

STATE RESPONSIBILITY

[Agenda item 3]

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Second report on State responsibility, by Mr. James Crawford, Special Rapporteur

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	<i>Source</i>
Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919)	<i>British and Foreign State Papers, 1919</i> , vol. CXII (London, HM Stationery Office, 1922), p. 1.
Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye) (Saint-Germain-en-Laye, 10 September 1919)	<i>Ibid.</i> , p. 317.
General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, <i>Treaty Series</i> , vol. 55, No. 814, p. 187.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	<i>Ibid.</i> , vol. 78, No. 1021, p. 277.
Geneva Conventions for the Protection of War Victims (Geneva, 12 August 1949)	<i>Ibid.</i> , vol. 75, Nos. 970–973, pp. 31 et seq.
Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	<i>Ibid.</i> , p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	<i>Ibid.</i> , p. 85.

	<i>Source</i>
Geneva Convention relative to the Treatment of Prisoners of War	Ibid., p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War	Ibid., p. 287.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977)	Ibid., vol. 1125, No. 17512, p. 3.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	Ibid., vol. 213, No. 2889, p. 221.
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Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)	Ibid., vol. 516, No. 7477, p. 205.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	Ibid., vol. 500, No. 7310, p. 95.
Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington, D.C., 18 March 1965)	Ibid., vol. 575, No. 8359, p. 159.
Convention on Transit Trade of Land-locked States (New York, 8 July 1965)	Ibid., vol. 597, No. 8641, p. 42.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	Ibid., vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, No. 14668, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., vol. 1155, No. 18232, p. 331.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	Ibid., vol. 1144, No. 17955, p. 123.
International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Brussels, 29 November 1969)	Ibid., vol. 970, No. 14049, p. 211.
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971)	Ibid., vol. 974, No. 14118, p. 178.
Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976)	Ibid., vol. 1108, No. 17119, p. 151.
United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)	Ibid., vol. 1489, No. 25567, p. 3.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	Ibid., vol. 1833, No. 31363, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
Statute of the International Tribunal for the Former Yugoslavia (New York, 25 May 1993)	United Nations, <i>Basic Documents</i> (Sales No. E/F.98.III.P.1).
Statute of the International Tribunal for Rwanda (New York, 8 November 1994)	ICTR(093)/D637/No. 1 (August 1999).
United Nations Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997)	<i>Official Records of the General Assembly, Fifty-first Session, Supplement No. 49, resolution 51/229, annex.</i>
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	United Nations, <i>Treaty Series</i> , vol. 2187, No. 38544, p. 90.

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Scope of the present report¹

1. The present report continues the task, begun in 1998,² of systematically considering the draft articles in the light

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² See the first report on State responsibility, *Yearbook ... 1998*, vol. II (Part One), p. 1, document A/CN.4/490 and Add.1–7.

of the comments of Governments and developments in State practice, judicial decisions and in the literature. In later parts of the report it is also proposed to deal with certain general issues raised by parts two and three of the draft articles, and to begin considering the articles in part two.³

³ Since the first report (see footnote 2 above), further Government comments have been received: see *Yearbook ... 1998*, p. 81, document A/CN.4/488 and Add.1–3, and A/CN.4/492, reproduced in the present volume. So far as these relate to articles 16 et seq., they are taken into account in what follows. It is proposed to reserve discussion of further comments on draft articles 1–15 until all the draft articles have been dealt with, at which point they will have to be looked at again in their ensemble.

Review of draft articles in part one

A. Part one, chapter III. Breach of an international obligation

1. INTRODUCTION

(a) Overview

2. Chapter III of part one consists of 11 articles dealing with the general subject of “breach of an international obligation”. The matters dealt with in chapter III on analysis fall into five groups:⁴

(a) Articles 16, 17 and 19, paragraph 1,⁵ deal with the notion of breach itself, emphasizing the irrelevance of the source of the obligation or its subject matter;

(b) Article 18, paragraphs 1 and 2, deals with the requirement that the obligation be in force for the State at the time of its breach;

(c) Articles 20–21 elaborate upon the distinction between obligations of conduct and obligations of result, and in similar vein article 23 deals with obligations of prevention;

(d) Articles 24–26 deal with the moment and duration of breach, and in particular with the distinction between continuing wrongful acts and those not extending in time. They also develop a further distinction between composite and complex wrongful acts. Article 18, paragraphs 3–5, seeks to specify when continuing, composite and complex wrongful acts have occurred, and deals with issues of inter-temporal law in relation to such acts;

(e) Article 22 deals with an aspect of the exhaustion of local remedies rule, which is analysed within the specific framework of obligations of result.

For reasons that will emerge, it is proposed to deal with the articles in this order.

3. Taken together, the articles in chapter III seek to analyse further the requirement, already laid down in principle by article 3 (b), that in every case of State responsibility there must be a breach of an international obligation of a State by that State. But there is a difficulty in taking this analysis much further without transgressing the

⁴ For the *travaux* on chapter III see:

Fifth report: *Yearbook ... 1976*, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1 and 2;

Sixth report: *Yearbook ... 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1–3;

Seventh report: *Yearbook ... 1978*, vol. II (Part One), p. 31, document A/CN.4/307 and Add.1 and 2;

Yearbook ... 1978, vol. I, pp. 232–237 (plenary debate); and pp. 269–270 (report of the Drafting Committee);

Yearbook ... 1978, vol. II (Part Two), pp. 76–78 (summary of the *travaux*);

Yearbook ... 1976, vol. II (Part Two), pp. 75–122;

Yearbook ... 1977, vol. II (Part Two), pp. 11–50;

Yearbook ... 1978, vol. II (Part Two), pp. 79–98 (text of the draft articles and commentaries thereto).

⁵ Article 19, paragraphs 2–4, deals with the definition of international crimes of States. The issues it raises are addressed in the context of the discussion on the distinction between “criminal” and “delictual”

responsibility (see, for example, the Special Rapporteur’s first report (footnote 2 above), paras. 43–60).

distinction between primary and secondary rules, on which the draft articles as a whole are founded. In determining whether there has been a breach of an obligation, consideration must be given above all to the substantive obligation itself, its precise formulation and meaning, all of which fall clearly within the scope of the primary rules. However the principles and distinctions elaborated in chapter III are intended to provide a framework for that consideration, and to the extent that they do so, chapter III can have a useful function.⁶

(b) *Comments of Governments on chapter III as a whole*

4. No comments call into question the need for chapter III as a whole. But the United Kingdom of Great Britain and Northern Ireland expresses concern that “the fineness of the distinctions drawn [in chapter III] between different categories of breach may exceed that which is necessary, or even helpful, in a statement of the fundamental principles of State responsibility”.⁷ Germany, summarizing its comments on individual articles, notes that (in addition to article 19) chapter III contains “a number of provisions that should be revised or redrafted”.⁸ Japan complains that the categorization of international obligations in chapter III contains “excessively abstract concepts . . . laid down in unclear language”; in its view the difficulty of drawing these distinctions “would be counterproductive to any effort to settle a dispute”.⁹

2. REVIEW OF SPECIFIC ARTICLES IN CHAPTER III

(a) *Article 16. Existence of a breach of an international obligation*

5. Article 16 provides as follows:

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation.

6. Article 16 repeats within the framework of chapter III, but in slightly different language, the element already expressed in article 3 (b). Under article 3 (b), an internationally wrongful act occurs when conduct attributable to

⁶ There is almost no systematic treatment in the literature of the subject of breach of international obligations as such. Breach of treaty has been studied to some extent: see, in particular, Sir Gerald Fitzmaurice's fourth report on the law of treaties, *Yearbook . . . 1959*, vol. II, document A/CN.4/120, pp. 37–81, which dealt with the effects of treaties. That report was never debated by the Commission, and although certain aspects of it were subsumed by his successor, Sir Humphrey Waldock, and are now included in the 1969 Vienna Convention on the Law of Treaties, those relating to non-performance of obligations arising from treaties were left to be dealt with in the framework of State responsibility. On breach of treaties see also Rosenne, *Breach of Treaty*; Reuter, *Introduction to the Law of Treaties*, chap. 4, p. 163 (who nevertheless conflates breach and invalidity under the rather unhelpful title of “Non-application of treaties”).

⁷ *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/488 and Add.1–3, p. 110.

