these questions.[283] Distress has in fact been invoked as a circumstance precluding the wrongfulness of an act of the State only in specific cases where the obligation in question was not to enter the sea or airspace of another State without its authorization. Yet we have seen that certain conventions have extended the applicability of this principle to somewhat different fields, and the *ratio* of the principle itself suggests that it is applicable, if only by analogy, to other comparable cases. Would a governmental organ pursued by insurgents or rioters who are determined to destroy it be committing an internationally wrongful act if it sought safety by entering a foreign embassy without permission? Further cases could be envisaged, but the area within which they would fall is of course inevitably limited by the very nature of our hypothesis, which is, to refresh our memories, that a State organ commits an act that is not in conformity with an international obligation so as to save its life in a situation of serious danger to it. In any case, a person–organ would have little material opportunity of breaching many international obligations of its State, and particularly the more important of them, simply in order to save its life in a situation of distress.

135. As to the second question, we have seen that the practice usually speaks of a situation of distress, which may at most include a situation of serious danger but not one that jeopardizes life itself. The protection of something other than life, particularly where the physical integrity of a person is still involved, may also represent an interest that is capable of severely restricting an individual's freedom of decision and compel him to act in a manner which is justifiable but not in conformity with an international obligation of the State of which he is an organ.

138. With regard to the third question, it seems to us beyond doubt that the wrongfulness of an act or omission not in conformity with an international obligation cannot be precluded unless the interest protected by that act or omission is to some extent proportionate to the interest ostensibly protected by the obligation. What is more, the latter interest must be markedly less important than that of protecting the life of the organ or organs in distress. An attempt to justify conduct which, although designed to save the life of a person or of a small group of persons, endangered the life of a greater number of human beings, would be unacceptable. One has but to imagine cases such as a military aircraft carrying explosives and liable to cause a disaster by making an emergency landing, or a nuclear submarine suffering a serious breakdown which might cause a nuclear explosion at a port in

[281] *Ibid.*

An old case involving the crossing of a border—in this case a land border—in order to save human life is that of the *Crossing of the Austrian border by Italian officials in 1862* case: S.I.O.I.–C.N.R., *op. cit.*, vol. II, p. 869; Secretariat Survey, para. 121.

[282] The International Convention for the Prevention of Pollution of the Sea by Oil, done at London on 12 May 1954, stipulates in art. IV, para. 1(*a*) that the prohibition on the discharge of oil into the sea shall not apply if it takes place "for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea" (United Nations, *Treaty Series*, vol. 327, p. 8; see also Secretariat Survey, para. 91), and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, done at London, Mexico City, Moscow and Washington on 29 December 1972, provides in article V that the prohibition on the dumping of wastes into the sea shall not apply:

> "when it is necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea in cases of *force majeure* caused by stress of weather or in any case which constitutes a danger to human life of a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat ..." (United Nations, *Legislative Series, National Legislation and Treaties relating to the Law of the Sea* (United Nations publication, Sales No. E/F.76.V.2), p. 466; Secretariat Survey, para. 92).

See also the other conventions cited in this connection in Secretariat Survey, footnotes 212 and 213.

[283] For example, Quadri (*op. cit.*, p. 226) formulates the rule in general terms, whereas Lamberti Zanardi (*loc. cit.*, pp. 905–906) envisages its application in regard to specific obligations only.

which it sought refuge. The influence of this factor on the applicability of the principle cannot be ignored.

139. It now remains to consider the case envisaged above known as "fortuitous event".[284] This term, as we pointed out, is intended to denote a situation in which, as a result of external factors it is impossible for the State organ to realize that its conduct is not in conformity with what is required of it by an international obligation incumbent upon the State. Such external factors may be either natural events or acts of man, but in both cases they must be factors which, for no fault of the organ concerned and of the State to whose apparatus it belongs, are beyond the control of both. The difference, also mentioned above, between *force majeure* and *fortuitous event* lies essentially in the fact that in the first case the State organ in question is aware that it is breaching an international obligation but does so against its will because it has no opportunity of acting otherwise, while in the second case, the organ could have adopted different conduct, for it normally acts of its own accord, but *it is not aware that it has breached an international obligation.*