⁸ *Ibid.*

⁹ A/CN.4/492 (reproduced in the present volume). See also the comments made by some Governments (Austria, Byelorussian Soviet Socialist Republic, Canada, Chile, Mali, the Netherlands, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics and Yugoslavia in *Yearbook . . . 1980*, vol. II (Part One), document A/CN.4/328 and Add.1–4, pp. 87–106; Bulgaria, Czechoslovakia, Federal Republic of Germany, Mongolia and Sweden in *Yearbook . . . 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, pp. 71–78) when chapter III was first adopted.

a State “constitutes a breach of an international obligation of [that] State”. But article 16 specifies the element of breach a little further, identifying as a breach (and thus as wrongful) all conduct which “is not in conformity with what is required of” the State by the obligation in question. This element is sometimes described as the “objective” element of State responsibility, as compared with the requirement of attribution which is described as the “subjective” element. The notion of State responsibility as focusing on the right (*le droit subjectif*) of the injured State is discussed further in the context of article 40 and its definition of “injured State”. But there are other difficulties in the dichotomy between “subjective” and “objective”. After all, attribution is a legal process, and is in that sense “objective”.¹⁰ In addition, the existence of a breach of international law may depend on the knowledge or state of mind of the actor(s) for whose conduct the State is responsible. In such cases some mental element is attributed to the State as a basis for its responsibility,¹¹ which is thus, in one sense at least, “subjective”, although still in principle governed by international law. Moreover, the same act may be a breach of a treaty vis-à-vis one State but lawful, or even required, under a treaty with another State:¹² in such cases the notion of “breach” has an inter-subjective element which is missing in relation to attribution. For these reasons, the terminology of “subjective” and “objective” elements of responsibility is confusing and is best avoided.

7. The commentary to article 16 justifies the use of the term “not in conformity with”, noting that “it expresses more accurately the idea that a breach may exist even if the act of the State is only partially in contradiction with an international obligation incumbent upon it”.¹³ It goes on to distinguish breach of an international obligation from a breach of comity,¹⁴ or of a contract between a State and a private person or corporation,¹⁵ or generally of “legal obligations governed by a legal order other than the international legal order”.¹⁶ It notes the need for compliance with other articles of chapter III in order to establish a breach, but says nothing about the relationship between chapters III and V.

8. There have been only a few Government comments on article 16. France raises the question of breach of an international obligation which is overridden by “an obligation considered to be superior”, citing as an example Article 103 of the Charter of the United Nations. It there-

¹⁰ The commentary to article 16, paragraph 2, stresses “the autonomy of international law” in relation to breach (*Yearbook . . . 1976*, vol. II (Part Two), p. 78, para. (2) of the commentary to article 16), but international law also determines the question of attribution: see the Special Rapporteur's first report (footnote 2 above), para. 154. It is true that in doing so it takes into account the provisions of internal law as to the status of persons acting on behalf of the State (*ibid.*, para. 163). But provisions of internal law are relevant in determining whether there has been a breach of an obligation. In both respects the dominant principle is that stated in article 4 (*ibid.*, paras. 136–139).

¹¹ As in *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 22.

¹² See paragraph 9 (c) and (d) below.

¹³ *Yearbook . . . 1976*, vol. II (Part Two), p. 78, para. (4) of the commentary to article 16.

¹⁴ *Ibid.*, para. (5) of the commentary to article 16.

¹⁵ *Ibid.*, pp. 78–79, paras. (6)–(7) of the commentary to article 16.

¹⁶ *Ibid.*, p. 79, para. (7) of the commentary to article 16.

fore proposes the addition of the words “under international law” at the end of article 16.¹⁷ The United Kingdom suggests that article 21 (obligations of result) be merged with article 16.¹⁸

(i) *Article 16 and the problem of conflicting international obligations*

9. France’s comment raises the general question of conflicting international obligations. So far as Article 103 of the Charter of the United Nations is concerned, the question might be thought sufficiently regulated by article 39 of the draft articles, on the assumption that that article will be expressed to apply to the draft articles as a whole.¹⁹ But the problem of potentially conflicting international obligations is a wider one:

(a) The first situation to be considered is where general international law resolves a contradiction between two or more international obligations which are, or have been, in force for a State, so that under international law, one of those obligations prevails over the other. For example, under the law of treaties, a later treaty between the same parties prevails over an earlier one to the extent of any inconsistency.²⁰ A later inconsistent rule of general international law normally prevails over an earlier rule. A peremptory norm of international law prevails over any inconsistent norm not having that character (i.e. any norm of *jus dispositivum*);²¹

(b) A second situation occurs where one treaty provision claims priority over another, as for example Article 103 of the Charter of the United Nations. All States Members have thereby agreed that in their mutual relations, Charter obligations prevail over other treaty obligations, even under later treaties. This was the basis for the Court’s decision in the *Lockerbie* cases, to the effect that the Libyan Arab Jamahiriya rights under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) not to extradite certain nationals were subordinated to its duty to do so under a Security Council resolution with which Libya was, *prima facie*, obliged to comply under article 25 of the Charter;²²

(c) These cases, however interesting they may be for other purposes, raise no special difficulties for article 16. In each case, one international obligation prevails, and no State has any right that the “subordinate”, “suppressed” or “repealed” provision should be complied with. But the rules referred to above cannot ensure complete consistency between the international obligations of a State, any more than national law can ensure completely against valid but inconsistent contractual obligations. Thus under article 30, paragraph 4, of the 1969 Vienna Convention, if any of the parties to two inconsistent treaties is different, both treaties are considered to remain in force, with the consequence that State A (a party to both) may have one set of obligations to one group of States and another set of obligations to another.²³ In *Costa Rica v. Nicaragua*,²⁴ the Central American Court of Justice held that Nicaragua was internationally responsible to Costa Rica for entering into a treaty with a third State²⁵ without first complying with the consultation requirements of an earlier treaty between Nicaragua and Costa Rica. The Court did not, however, declare the later treaty invalid, because it had no jurisdiction over the United States. In the *East Timor* case, ICJ was even more reticent. It was argued that Australia’s entry into a treaty with Indonesia which conflicted with the rights of Portugal under the Charter of the United Nations, as well as with the rights of the people of East Timor as represented by Portugal, gave rise to the international responsibility of Australia. Unlike Costa Rica, Portugal expressly did not seek a determination that the treaty with Indonesia was void, restricting itself to a claim of responsibility. The Court declined to decide the case at all, on the ground that it could not do so without first pronouncing on the illegality of the conduct of Indonesia, a State not a party to the proceeding.²⁶ In these circumstances, it was not competent to determine Portugal’s claim of responsibility against Australia;

(d) The 1969 Vienna Convention does not contemplate that a treaty will be void for inconsistency with

decisions taken under it by non-members: see Article 2, paragraph 6, of the Charter; and Vitzthum, “Article 2 (6)”, pp. 131–139.

¹⁷ See *Yearbook ... 1966*, vol. II, p. 217, para. (11) of the commentary to that provision (art. 26 in the Commission’s final draft); and also document A/CN.4/186 and Add.1–7 (*ibid.*, p. 76).

¹⁸ See *Yearbook ... 1966*, vol. II, p. 217, para. (11) of the commentary to that provision (art. 26 in the Commission’s final draft); and also document A/CN.4/186 and Add.1–7 (*ibid.*, p. 76).

¹⁹ See *Yearbook ... 1966*, vol. II, p. 217, para. (11) of the commentary to that provision (art. 26 in the Commission’s final draft); and also document A/CN.4/186 and Add.1–7 (*ibid.*, p. 76).

²⁰ “Judicial decisions involving questions of international law”, *American Journal of International Law*, vol. 11 (1917), p. 181.

²¹ *Viz.*, the Interoceanic Canal (Bryan-Chamorro Treaty) of 5 August 1914 between Nicaragua and the United States of America; text in Charles I. Bevans, ed., *Treaties and Other International Agreements of the United States of America, 1776–1949* (Washington, D.C., United States Government Printing Office, 1972), vol. 10, p. 379.

²² *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, p. 90, applying the principle of admissibility enunciated in *Monetary Gold Removed from Rome in 1943*, Judgment, *I.C.J. Reports 1954*, p. 32. Formally the decision may be distinguishable from *Costa Rica v. Nicaragua* (see footnote 24 above). In that case there was no question raised of any unlawful act on the part of the United States, even though it clearly had notice of the provisions of the earlier treaty. But it is slightly odd that a treaty should be considered void for a breach, by one party only, of another treaty with a third State, whereas a treaty arguably entered into in disregard of an *erga omnes* norm should escape judicial scrutiny. For discussions of the *East Timor* case see, for example, Chinkin, “The East Timor case (*Portugal v. Australia*)”, p. 712; Jouannet, “Le principe de l’ordre monétaire, à propos de l’arrêt du 30 juin 1995 dans l’affaire du Timor Oriental”, p. 673; Thouvenin, “L’arrêt de la CIJ du 30 juin 1995 rendu dans l’affaire du Timor oriental: *Portugal c. Australie*”, p. 328.