138. In international relations, the probability of specific situations occurring which can be classed as fortuitous events seems far less than in the case of relations between individuals. Nevertheless they are possible, and we have already looked at some examples. We mentioned the case in which, because of sudden thick fog, a frontier guard may unwittingly be on foreign territory, and that of an aircraft which enters the airspace of another State, unbeknown to the pilot, because weather or other difficulties have prevented him from fixing his position visually and have put the aircraft's instruments out of action. A similar situation may affect a ship which, again because of poor weather conditions, unknowingly enters foreign territorial waters closed to navigation. A conceivable case is that of a house recently purchased by a foreign diplomatic or consular agent and then requisitioned by military authorities, where it has been impossible to acquaint them with the new ownership. A diplomat's baggage may be searched because it bears no indication of the name and status of the owner and happens to have ended up with other luggage. A foreigner who has not paid attention to certain notices may enter a firing area and be killed as he is passing behind the targets by a shot fired by a trainee soldier. An isolated mountain artillery battery will conceivably continue firing after a truce or an armistice because its radio equipment is not working and an avalanche prevents the high command from contacting it in any other way, etc. If cases of this kind occur, the very logic of the principles on which we have seen international law to be based leads us to conclude, beyond all doubt, that the circumstances surrounding and characterizing the case preclude the international wrongfulness of the conduct adopted by the organ.

139. Here again, however, it is interesting to see whether the positions taken by Governments in cases which present features of the above kind confirm this conclusion or contradict it—although the latter would be surprising. Naturally enough, in view of the particular characteristics of the theory of fortuitous event, the cases available for consideration relate almost entirely to the adoption by State organs of conduct conflicting with obligations "not to do", namely, obligations specifically requiring the organ to refrain from the action actually taken. The number of such cases is small; we shall simply select a few which lend particular emphasis to our conclusions.

140. In 1881, during the war between Chile and Peru, the Chilean military authorities in occupation of the town of Quilca twice confiscated the goods of some Italian traders. Following claims by the Italian Chargé d'Affaires at Santiago, the Chilean Government agreed to return the improperly confiscated goods or pay their value where they had been destroyed, but it refused any damages, alleging that reparation for loss and damage was payable only by those who "act in bad faith". This assertion being patently equivocal, Mancini, the Italian Minister for Foreign Affairs, replied that the Chilean authorities had to prove not only that there had been "good faith" on their part but also that they had made every effort to prevent the violation of neutral property. This opinion (particularly authoritative in view of the competence of the eminent jurist who expressed it) signifies that the conduct of the Chilean authorities was to be regarded as proper only if, in addition to acting in good faith, they had avoided acting negligently. The soundest case would obviously have been that where a *fortuitous* event, regardless of any negligence on the part of the local authorities, had made it impossible to distinguish the neutral goods from the mass of enemy goods.[285]

141. In 1906 an American citizen, Lieutenant England, serving on the U.S.S. *Chattanooga*, was mortally wounded as his ship entered the Chinese harbour of Chefoo by a bullet from a French warship which was engaged in rifle practice as the *Chattanooga* passed it. The United States Government sought and obtained reparation, having maintained that:

> While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the *unavoidable class** whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the

[284] See para. 104 above.

[285] For example, flood water, caused by a tidal wave, entering the harbour premises where the neutral goods were situated alongside enemy goods and destroying any markings whereby the goods could be recognized. For a description of the case, see S.I.O.I.–C.N.R. (*op. cit.*), vol. II, pp. 867 *et seq.*

Chattanooga, in the course of her regular passage through the public channel, came into the line of fire.[286]

An analysis of the case shows both Governments to have concluded that the killing of Lieutenant England, although accidental, could not have occurred unless the officers of the French warship had failed to be diligent. It was therefore impossible to regard the occurrence as a truly fortuitous event. That is what the United States Secretary of State meant by his comment that the case could not be regarded as belonging to the "unavoidable class" whereby no responsibility is entailed. This shared conclusion was nevertheless based on the likewise joint and also precise belief that an act committed by a State organ in a situation which might rightly be definable as a fortuitous event does not entail the international responsibility of the State.