¹⁷ *Yearbook ... 1998* (see footnote 7 above).

¹⁸ *Ibid.* See also the comments by Chile (*Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1–4, p. 95), Yugoslavia (*ibid.*, p. 106) and the Federal Republic of Germany (*Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, p. 74).

¹⁹ This was foreshadowed in the Special Rapporteur’s first report (see footnote 2 above), paras. 73–74.

²⁰ 1969 Vienna Convention, art. 30, para. 3, subject to article 41.

²¹ Other contingencies include the supersession of an earlier customary rule (not a rule of *jus cogens*) by a later treaty, and the desuetude of a treaty as a result of a new rule of general international law. On these and similar problems see, for example, Rosenne, *op. cit.*, pp. 85–95; Binder, *Treaty Conflict and Political Contradiction: The Dialectic of Duplicity*; Chinkin, *Third Parties in International Law*, pp. 69–80; Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law*; and Reuter, *op. cit.*, pp. 129–147.

²² See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, *I.C.J. Reports 1992*, p. 3; and *ibid.* (*Libyan Arab Jamahiriya v. United States of America*), Provisional Measures, Order of 14 April 1992, *I.C.J. Reports 1992*, p. 114. For the purposes of the applications, the validity of the Security Council resolution was presumed. Different questions arise in respect of compliance with the Charter of

another treaty.²⁷ Instead, it seeks to resolve the difficulties of conflicting treaty obligations by expressly reserving “any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty”.²⁸ Thus it is no excuse under international law for non-compliance with a subsisting treaty obligation to State A that the State was simultaneously complying with a treaty obligation to State B. So far as the law of responsibility is concerned, this raises questions about the possibility of cessation or restitution in cases where it is impossible for the State concerned to comply with both obligations. This may raise issues for part two of the draft articles, but not for the formulation of article 16.

(ii) *The relationship between disconformity with an obligation, wrongfulness and responsibility*

10. Article 16 identifies as a breach of an obligation any failure to “conform” with what is required of a State by that obligation. One difficulty with this idea is the identification of the “obligation” in question. It is normally said, for example, that States are under an obligation to protect diplomatic premises, or to allow innocent passage to foreign vessels in the territorial sea, the obligation being identified with the particular primary rule as found, respectively, in article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations, or in articles 17 et seq. of the United Nations Convention on the Law of the Sea, or their customary law equivalents. But these primary rules do not specify all of the conditions which have to be met in order for a breach of an obligation to be established. Within the system of the draft articles, and under general international law, certain other factors are relevant to the question whether there has been a breach, for example, the consent of the “victim” State, or the circumstances of self-defence or force majeure. It might be said that, properly understood, the primary rule actually contains in itself all the conditions, qualifications, justifications or excuses applicable to it, so that the notion of “conformity” with the obligation imposed by that rule entails that all these conditions or qualifications are met, and all possible justifications or excuses excluded. But it is clear that this is not the sense in which article 16 should be read. Otherwise it would be circular, saying nothing more than that the breach of an obligation occurs when that obligation is breached. Moreover, the circumstances precluding wrongfulness, dealt with in chapter V of the draft articles, are treated as secondary rules of a general character, and not as a presumptive part of every primary rule.

11. If this is so, then there is a difficulty with article 16, in that it appears to say that a breach of an international obligation occurs when an act attributable to a State does not conform with the obligation imposed on that State by a primary rule, notwithstanding that one of the circumstances precluding wrongfulness in chapter V may exist.

²⁷ See article 30, paragraphs 4–5. Articles 52, 53, 64, 69 and 71 expressly deal with cases where a treaty is void, and they were intended to be exclusive. See Reuter, *op. cit.*, p. 173, para. 251. Lauterpacht argued strenuously for the invalidity of later conflicting treaties, relying largely on municipal law analogies: see “The covenant as the ‘higher law’”, p. 326, and especially “Contracts to break a contract”, pp. 371–375.

²⁸ Art. 30, para. 5. Article 30 itself is stated to be “[s]ubject to Article 103 of the Charter of the United Nations” (art. 30, para. 1).

This might appear to create a kind of “wrongfulness in the abstract”, i.e. a breach for which no State is responsible, which the Commission in its commentary expressly disclaims.²⁹ Or it might appear to contradict article 3, which provides that attribution and breach are, taken together, sufficient conditions for wrongfulness.³⁰ How can there be wrongfulness in circumstances where wrongfulness is precluded?

12. In responsibility cases since article 16 was adopted, ICJ has approached this issue in rather different ways:

(a) In the *United States Diplomatic and Consular Staff in Tehran* case, the Court, having determined that the conduct in question was attributable to the Islamic Republic of Iran, concluded that on the facts Iran had failed to comply with its obligations under the relevant treaties and under general international law to protect the diplomatic and consular personnel and to respect and secure their inviolability. It concluded that there had been “successive and still continuing breaches by Iran of its obligations to the United States”, and added:

Before drawing from this finding the conclusions which flow from it, in terms of the international responsibility of the Iranian State vis-à-vis the United States of America, the Court considers that it should examine one further point. The Court cannot overlook the fact that on the Iranian side ... the idea has been put forward that the conduct of the Iranian Government ... might be justified by the existence of special circumstances.³¹

The Court went on to examine, and reject, a possible “defence” of Iran, not specifically pleaded (because Iran had not appeared), still less proved. The Court noted that even if it had been duly pleaded and proved, it would not have constituted “a justification of Iran’s conduct and thus a defence to the United States’ claims in the present case”.³² It was on this basis that the Court sustained the finding that Iran “has incurred responsibility towards the United States”.³³ Apparently the breach of the obligation occurred, as it were, prior to any determination as to the existence of any special justification or “defence”, whereas the determination of responsibility was only made *after* such a defence had been excluded. This may imply that responsibility has not two but three elements, attribution, breach and the absence of any “special” defence or justification—although too much should not be read into a judgement dealing with an egregious breach, in a case where the Respondent State did not appear and where the Court was apparently leaving no stone unturned in its analysis;

(b) In the *the Gabčíkovo-Nagymaros Project* case, the Court noted that:

when a State has committed an internationally wrongful act, its international responsibility is *likely to be involved* whatever the nature of the obligation it has failed to respect.³⁴

²⁹ See the Special Rapporteur’s first report (footnote 2 above), para. 121, and the discussion, *ibid.*, paras. 122–125.

³⁰ See *Yearbook ... 1973*, vol. II, pp. 182–184, paras. (11) and (12) of the commentary to article 3, as adopted on first reading.

³¹ *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 37.

³² *Ibid.*, p. 38; see also page 40.

³³ *Ibid.*, p. 41.

³⁴ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Order of 5 February 1997, I.C.J. Reports 1997*, p. 38, para. 47, citing *Interpreta-*

Further, the Court stressed that:

when it invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful. The state of necessity claimed by Hungary—supposing it to have been established—thus could not permit of the conclusion that, in 1989, it had acted *in accordance with*³⁵ its obligations under the 1977 Treaty [on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System] or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.³⁵

But how can it be said that international responsibility is “likely” to be involved in the event of an internationally wrongful act if, according to article 3, there can be no such act without responsibility?

13. The Arbitral Tribunal in the *Rainbow Warrior* arbitration adopted yet another formula, referring to “the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent)”.³⁶ But in accordance with article 16, “[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it”; the breach is not merely “apparent”.

14. The difficulty may be more semantic than real, but nonetheless there is a difficulty. On the one hand, it cannot be said that a State which has evidently not acted in the manner required by a treaty or customary obligation in force for it has nonetheless acted “in conformity with” or “in accordance with” that obligation. On the other hand, it is odd to say that a State has committed an internationally wrongful act when the circumstances are such as to preclude the wrongfulness of its act under international law. However, this problem is more appropriately discussed in the framework of chapter V (circumstances precluding wrongfulness). For the moment, a reservation needs to be entered to the language of article 16, depending on the analysis to be undertaken of the various concepts underlying chapter V. But France’s suggestion that the words “under international law” be added to article 16 seems a sensible one in any event, since it emphasizes the point that the existence and content of an international obligation are determined by the system of international law and not just by the literal terms of any particular text taken in isolation.

(iii) “[N]ot in conformity with what is required of it by that obligation”

15. Finally, it might be asked whether the words “not in conformity with what is required . . . by that obligation” are apt to cover the many different kinds of breach. In some cases, an international obligation may require

tion of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950, p. 228, and article 17 of the draft articles.

³⁵ *I.C.J. Reports 1997* (see footnote 34 above), p. 39, para. 48.

³⁶ *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, decision of 30 April 1990* (UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 251.

precisely defined conduct from the State concerned (e.g. the enactment of a specified law). In others it may set a minimum standard of conduct above which the State concerned is free to go (e.g. most human rights obligations). Later articles attempt to encapsulate some of these differences by drawing distinctions between so-called obligations of conduct, obligations of prevention and obligations of result; these are discussed in due course. It can be argued that the phrase “is not in conformity with” is flexible enough to cover the many permutations of obligation, and that any doubts can be sufficiently covered in the commentary. On the other hand, it is slightly odd to talk of an act as not being “in conformity with” an obligation. The Drafting Committee may wish to consider alternative formulations in the various languages (e.g. “does not comply with”).

(b) *Article 17. Irrelevance of the origin of the international obligation breached*

16. Before reaching any conclusion on article 16, it is necessary to consider also articles 17 and 19, paragraph 1. Article 17 provides as follows:

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

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

17. The commentary to article 17 poses the important question whether international law has a single regime of responsibility for all breaches of obligation, i.e. whether it matters that the “origin” of an obligation is a bilateral or multilateral treaty, a unilateral act, a rule of general international law, a local custom or a general principle of law. It notes that:

[M]ost systems of internal law distinguish between two different régimes of civil liability, one of which applies to the breach of an obligation assumed by contract, the other to the breach of an obligation having its origin in another source.³⁷

The answer given, drawing on the implication already provided in articles 1 and 3, is: no. Unlike most systems of national law,³⁸ international law has a single regime of responsibility, or at least a single general regime. It is possible for special self-contained regimes of responsibility to be developed, in which case the general regime of responsibility will be excluded either by express provision or (more likely) by application of the *lex specialis* princi-

³⁷ *Yearbook . . . 1976*, vol. II (Part Two), p. 80, para. (3) of the commentary to article 17. The statement is something of an oversimplification, since some legal systems go beyond the basic distinction between liability *ex contractu* and liability *ex delicto*. For example, for historical reasons—limitations on contractual liability imposed by rules relating to consideration and privity, the lack of any general principle of tortious liability, the limitations imposed by the forms of action—the common law developed further categories of liability that were neither contractual nor tortious (quasi-contract, restitution . . .). See Cooke and Oughton, *The Common Law of Obligations*, pp. 5–6 and 52–59; Rogers, *Winfield and Jolowicz on Tort*, pp. 4–18. For an attempt to analyse State responsibility in terms of the “causes of action”, see Brownlie, *System of the Law of Nations: State Responsibility*, pp. 53–88.

³⁸ For a brief comparative review, see Tunc, *La responsabilité civile*, pp. 32–46, who admits the validity of the distinction in principle but calls for a unification of the regimes of contractual and delictual responsibility as far as possible, noting that this was first achieved by the Civil Code of Czechoslovakia in 1950.

ple, dealt with in article 37 of the draft articles.³⁹ But apart from that, there is, it is argued, no systematic distinction in international law between obligations arising from treaties and those arising in other ways (e.g. by unilateral act, under general international law).⁴⁰ While the absence of explicit authority on the point is noted, a review of case law and practice reveals that:

The customary, conventional or other origin of the obligation breached is not invoked to justify the choice of one form of reparation in preference to another for instance, or to determine what subject of law is authorized to invoke responsibility.⁴¹

Various reasons are given for the absence of any such distinction. In particular, “the same obligation is sometimes covered by a customary rule and by a rule codified conventionally”,⁴² and the same treaty often contains “contractual” and “law-making” provisions, so that the suggested distinction between *traités-lois* and *traités-contrats* is unreliable.⁴³

18. A second question, addressed by article 17, paragraph 2, is whether the origin of an international obligation may in some way affect the regime of responsibility for its breach. Here, a potentially relevant distinction is that between obligations owed to the international community of States as a whole and those owed to one or a few States. But nonetheless, the commentary asserts that “the pre-eminence of these obligations over others is determined by their content, not by the process by which they were created”.⁴⁴ The reason given is that “there is, in the international legal order, no special source of law for creating ‘constitutional’ or ‘fundamental’ principles”.⁴⁵ It concludes that there is no need for article 17 to refer to Article 103 of the Charter of the United Nations, or to peremptory rules of international law.⁴⁶

(i) *Government comments on article 17*

19. Switzerland notes that the clarification in article 17 “although absolutely correct, adds nothing new to the principle articulated in draft article 16”.⁴⁷ Greece remarks that paragraph 2 “would appear to be superfluous”.⁴⁸

(ii) *Article 17, paragraph 1: the “origin” of obligations (customary, conventional or other)*

20. In the *Rainbow Warrior* arbitration, New Zealand argued that issues of the performance of a treaty were primarily governed by the law of treaties, and that the law

³⁹ See *Yearbook ... 1976* (footnote 37 above), para. (5) of the commentary to article 17, and for the treatment of the *lex specialis* principle in the draft articles, see the Special Rapporteur’s first report (footnote 2 above), para. 27.

⁴⁰ See *Yearbook ... 1976* (footnote 37 above), p. 85, paras. (19)–(20) of the commentary to article 17.

⁴¹ *Ibid.*, p. 82, para. (11).

⁴² *Ibid.*, p. 85, para. (20).

⁴³ *Ibid.*

⁴⁴ *Ibid.*, para. (21).

⁴⁵ *Ibid.*, p. 86, para. (21).

⁴⁶ *Ibid.*, para. (23).

⁴⁷ A/CN.4/488 and Add.1–3 (see footnote 7 above), comment by Switzerland on article 16.

⁴⁸ A/CN.4/492 (reproduced in the present volume), comment by Greece on article 17.

of State responsibility had a merely supplementary role.⁴⁹ One corollary, according to New Zealand, was that the only excuses for failure to comply with a treaty obligation were those contained in the 1969 Vienna Convention (e.g. impossibility of performance, fundamental change of circumstances). The Tribunal disagreed. In its view:

[T]he legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness ... and the appropriate remedies for breach, are subjects that belong to the customary Law of State Responsibility.

The reason is that the general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation. The particular treaty itself might of course limit or extend the general Law of State Responsibility, for instance by establishing a system of remedies for it.⁵⁰

21. In the *Gabčíkovo-Nagymaros Project* case, ICJ referred to article 17 in support of the proposition that it is “well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect”.⁵¹ This passage has already been discussed, but it does lend further support to the proposition contained in article 17, paragraph 1.⁵²

(iii) *Article 17, paragraph 2: “does not affect”*

22. According to the commentary, the language of article 17, paragraph 2, seeks only to convey that “there is no *raison d’être* in general international law for a distinction between different types of internationally wrongful act according to the origin of the obligation”.⁵³ In particular, it is said, the hierarchical superiority of one obligation over another (e.g. under Article 103 of the Charter of the United Nations, as between Member States) does not have any consequences for the regime of responsibility:

[T]he consequences of applying the principle stated in [Article 103] do not relate to international responsibility arising from a breach of international obligations, but rather to the validity of certain treaty obligations in the event of a conflict between them and the obligations contracted by Members of the United Nations by virtue of the Charter. As a result of the provision in Article 103, an obligation under an agreement in force between two States Members of the United Nations which is in conflict with an obligation under the Charter, becomes ineffective to the extent of the conflict: consequently, it cannot be the subject of a breach entailing international responsibility. And if an obligation in conflict with those laid down by the Charter binds a Member State to a non-member State, the problem created will be that which normally arises in the event of conflict between obligations contracted by one State with several other States: that is to say, unless the rule in the Charter estab-

⁴⁹ UNRIIAA (see footnote 36 above), p. 249.

⁵⁰ *Ibid.*, p. 251. The Tribunal was unanimous on this point.

⁵¹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 38, para. 47.

⁵² In that case, Slovakia had reserved the right to argue (as New Zealand had done) that circumstances precluding wrongfulness were no excuse for a breach of an express treaty provision. Hungary disagreed. As the Tribunal had done in *Rainbow Warrior*, ICJ treated the circumstances precluding wrongfulness as relevant in principle to the question of breach of a treaty, but it went on to hold that the relevant circumstances did not justify non-compliance in fact, *I.C.J. Reports 1997* (see footnote 51 above), pp. 38, para. 47, and 63, para. 101.