142. During the 1914–1918 war, the belligerents often invoked factors such as fog, cloud and atmospheric disturbance as reasons for aircraft unintentionally flying off their course and passing over neutral territory without the knowledge or fault of the pilot. This happened when Allied aircraft making for Friedrichshafen flew over Swiss territory in November 1914. The First Lord of the Admiralty said in Parliament on 26 November that the Allied pilots had violated Swiss airspace unintentionally because high altitude and lack of visibility had prevented them from realizing that they were off course. When the town of Goes (the Netherlands) was bombed by a German zeppelin airship, the German Government stated that the pilots had lost their way in thick cloud. Similar excuses were offered for violations of Danish, Norwegian and Swedish airspace. It should be noted that some of them were rejected by the countries concerned, but solely on the ground that the alleged physical circumstances had not existed in the case in point, and not because these countries refused to recognize the actual principle involved in the excuses.[287]

143. In 1948, two Turkish military aircraft entered Bulgarian airspace; one was shot down and the other forced to land. The Turkish Government protested on the ground that the violation of the Bulgarian frontier had not been intentional, but was due to the rainy weather which had prevented the pilots from realizing that they had left Turkish airspace. The Bulgarian Government's answer was that the aircraft were flying in conditions of excellent visibility. The discussion therefore turned not on the validity, which was in no way disputed, of the principle that conditions constituting a fortuitous event precluded the wrongfulness of an act committed by the State in those conditions and not in conformity with an international obligation, but solely on the factual existence of those conditions in the given case.[288]

144. On 17 March 1953, the United States Government sent two notes, to the Hungarian Government and the Government of the USSR respectively, concerning the case of the *Treatment in Hungary of Aircraft and Crew of United States of America*. An American aircraft bound for Belgrade entered Hungarian airspace and was forced to land in Hungary, where its crew were interned. The American notes maintained that the crossing of the Hungarian frontier was accidental. But the chief interest of the two notes lies in the care taken by the writer to indicate a series of facts intended to prove that, in the circumstances, even the most experienced pilot could not have noticed the mistake. The notes stated:

> The airplane and crew attempted at all times to follow the course so given for Belgrade, but while the crew, and in particular the pilots, believed that the plane was flying that course, it was actually blown by winds the existence and direction of which the pilots did not then know or have any warning of, and the velocity of these winds accelerated the speed of the plane considerably beyond the speed at which the pilots believed the plane was flying. The plane, therefore, flew somewhat north of the expected course and covered a distance considerably greater than the pilots then thought or had reason to believe they were covering.[289]

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[286] M.M. Whiteman, *Damages in International Law* (Washington, D.C., U.S. Government Printing Office, 1937), vol. I, p. 221, and Secretariat Study, para. 130.

On the other hand, we do not feel that a sound precedent, for our present purpose, is provided by the Dogger Bank case, which arose out of an incident on the night of 21–22 October 1904 when the Russian fleet, *en route* for the Far East under Admiral Rojhdestvensky, met a number of British trawlers in fog in the North Sea and, mistaking them for Japanese warships from which it anticipated an attack, opened fire and sank some of the trawlers. The International Commission of Inquiry, composed of five admirals of different nationalities, found that the Russian admiral's mistake had been unintentional and due to the fog, and it accordingly rejected the United Kingdom's claim that the admiral should be punished. The Russian Government had already offered the United Kingdom compensation for the loss and damage caused by the incident, however, and an indemnity of £65,000 was eventually paid. In these circumstances, it is not clear whether the compensation should be regarded as a humanitarian and *ex gratia* gesture or as reparation for an act acknowledged to be wrongful. We cannot therefore say whether the incident was treated as a case of fortuitous event precluding any wrongfulness and responsibility, or instead as an unintentional wrongful act having less solemn consequences than the punishment of the organ committing it, but nevertheless entailing an international responsibility of the State in the form of an obligation or reparation. See A. Mandelstam, "La commission internationale d'enquête sur l'incident de la Mer du Nord", *Revue générale de droit international public* (Paris), vol. XII (1905), pp. 161 *et seq.*, pp. 351 *et seq.*; and Secretariat Survey, para. 129.

[287] On the other hand, in cases in which occurrences (such as the bombing of La Chaux-de-Fonds by German airmen on 17 October 1915 and of Porrentruy by a French aviator on 26 April 1917) were ascribed to negligence on the part of the aviators and not to fortuitous events, the belligerents undertook to punish the offenders and make reparation for the loss and damage. See Secretariat Survey, paras. 255 and 256.

[288] See Secretariat Survey, para. 147.

[289] *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of United States of America* (note to the Hungarian Government), p. 14. On the following page, the United States Government added:

> "The crew selected for the flight were competent for the purpose ... The aircraft and its equipment ... were in sound flying condition."