⁵³ *Yearbook ... 1976* (see footnote 37 above), p. 87, para. (27) of the commentary to article 17.

lishing a certain obligation has meanwhile become a peremptory rule of general international law binding, as such, on all States. Thus there is no special problem of responsibility to be solved.⁵⁴

23. This passage calls for several comments. The first is that in part two of the draft articles, a number of distinctions are drawn between breaches of obligations of a special character (obligations *erga omnes*, peremptory norms), as compared, for example, with ordinary breaches of a bilateral treaty,⁵⁵ and it may well be that further such consequences should be elaborated. If there is to be a distinction between international crimes and international delicts, one would expect that distinction to have far-reaching effects.⁵⁶ For example, in the case of a rule whose main aim is the punishment of the guilty (i.e. in the context of criminal responsibility properly so-called), one would expect different and stricter rules of attribution than in the case of rules of delictual or civil responsibility whose main aim is cessation, restitution and reparation. Faced with these possibilities, it is odd to say that “there is no special problem of responsibility to be solved”.

24. Secondly, it is not the case that Article 103 relates “to the validity of certain treaty obligations in the event of a conflict between them and the obligations contracted by Members of the United Nations by virtue of the Charter”. Article 103 is expressly concerned to establish a priority as between two conflicting *obligations* in a given case. It provides only that Charter obligations prevail in the event of a conflict with obligations under other treaties, not that the other treaties are invalid.⁵⁷ Moreover, the possibility of a conflict between a peremptory norm and an obligation arising under a treaty can be envisaged, even if the treaty is in itself a perfectly proper one.⁵⁸ Thus it cannot be excluded that the “origin” of an obligation (for example, in the Charter, or in a peremptory norm) may “affect” international responsibility arising from the internationally wrongful act of a State. Certainly the *content* of an obligation may have a strong bearing on responsibility, and yet the “origin” of an obligation may have important implications for its content.⁵⁹

(iv) *Conclusions on article 17*

25. It may be that all paragraph 2 seeks to convey is that, where an internationally wrongful act has occurred, the origin of the obligation does not alter that fact. But that is a truism; a breach is a breach, whatever the source of the obligation. Moreover, that proposition is already clearly implied in articles 3 and 17, paragraph 1. For these

⁵⁴ *Ibid.*, p. 86, para. (23).

⁵⁵ See articles 40, paragraph 3, 43 (b), 50 (e) and 51–53.

⁵⁶ A/CN.4/490 and Add.1–7 (see footnote 2 above), paras. 51, 78–80 and 84–86.

⁵⁷ Article 103 says nothing about conflicts with obligations arising from other sources, e.g. general international law, although as a treaty the Charter would normally prevail as between its parties over any norm other than a norm of *jus cogens*.

⁵⁸ For example, the 1971 Montreal Convention, to which the Court applied Article 103 of the Charter in the *Lockerbie* case, *I.C.J. Reports 1992* (see footnote 22 above), p. 15, para. 39. See also paragraph 9 above.

⁵⁹ For example, an obligation arising from a unilateral act should be interpreted primarily in accordance with the intention of the individual actor, but this is not true of a treaty obligation (see *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, pp. 104–105).

reasons, paragraph 2 is unnecessary and confusing and should be deleted.

26. As to paragraph 1, the fact that it has been necessary for ICJ and other tribunals to rule on the matter suggests that the clarification it offers is useful. Moreover, the proposition that international law does not generally distinguish between the regime of responsibility for breaches of treaty and for breaches of other legal rules is an important one. As already noted, many legal systems take the distinction between contractual and delictual responsibility for granted.⁶⁰ For these reasons the substance of paragraph 1 should be retained. However, the Special Rapporteur agrees with the comment of Switzerland at least to the extent that the substance of paragraph 1 is really a clarification of article 16. It is recommended that article 16 should have added to it the phrase “regardless of the source (whether customary, conventional or other) of that obligation”.⁶¹

(c) *Article 19, paragraph 1. Irrelevance of the subject matter of the obligation breached*

27. Article 19 deals primarily with the “distinction” between international delicts and international crimes of State, which was discussed in detail in an earlier report.⁶² However, one aspect of article 19 requires discussion here. Paragraph 1 provides that:

An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

This is a further clarification of the general language of articles 3 and 16, not unlike that offered in article 17, paragraph 1.

28. The commentary to article 19, paragraph 1, notes that it “cannot give rise to any doubt even on a purely logical basis”,⁶³ and goes on to review the case law and doctrine. As is common with such elemental notions, there is very little discussion of the precise point in the sources mentioned, no doubt because it was taken for granted or was not in dispute.

(i) *Government comments on article 19, paragraph 1*

29. There has been more comment by Governments on article 19 than on any other of the draft articles. None of it, however, touches on (or for that matter, calls into question) the principle stated in paragraph 1, except that, for those Governments proposing the deletion of article 19,⁶⁴ one may assume that paragraph 1 contains little of value.⁶⁵

⁶⁰ See paragraph 17 above.

⁶¹ For the full text of article 16 as proposed, see paragraph 34 below.

⁶² See A/CN.4/490 and Add.1–7 (footnote 2 above), paras. 43–95; and *Yearbook ... 1998*, vol. II (Part Two), pp. 64–77, paras. 241–330.

⁶³ *Yearbook ... 1976* (see footnote 37 above), p. 96, para. (3) of the commentary to article 19.

⁶⁴ As, for example, Austria, France, the United Kingdom (A/CN.4/488 and Add.1–3) (see footnote 7 above); and Japan (A/CN.4/492 (reproduced in the present volume)).

⁶⁵ In earlier comments, Chile pointed out that provisions included in chapter I and articles 16 and 19 should be read together (*Yearbook ...*
(Continued on next page.)

(ii) *The basic principle*

30. Curiously, the commentary does not cite the important statement of PCIJ in *S.S. "Wimbledon"*, where the Court affirmed that "the right of entering into international engagements [sc., on any subject whatever concerning that State] is an attribute of State sovereignty".⁶⁶ That proposition—viz., that there is no a priori limit to the subject matters on which States may assume international obligations—has often been affirmed, in one context or another.⁶⁷ For example, in the *Military and Paramilitary Activities in and against Nicaragua* case, ICJ said that it could not "discover, within the range of subjects open to international agreement, any obstacle . . . to hinder a State from making a commitment" on "a question of domestic policy, such as that relating to the holding of free elections on its territory".⁶⁸

31. In other words, it has been argued from time to time that a State *could* not, a priori, have entered into an obligation on a particular subject matter, and the consistent reply has been that the only question was whether the State *had* done so. Similarly, it has sometimes been argued that an obligation dealing with a certain subject matter could only have been breached by conduct of the same character or description. In the *Oil Platforms* case, the United States argued that a Treaty of Amity, Economic Relations and Consular Rights, taking the form of a traditional friendship, commerce and navigation treaty, could not in principle have been breached by conduct involving the use of armed force and taken in the framework of national security or defence; a "commercial treaty", so it was said, had to be breached "commercially", i.e. by conduct of a commercial rather than a military character. The consequence of the argument was that the Court lacked jurisdiction to entertain a case which did not involve commercial conduct. The Court dealt with the matter shortly:

The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not *per se* excluded from the

(Footnote 65 continued.)

1980, vol. II (Part One), document A/CN.4/328 and Add.1–4, p. 95). The Federal Republic of Germany proposed the incorporation "in article 17 [of] the concept embodied in article 19, paragraph 1" (*Yearbook* . . . 1981, vol. II (Part One), document A/CN.4/342 and Add.1–4, p. 74).

⁶⁶ *S.S. "Wimbledon"*, *Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 25.

⁶⁷ In another case the Court noted that, while the domestic jurisdiction of States extended to matters which are not "in principle" regulated by international law, the extent of domestic jurisdiction was "an essentially relative question", *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, p. 24. See also the following cases: *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, pp. 70–71; *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, pp. 20–21; *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 24; and *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 33.

⁶⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 131, para. 259.

reach of the Treaty of 1955. The arguments put forward on this point by the United States must therefore be rejected.⁶⁹

(iii) *The formulation of the principle: "regardless of the subject-matter"*

32. Thus the underlying principle is clear, whether it is raised at the level of jurisdiction (as in *Oil Platforms*) or of substance (as in the *Military and Paramilitary Activities in and against Nicaragua* case⁷⁰). However, the reference to "subject-matter" in paragraph 1 is both non-specific and raises a perhaps unnecessary question: what subject matters would there be that would make such a difference? After all, some subject matters may lend themselves more readily than others to the conclusion that an international obligation has been assumed. For these reasons, if paragraph 1 is to be retained it may be preferable to formulate it by reference to the "content" rather than the "subject-matter" of the obligation.

33. As to whether it should be retained, the fact of repeated reference to one or other version of the principle in decisions of the Court, including recent decisions, suggests that it should be. However, for similar reasons as those given in relation to article 17, paragraph 1, it is sufficient to include it as an element in the formulation of the basic principle in article 16. There is no need for a separate paragraph or article.

(iv) *Conclusions on articles 16, 17 and 19, paragraph 1*

34. For these reasons, it is proposed that articles 16, 17 and 19, paragraph 1, be merged into a single article, which might read as follows:

"Article 16. Existence of a breach of an international obligation"

"There is a breach of an international obligation by a State when an act of that State does not comply with what is required of it under international law by that obligation, regardless of the source (whether customary, conventional or other) or the content of the obligation."

(d) *Article 18, paragraphs 1–2. Requirement that the international obligation be in force for the State*

35. Article 18 provides as follows:

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

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

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character,

⁶⁹ *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp. 811–812, para. 21.

⁷⁰ See footnote 68 above.

there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

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

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

36. Article 18 is a complex provision. It deals globally with the basic postulate that an act of a State is only wrongful if it breached an international obligation in force at the time that act was performed. The basic rule is stated in paragraph 1, but it is immediately qualified by reference to a special case involving *jus cogens* norms in paragraph 2, and is then further developed and particularized in relation to different classifications of wrongful act in paragraphs 3–5. This is significant because these classifications reappear in article 25, and they are implicated in the overall treatment of different kinds of breaches in articles 24–26. Accordingly only paragraphs 1–2 of article 18 are considered here.

(i) *Government comments on article 18, paragraphs 1–2*

37. Government comments are largely directed to later paragraphs of article 18, and the basic principle in article 18, paragraph 1, appears uncontroversial.⁷¹ For Switzerland, however, that principle is “self-evident and does not need to be explained”.⁷²

(ii) *Article 18, paragraph 1: the basic principle*

38. Paragraph 1 states the basic principle that, for responsibility to exist, the breach must occur at a time when the obligation is in force for the State. This is but the application in the field of State responsibility of the general principle of the inter-temporal law, as stated by the arbitrator, Max Huber, in another context in the *Island of Palmas* case:

[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.⁷³

39. The commentary to paragraph 1 notes the many cases in which the principle has been applied by international tribunals. But it goes further: “As this is a general principle of law universally accepted and based on reasons which are valid for every legal system, it ought

⁷¹ See the comments of Canada (*Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1–4, p. 94); France, Germany, the United Kingdom and the United States (*Yearbook ... 1998* (footnote 7 above), pp. 111 et seq.). See also paragraph 91 below.

⁷² *Yearbook ... 1998* (see footnote 7 above), p. 111.

⁷³ *Island of Palmas* (Netherlands/United States of America), award of 4 April 1928 (UNRIIAA, vol. II (Sales No. 1949.V.1), p. 845, cited in *Yearbook ... 1976* (footnote 37 above), p. 88, para. (7) of the commentary to article 18. Generally on the inter-temporal law, see the resolution of the Institute of International Law, *Annuaire*, vol. 56 (Wiesbaden Session, 1975), pp. 536–539; for the debate, *ibid.*, pp. 339–374; for Sørensen’s reports, *ibid.*, vol. 55 (Centenary Session, 1973), pp. 1–116. See further, Karl, “The time factor in the law of State responsibility”.

necessarily to apply in international law also.”⁷⁴ Moreover, in international law, it is not merely a necessary but a *sufficient* basis for responsibility; in other words, once responsibility has accrued as a result of a wrongful act, that is not affected by the subsequent termination of the obligation (whether as a result of the termination of the treaty or a change in international law).⁷⁵

40. Both aspects of the principle are implicit in the ICJ decision in the case concerning *Certain Phosphate Lands in Nauru*. Australia argued there that a State responsibility claim relating to the period of its joint administration of the Trust Territory for Nauru (1947–1968) could not be brought decades later, even if the claim had not been formally waived. The Court rejected the argument, applying a liberal standard of laches or unreasonable delay.⁷⁶ But it went on to say that:

[I]t will be for the Court, in due time, to ensure that Nauru’s delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.⁷⁷

Evidently the Court intended to apply the law in force at the time the claim arose. Indeed that position was necessarily taken by Nauru itself, since its claim was based on a breach of the Trusteeship Agreement, which terminated at the date of its accession to independence in 1968. The gist of its claim was that the responsibility of Australia, once engaged under the law in force at a given time, continued to exist even if the primary obligation had terminated.⁷⁸ That principle, which was not questioned by Australia, has been applied in other cases⁷⁹ and is affirmed in the commentary.⁸⁰ But it is nowhere expressly set out in the draft articles. It is associated with the question of the loss of the right to invoke responsibility, and is discussed in reviewing the provisions of part two.

(iii) *The principle of non-retrospectivity and the interpretation of human rights obligations*

41. Although the basic principle is clearly correct, the question is whether it is subject to any qualifications or exceptions. One clear qualification relates to the question of continuing wrongful acts. It is dealt with in article 18,

⁷⁴ *Yearbook ... 1976* (see footnote 37 above), p. 90, para. (11) of the commentary to article 18.

⁷⁵ *Ibid.*, p. 89, para. (9). That proposition is expressly affirmed for treaty obligations in the 1969 Vienna Convention (art. 70).

⁷⁶ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, I.C.J. Reports 1992, pp. 253–255.

⁷⁷ *Ibid.*, p. 255. For comment, see Higgins, “Time and the law: international perspectives on an old problem”, p. 514.

⁷⁸ More difficult problems might have been raised in respect of Nauru’s claim against Australia in respect of the mining of phosphate lands under the period of the Mandate. See further Weeramantry, *Nauru: Environmental Damage under International Trusteeship*; and Reisman, “Reflections on State responsibility for violations of explicit protectorate, mandate, and trusteeship obligations”. The case was settled before the Court had the opportunity to consider these questions, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Order of 25 June 1993*, I.C.J. Reports 1993, p. 322; and for the Settlement Agreement of 10 August 1993, see *International Legal Materials* (Washington, D.C.), vol. XXXII, No. 6 (November 1993), p. 1471.

⁷⁹ For example, the *Rainbow Warrior* case (see footnote 36 above), pp. 265–266, where the Arbitral Tribunal held that, although the relevant treaty obligation had terminated with the passage of time, France’s responsibility for its earlier breach remained.

⁸⁰ *Yearbook ... 1976* (see footnote 37 above), p. 89, para. (9) of the commentary to article 18.

paragraph 3, which is discussed below.⁸¹ Another possible qualification relates to the issue of human rights obligations. It has been suggested that “the inter-temporal principle of international law, as it is commonly understood, does not apply in the interpretation of human rights obligations”,⁸² and reliance has been placed on a dictum of Judge Tanaka (dissenting) in the *South West Africa* case. That case concerned a mandate obligation assumed by South Africa in 1920. The majority proceeded on the basis that:

[I]n order to determine what the rights and obligations of the Parties relative to the Mandate were and are ... and in particular whether ... these include any right individually to call for the due execution of the “conduct” provisions, ... the Court must place itself at the point in time when the mandates system was being instituted, and when the instruments of mandate were being framed. The Court must have regard to the situation as it was at that time, which was the critical one, and to the intentions of those concerned as they appear to have existed, or are reasonably to be inferred, in the light of that situation ... Only on this basis can a correct appreciation of the legal rights of the Parties be arrived at.⁸³

By contrast, Judge Tanaka said that:

In the present case, the protection of the acquired rights of the Respondent is not the issue, but its obligations, because the main purposes of the mandate system are ethical and humanitarian. The Respondent has no right to behave in an inhuman way today as well as during these 40 years.⁸⁴

42. This “progressive” view of the obligations of a mandatory instrument was affirmed by the new majority of the Court in the *Namibia* case, in a well-known passage:

Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant ... were not static, but were by definition evolutionary, as also, therefore, was the concept of the “sacred trust”. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years ... have brought important developments ... In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.⁸⁵

43. In the view of the Special Rapporteur, this statement does not qualify the principle stated in article 18, paragraph 1, still less does it create an exception to it. This is so for two reasons. First, the complaint against South Africa was not that it had violated the mandate in 1920 or 1930 but that it was doing so in 1966; in other words, it concerned continuing wrongful conduct in relation to an obligation assumed to continue in force. Secondly, the inter-temporal principle does not entail that treaty provisions

are to be interpreted as if frozen in time. The “progressive” or evolutionary interpretation of treaty provisions (including human rights treaties) is an established mode of interpretation,⁸⁶ although it is not the only such mode.⁸⁷ Interpretation of legal instruments over time is not an exact science, but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct.⁸⁸

(iv) *Conclusion as to article 18, paragraph 1*

44. For these reasons, the principle expressed in article 18, paragraph 1, should be retained. As to its formulation, it may be more in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility if it were expressed in the form “No act of a State shall be considered internationally wrongful unless ...”⁸⁹ The *lex specialis* principle (expressed in article 37 of the draft articles) is sufficient to deal with those rare cases where it is agreed or decided that responsibility will be assumed retrospectively.⁹⁰

(v) *Article 18, paragraph 2: emerging peremptory norms*

45. The only express qualification to the principle underlying article 18, paragraph 1, is that in paragraph 2. This contemplates that an act which was unlawful at the time it was committed will be considered lawful if that act is subsequently *required* by a peremptory norm of international law. In such cases the peremptory character of the norm extends, as it were, backwards in time, at least to the extent that it reverses the earlier characterization of the conduct as wrongful. This is described in the commentary as concerning certain “hypothetical cases which do not happen to have arisen in the past and are likely to arise only very rarely in the future, but which nevertheless cannot be ruled out”.⁹¹ The justification is stated in the following terms:

Where an act of the State appeared, at the time of its commission, to be wrongful from the formal legal point of view, but turns out to have been dictated by moral and humanitarian considerations which have since resulted in a veritable reversal of the relevant rule of law, it is difficult

⁸⁶ See, for example, the dictum of the European Court of Human Rights in the *Tyrrer* case (European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 26, *Judgment of 25 April 1978* (Council of Europe, Strasbourg, 1978), pp. 15–16.