This itemization of facts sounds almost like a description of a typical "fortuitous event" . . .

145. So far, we have discussed the effect of a fortuitous event in precluding the wrongfulness of an act of the State in relation only to conduct by States which is not in conformity with international obligations "not to do", that is, to refrain from a specific act. Theoretically, it is less conceivable that a fortuitous event can enter into consideration in regard to the fulfilment of an obligation "to do", that is, to perform a certain act rather than refrain from it. Within the vast range of these obligations there is, however, one well-known area which merits some attention in this context—that of so-called obligations "of prevention". We use this term to denote those obligations which require of the State action that is designed to prevent the occurrence of events injurious to foreign States and aliens—events which, as we have many times had occasion to state, may have their origin either in natural causes or, more frequently, in the acts of individuals, and at all events of persons whose acts are not attributable to the State itself. The fortuitous element may operate to preclude the wrongfulness of conduct by a State which is not in conformity with one of these obligations of prevention, although in somewhat different forms from those to which we have drawn attention in connection with obligations not to commit certain acts. Where the obligation is to ensure that an event due to another does not occur, what may be "fortuitous" is the occurrence of the event itself. In other words, the obviously unexpected and unforeseeable nature of such an event gives its possible occurrence the appearance of a fortuitous event, and it is that which may have made it impossible for the State organs to realize that their conduct might have been such as not to have the effect of preventing the event as the obligation required. Since this quality of fortuitous event, if present, removes the possibility of charging the State with culpable negligence,[290] it may serve, at the international level, as justification for any failure in prevention. A few cases drawn from intentional jurisprudence will serve as examples.

146. In 1864, during the American Civil War, some 20 members of the Confederate Army managed to slip through the frontier defences between Canada and the United States; having arrived at Saint Albans in Vermont, they destroyed property there, looted the village and then returned to Canada with their spoils. The United States Government claimed that the Canadian authorities had failed in their duty to prevent military operations taking place against the United States from Canadian soil. But the British Government replied that no negligence was attributable to the Canadian authorities and that what had occurred could in no way have been foreseen. In its decision in the *Saint Albans Raid* case, the American and British Claims Commission set up under the Treaty of 8 May 1871 rejected the United States claim and pointed out in particular that the Canadian authorities could not have discovered the preparations for the raid, which had been planned and arranged in the greatest secrecy.[291]

147. More or less in the same period, a vessel carrying Mr. Wipperman, United States Consul in Venezuela, ran aground on an infrequented stretch of the Venezuelan coast. Indian tribes attacked the vessel and looted the Consul's belongings. The United States Government demanded reparation from Venezuela, claiming that the latter had failed in its duty to protect a foreign consul. The dispute was referred to the United States of America/Venezuelan Claims Commission set up under the Convention of 5 December 1885. On behalf of the Commission, Commissioner Findlay rejected the American claim on the ground that there could be no possible parallel between the case of a consul residing in a large city who was attacked by hostile individuals whom the police or army ought to keep under control and:

> the *accidental** injury suffered by an individual in common with others, not in his character as consul, but as passenger on a vessel which has been unfortunate enough to be stranded on an unfrequented coast, subject to the incursions of savages which *no reasonable foresight could prevent** . . .
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> . . .
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> *there is nothing . . . to show that the government had any notice of the incursion or any cause to expect that such a raid was threatened** . . . the raid was one of those *occasional and unexpected outbreaks against which ordinary and reasonable foresight could not provide.**[292]

148. Commissioner Findlay took a similar position in his opinion in the *Brissot et al.* case. Rejecting Venezuela's responsibility for damage suffered by the American vessel *Apure*, which was attacked by a group of rebels while it was carrying General García, President of one of the States forming the Republic of Venezuela, the Commissioner pointed out that the Venezuelan Government:

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[290] By this, we do not of course mean to limit the cases in which the State may not be accused of culpable negligence and held internationally responsible for not having prevented the occurrence of an event solely to those in which the event in question, because of its unexpected and unforeseeable nature, assumes the appearance of a genuinely fortuitous event. There may be other convincing reasons for excluding the presence of such negligence, taking into account as well that the degree of diligence required for the purpose of prevention varies according to the content of the obligation and the specific features of each particular case.