⁸⁷ Reference to the *travaux préparatoires* of treaties, as permitted by article 32 of the 1969 Vienna Convention, necessarily points the interpreter to the understanding of the treaty provision at the time of its adoption, and thus stands in tension with progressive interpretation. But it is used for the interpretation of human rights treaties.

⁸⁸ Nor does the principle of the inter-temporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account. Take, for example, the obligation to ensure that persons accused are tried without undue delay (International Covenant on Civil and Political Rights, art. 14, para. 3 (c)). If, when that obligation enters into force for a State, accused persons have already been imprisoned awaiting trial for a long time, this could be relevant in deciding whether a breach had been committed, but no compensation could be awarded in respect of the period prior to the entry into force of the obligation: see Pauwelyn, “The concept of a ‘continuing violation’ of an international obligation: selected problems”, pp. 443–445.

⁸⁹ For the proposed language of article 18, see paragraph 158 below.

⁹⁰ As to the retroactive effect of the acknowledgement and adoption of a conduct by a State, see draft article 15 *bis* and *Yearbook ... 1998* (footnote 2 above), pp. 54–55, paras. 278–283.

⁹¹ *Yearbook ... 1976* (see footnote 37 above), p. 91, commentary to article 18, para. (14).

⁸¹ See paragraph 100 below.

⁸² Higgins, “Time and the law ...”, p. 517.

⁸³ *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 23, para. 16.

⁸⁴ *Ibid.*, pp. 293–294, cited with approval by Higgins, “Time and the law ...”, pp. 516–517.

⁸⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 31–32, para. 53.

not to see retrospectively in that act the action or omission of a forerunner. And if the settlement of the dispute caused by that act comes after the change in the law has taken place, the authority responsible for the settlement will be loath to continue treating the earlier action or omission as internationally wrongful in spite of everything, and to attach international responsibility to it.⁹²

The commentary goes on to illustrate some possibilities. For example:

[I]t is not inconceivable that an international tribunal might now be called upon to settle a dispute concerning the international responsibility of a State which, being bound by a treaty to deliver arms to another State, had refused to fulfil its obligation, knowing that the arms were to be used for the perpetration of aggression or genocide or for maintaining by force a policy of *apartheid* and had done so before the rules of *jus cogens* outlawing genocide and aggression had been established, thus making the refusal not only lawful, but obligatory.⁹³

But it is stressed that the retrospective effect of a new peremptory norm is very limited: “the act of the State is not retroactively considered as lawful *ab initio*, but only as lawful from the time when the new rule of *jus cogens* came into force”, and it has no effect on decisions or agreed settlements already reached.⁹⁴ This limited effect is expressed by the words “ceases to be considered an internationally wrongful act” in paragraph 2.

(vi) *Comments by Governments on article 18, paragraph 2*

46. France disagrees with paragraph 2, on grounds related to its general reservations about peremptory norms; it also says that an obligation to act “has no place in an article on inter-temporal law”.⁹⁵ The Netherlands, in an earlier comment, suggested that article 18, paragraph 2, if it belongs at all in the draft articles, belongs in chapter V in the context of circumstances precluding wrongfulness.⁹⁶

(vii) *Is there a need for article 18, paragraph 2?*

47. The situation contemplated in paragraph 2 must be even less common than that contemplated in article 64 of the 1969 Vienna Convention, which deals with the continued validity of treaties when a new conflicting norm of *jus cogens* comes into existence. Article 18, paragraph 2, contemplates nothing less than that an act, specifically *prohibited* by international law on day one, should itself have become *compulsory* by virtue of a new norm of *jus cogens* on day two, or at least within such a period of time as to allow issues of responsibility arising on day one to remain live but unresolved. Not even the slavery cases provide an example of this situation.⁹⁷

48. Given the limited form of retrospectivity contemplated, and the extreme unlikelihood of such cases occurring, the question must be asked why these cases are not sufficiently dealt with by the combination of arti-

cle 37 (the *lex specialis* provision), article 43 (b) (excluding restitution contrary to a peremptory norm of international law) and, finally, the flexibility inherent in the assessment of compensation. For example, in the slavery cases, assuming a wrongful seizure of slaves at a time when the slave trade remained internationally lawful,⁹⁸ there could be no question either of restitution of the slaves or of compensation for their loss, since what was lost (ownership of human beings) had become incapable of valuation in international law. As to the examples of aggression and genocide, these have been recognized as peremptory, in substance, for the whole of the Charter period.⁹⁹ It is difficult if not impossible to think of any actual case which could turn on the illegality of former conduct now required by a peremptory norm; or even, for that matter, the legality of former conduct now prohibited by such a norm.

(viii) *Effect of new peremptory norms under the 1969 Vienna Convention*

49. A further point to note is that, while the 1969 Vienna Convention contemplates that new peremptory norms may come into existence, it does not give them any retrospective effect.¹⁰⁰ Article 64 provides that, if a new peremptory norm of general international law emerges, “any existing treaty which is in conflict with that norm becomes void and terminates”. Article 71, paragraph 2, provides that:

In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

This solution avoids outright retrospectivity, but at the same time respects the demands of the new peremptory norm in that rights (for example, the right to restitution arising from an earlier wrongful act) which cannot be maintained consistently with the new norm are abrogated. This consequence a new peremptory norm would have,

⁹⁸ The point of time at which a new rule of customary international law comes into existence can be a difficult question, as it was in the slavery cases: see, for example, *Le Louis* (1817), *The English Reports*, vol. CLXV (Edinburgh, Green, 1923), p. 1464; *The Antelope* (1825), Wheaton, *Reports of cases argued and adjudged in the Supreme Court of the United States*, p. 66. In practice, such rules are regarded as effective from an early date, and in this sense an element of “retrospectivity” is built into the law-determining process.

⁹⁹ The Nürnberg principles (see *Yearbook ... 1950*, vol. II, document A/1316, Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, p. 374) criminalized the waging of aggressive war as of 1939, and those principles were affirmed by the General Assembly in 1948. ICJ in the *Reservations to the Convention on Genocide* case said that the principles underlying the Convention “are recognized by civilized nations as binding on States, even without any conventional obligation” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23).

¹⁰⁰ A point noted by Sweden in commenting on article 18, paragraph 2 (*Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1-4, p. 78).

⁹² *Ibid.*, para. (15).

⁹³ *Ibid.*, pp. 91-92, para. (17).

⁹⁴ *Ibid.*, p. 92, para. (18).

⁹⁵ *Yearbook ... 1998* (see footnote 7 above), p. 112.

⁹⁶ *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1-4, p. 103.

⁹⁷ As noted in *Yearbook ... 1976* (see footnote 37 above), p. 91, para. (16) of the commentary to article 18. The slavery cases did raise important issues of inter-temporal law: see the cases cited in paragraph (10) of the commentary (*ibid.*, pp. 89-90).

independently of the secondary rules of State responsibility.¹⁰¹

(ix) *Conclusion as to article 18, paragraph 2*

50. Ultimately, paragraph 2, as it is formulated, seems to relate more to the question of the response which a later authority (a court or tribunal) should make to a situation of responsibility arising at an earlier time, in the light of a later inconsistent peremptory rule, than it does to the question of responsibility at that earlier time. According to the commentary, the earlier conduct was actually a breach of an obligation.¹⁰² Nonetheless, the secondary relationship of responsibility thereby arising is negated by a later peremptory norm in certain particular cases.