[291] Commissioner Frazer, whose opinion was accepted by the majority of the Commission, observed:

> "The raid upon Saint Albans was by a small body of men, who entered that place from Canada without anything to indicate a hostile purpose . . . *Such was the secrecy with which this particular affair was planned** that I can not say it escaped the knowledge of Her Majesty's officers in Canada because of *any want of diligence on their part** which may possibly have existed. I think rather it was because *no care** which one nation may reasonably require of another in such cases *would have been sufficient to discover it.***" (Moore, *History and Digest . . .* (*op. cit.*), vol. IV, p. 4054 (Secretariat Survey, para. 339).)

[292] *Ibid.*, vol. III, pp. 3040–3043 (Secretariat Survey, paras. 349–350).

... surely had *no means of knowing of or anticipating such a murderous outbreak** ... General García and his detachment of troops on board the *Apure* ... certainly do not appear to have apprehended any difficulty at this particularly point. *The attack was in the nature of an embuscade and complete surprise.** It would be wholly unwarranted therefore to hold Venezuela responsible for not anticipating and preventing an outbreak of which the persons most interested in knowing and the very actors on the spot had no knowledge.[293]

149. Lastly, there is the decision of 19 May 1931 of the United Kingdom/Mexico Claims Commission established under the Convention of 19 November 1926 in the *Gill* case. John Gill, a British national residing in Mexico, had his house destroyed as a result of sudden and unforeseen action by opponents of the Madero Government. The Commission held that a Government could not be held responsible for failure to prevent an injurious act where that failure was due not to negligence but to its being genuinely impossible for the Government authorities to take immediate protective measures in the face of a "situation of a very sudden nature".[294] This case, like the others already cited, confirms that according to international jurisprudence—and indeed the practice of Governments—failure by a State to prevent an event injurious to a foreign State or to aliens ceases to be internationally wrongful if the event in question was so unexpected and unforeseeable that its occurrence in such circumstances cannot appear as anything other than a fortuitous event.

150. Legal writers have not made any very substantial contribution to the definition of a fortuitous event. Doctrine[295] has been largely taken up with the debate between the proposition that the international responsibility of States for acts which are not in conformity with an international obligation is an "objective" responsibility[296] and the contrary proposition that a precondition for the existence of an internationally wrongful act of the State giving rise to responsibility is, if not intention, at least negligence in the conduct of the State organ.[297] Writers, and particularly those (the greater number) who subscribe to the second proposition, have concentrated on defining "negligence" and determining the dividing line between conduct which remains "excusable", even though not in conformity with an international obligation, and conduct which must be recognized as a genuine "breach" of that obligation. Obviously, however, for the advocates of the second approach, a fortuitous event in the sense in which we have described it—namely a situation brought about by some sudden and unforeseeable external factor, making it impossible for the State organ to realize that the conduct it has adopted was not in conformity with the international obligation—comes beyond any shadow of doubt under the heading of circumstances which preclude any culpable negligence by that organ, and hence the international wrongfulness of its act or omission. Even those who see international responsibility as a responsibility independent of the "fault" of the organ which engages in the conduct do not go so far as to repudiate something so self-evident as the preclusion of the State's responsibility for conduct adopted in a fortuitous event situation. On the contrary, they include the authors of some of the most recent and searching studies who take an open stand in support of this view.[298]

151. As regards the codification drafts, admittedly they do not refer specifically to "fortuitous event" as being among the circumstances which preclude the wrongfulness of the conduct of the State;[299] however, many of them make the existence of the international responsibility of the State generally conditional on whether the acts giving rise to that responsibility, or at least the acts of omission,[300] are tainted by bad faith or negligence. Other drafts lay down the same condition in regard to the more restricted field with which they are concerned, namely acts causing injury to the person or property of aliens.[301] Yet others do likewise in the case of acts which are not in conformity with obligations of prevention.[302] The comments in the previous paragraph with regard to the legal writers who express comparable views therefore apply to these codification drafts as well; there is no doubt that the latter include fortuitous event among the circumstances in which international responsibility does not arise. A point which may be of interest is that article 7 of the 1961 revised preliminary draft of García Amador, dealing with the determination of the inter-

[293] *Ibid.*, p. 2969 (Secretariat Survey, para. 352).

[294] United Nations, *Reports of International Arbitral Awards*, vol. V (United Nations publication, Sales No. 1952.V.3), p. 159 (Secretariat Survey, para. 463).

[295] A full account appears in Secretariat Survey, paras. 488 *et seq.* See also the thorough review of the various positions given by Luzzatto, *loc. cit.*, pp. 53 *et seq.*

[296] For the principal examples, see Secretariat Survey, footnotes 703–722.

[297] *Ibid.*, footnotes 683–702.

[298] Luzzatto, *loc. cit.*, p. 93, maintains that obligations to make reparation can arise out of acts of the State despite the fact that the acts in question cannot possibly be regarded as "wrongful" since neither bad faith nor negligence is involved. But he also points out that such an obligation to make reparation may not exist where the act of the State was due to *force majeure* or fortuitous event.

[299] See Secretariat Survey, paras. 561 *et seq.*

[300] See the second paragraph of article 1 of the draft prepared by K. Strupp (*Yearbook ... 1969*, vol. II, p. 151, document A/CN.4/217 and Add.1, annex IX) and article 3 of the draft prepared by A. Roth (*ibid.*, annex X).

[301] See art. 1 of the draft of the Japanese branch of the ILA and the International Law Association of Japan (*ibid.*, p. 141, annex II), and art. 1 of the resolution adopted in 1927 by the Institute of International Law (*Yearbook ... 1956*, vol. II, pp. 227–228, document A/CN.4/96, annex 8).

[302] See arts. 10, 11, 12 and 14 of the draft prepared by the Harvard Law School in 1929 (*ibid.*, p. 229, annex 9) and art. 3, paras. 1(*a*) and (*b*), and arts. 5–13 of the draft which it prepared in 1961 (*Yearbook ... 1969*, vol. II, pp. 143 *et seq.*, document A/CN.4/217 and Add.1, annex VII).

national responsibility of the State for injuries caused to an alien by the conduct of individuals, states expressly, in regard to the determination of such responsibility, that the circumstances to be taken into account "shall include, in particular, the extent to which the injurious act *could have been foreseen** ...".[303] It therefore follows that "fortuitous event" is necessarily excluded from those cases in which responsibility can be established, since a fortuitous event is by definition an *unforeseeable* event.

152. The conclusion we had drawn from the general bases of international law[304] can now be said to have been reinforced by our subsequent analysis of State practice, international jurisprudence and the opinions of legal writers. It may therefore be taken as established that, in the case of a fortuitous event—in other words, where there is a situation in which, owing to a supervening external and unforeseeable factor, it is impossible for the author of the conduct attributable to the State to be aware that its conduct is not in conformity with the international obligation—the conduct is not internationally wrongful and there is no ensuing responsibility. Having said that, it is hardly necessary to add that the "justifying" effect of a fortuitous event, in the same way as that of *force majeure*, does not last beyond the period during which the conduct in question continues to be due to the fortuitous event. Once the author of the conduct realizes that its conduct conflicts with an international obligation, the conduct will become wrongful if it continues and if the organ does not immediately modify it so as to bring it into conformity with the obligation.[305]

153. In the light of the various considerations set forth above, we would propose the following articles for the approval of the Commission in connection with the two questions dealt with in this section.

Article 31. Force majeure

1. The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded if it is absolutely impossible for the author of the conduct attributable to the State to act otherwise.

2. The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is likewise precluded if the author of the conduct attributable to the State has no other means of saving himself, or those accompanying him, from a situation of distress, and in so far as the conduct in question does not place others in a situation of comparable or greater peril.

3. The preceding paragraphs shall not apply if the impossibility of complying with the obligation, or the situation of distress, are due to the State to which the conduct not in conformity with the obligation is attributable.

Article 32. Fortuitous event

The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded if, owing to a supervening external and unforeseeable factor, it is impossible for the author of the conduct attributable to the State to realize that its conduct is not in conformity with the international obligation.

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[303] *Yearbook ... 1961*, vol. II, p. 46, document A/CN.4/134 and Add.1, addendum.

[304] See para. 138 above, *in fine*.

[305] In 1915, two German zeppelins airships entered the airspace of the Netherlands, a neutral State; at a certain moment, their position was signalled to them and they were required to land, yet they continued on their course. The Netherlands Government contended that even though the two airships might have flown over Netherlands territory as a result of a chance error, their conduct was no longer justified once they had been acquainted with the situation. The German Government recognized the merits of the Netherlands protest and expressed its regrets. See Hackworth, *op. cit.*, vol. VII (1943), pp. 551–552.