51. Seen in this way, paragraph 2 raises two different issues, neither of which is properly located in an article which deals with the effect of the inter-temporal law on the origins of responsibility. The first is the consequence for an existing responsibility relationship of subsequent changes in the primary rules (especially where these involve new peremptory norms). That relates to part two of the draft articles, and has no place in part one. The second, more important issue is the relationship between the origins of responsibility and the overriding demands of peremptory norms, and that issue arises also, and in practice more often, with respect to existing peremptory norms. It will be discussed further in considering the circumstances precluding wrongfulness in chapter V of part one. For these reasons, paragraph 2 is unnecessary *as an aspect of article 18*, and can be deleted.

(e) *Articles 20–21. Obligations of conduct and obligations of result*

52. Articles 20–21 draw a distinction between obligations of conduct and obligations of result.¹⁰³ Because of the link between the two, the articles should be considered together. They provide as follows:

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

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

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

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

¹⁰¹ It is also consistent with the well-known proviso to Max Huber's dictum in the *Island of Palmas* case (see footnote 73 above).

¹⁰² *Yearbook ... 1976* (see footnote 37 above), p. 92, para. (18) of the commentary to article 18.

¹⁰³ This has attracted a considerable literature. See, for example, Combacau, "Obligations de résultat et obligations de comportement: quelques questions et pas de réponse"; Nguyen Quoc Dinh, Daillier and Pellet, *Droit international public*, paras. 139 and 473; Dupuy, "Le fait générateur de la responsabilité internationale des États", pp. 43–54; Brownlie, *op. cit.*, p. 241; Tomuschat, "What is a 'breach' of the European Convention on Human Rights"; and Wyler, *L'illicite et la condition des personnes privées*, pp. 17–43.

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

53. The commentary to these articles notes that, while the distinction may be difficult to apply in specific cases, it is "of fundamental importance in determining how the breach of an international obligation is committed in any particular instance".¹⁰⁴ This is so because it affects both whether, and when, a breach of obligation may be judged to have occurred. In particular, "the conditions in which an international obligation is breached vary according to whether the obligation requires the State to take some particular action or *only** requires it to achieve a certain result, while leaving it free to choose the means of doing so".¹⁰⁵ The essential basis of the distinction is that obligations of conduct, while they will have some purpose or result in mind, determine with precision the means to be adopted; hence they are sometimes called obligations of means. By contrast, obligations of result do not do so, leaving it to the State party to determine the means to be used.¹⁰⁶ This does not mean that the State has a free choice of means. Its choice may be constrained, more or less. But it will have a degree of choice, and indeed in some cases, it may have a further choice, to remedy the situation if no irrevocable harm has been done by a failure of the means originally chosen.¹⁰⁷ For example, the adoption of a law, while it may appear inimical to the result to be achieved, will not actually constitute a breach; what matters is whether the legislation is actually applied. In such cases, the breach is not committed until the legislation is definitively applied in the particular case, producing the prohibited result.¹⁰⁸

54. The commentary accepts that the type of obligation which should be imposed in any case is not a matter for the draft articles but for the authors of the primary rule. Obligations of conduct (involving either acts or omissions) are more likely to be imposed in the context of direct State-to-State relations, whereas obligations of result predominate in the treatment of persons within the internal legal order of each State.¹⁰⁹ In this sense the distinction is implicated with a view of the State and of sovereignty: a choice of means is more likely to exist in internal than in international matters. But this is not a hard and fast rule. For example, a uniform law treaty is conceived as imposing an obligation of conduct, to make the provisions of the uniform law a part of the law of the State

¹⁰⁴ *Yearbook ... 1977*, vol. II (Part Two), p. 13, commentary to article 20, para. (4).

¹⁰⁵ *Ibid.*, para. (5).

¹⁰⁶ *Ibid.*, pp. 13–14, para. (8).

¹⁰⁷ *Ibid.*, pp. 12–13, paras. (2)–(4).

¹⁰⁸ *Ibid.*, pp. 24–26, paras. (18)–(22) of the commentary to article 21, citing the decision reached in 1933 by the United States-Panama General Claims Commission in the *Mariposa Development Company* case, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 340; *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19; and the decision of the European Court of Human Rights in the *De Becker* case, *Yearbook of the European Convention on Human Rights, 1962* (The Hague), vol. 5, 1963.

¹⁰⁹ *Yearbook ... 1977*, vol. II (Part Two), p. 13, commentary to article 20, para. (6).

concerned.¹¹⁰ Obligations in the field of human rights, on the other hand, involve obligations of result, since they do not prescribe precisely how the relevant rights are to be respected, and they are consistent with a diversity of laws and institutions.

55. Articles 20–21 thus take a distinction between different types of obligation established by the primary rules and seek to develop the consequences of that distinction in terms of responsibility.¹¹¹ According to the commentary, the principal consequence for the purposes of articles 20–21 is that:

The existence of a breach of an obligation of [result] is thus determined in international law in a completely different way from that followed in the case of an obligation “of conduct” or “of means” where ... the decisive criterion for concluding that the obligation has been fulfilled or breached is a comparison between the particular course of conduct required by the obligation and the conduct actually adopted by the State.¹¹²

(i) *Government comments on articles 20–21*

56. Those Governments that have commented on articles 20–21 are sceptical of the value of the distinction. Denmark (on behalf of the Nordic countries) notes that the distinctions developed in chapter III “do not appear to have any bearing on the consequences of their breach as developed in part two.”¹¹³ France notes that these provisions relate to “rules of substantive law, which classify primary obligations”; such provisions have “no place in a draft of this kind and should be deleted”.¹¹⁴ Germany states that:

[T]here is a certain danger in establishing provisions that are too abstract in nature, since it is difficult to anticipate their scope and application. Such provisions, rather than establishing greater legal certainty, might be abused as escape clauses detrimental to customary international law. They may also seem impractical to States less rooted in the continental European legal tradition, because such abstract rules do not easily lend themselves to the pragmatic approach normally prevailing in international law.

...

In sum, Germany is not quite sure whether the complicated differentiations set out in draft articles 20, 21 and 23 are really necessary, or even desirable.¹¹⁵

The United Kingdom is concerned that “the fineness of the distinctions drawn between different categories of breach may exceed that which is necessary, or even helpful, in a statement of the fundamental principles of State responsibility [and] that it may be difficult to determine the category into which a particular conduct falls”.¹¹⁶ As to article 21 in particular, while it regards the basic propositions as “uncontroversial”, it rejects the interpretation given to them in the commentary, especially as concerns

¹¹⁰ *Ibid.*, pp. 13–14, para. (8). See Conforti, “Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme”.

¹¹¹ *Yearbook ... 1977*, vol. II (Part Two), p. 13, para. (5) of the commentary to article 20.

¹¹² *Ibid.*, p. 29, para. (35) of the commentary to article 21.

¹¹³ *Yearbook ... 1998* (see footnote 7 above), p. 123.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, p. 127.

obligations with respect to the treatment of foreigners and their property.¹¹⁷

(ii) *Relationship between the distinction as applied in national and international law*

57. The distinction between obligations of conduct and result derives from civil law systems. It is not known to the common law; hence, perhaps, the limited treatment of it in the English literature.¹¹⁸ The function of the distinction, for example in French law, is lucidly explained by Combacau:

It is ... the degree of probability of the achievement of the creditor's objective which controls the nature of the obligation imposed on the debtor: where its achievement is highly probable, the law or contract institutes obligations of result; where [the achievement of the objective] is essentially more unpredictable, [the law or contract] limits itself to reducing the risk and engaging only an obligation of means.¹¹⁹

In other words, in the civil law understanding, obligations of result involve in some measure a guarantee of the outcome, whereas obligations of conduct are in the nature of best efforts obligations, obligations to do all in one's power to achieve a result, but without ultimate commitment. Thus a doctor has an obligation of conduct towards a patient, but not an obligation of result; the doctor must do everything reasonably possible to ensure that the patient recovers, but does not undertake that the patient *will* recover. Under this conception, it is clear that obligations of result are more onerous, and breach of such obligations correspondingly easier to prove, than in the case of obligations of conduct or means.

58. By contrast, in the form presented by articles 20–21 and explained in the commentary, the distinction is drawn on the basis of determinacy, not risk. An obligation of conduct is an obligation to engage in more or less determinate conduct. An obligation of result is one that gives the State a choice of means.¹²⁰ It is for this reason that obligations of result are treated in the commentary as in some way *less* onerous than obligations of conduct, where the State has little or no choice as to what it will do.¹²¹ In international law:

The root of the distinction lies henceforth in the degree of freedom allowed the obligated party in the choice of means by which it may fulfil the obligation, and no longer in the more or less unpredictable nature of the expected result.¹²²

The difference is worth noting. In adopting what was originally a civil law distinction, the draft articles have

¹¹⁷ *Ibid.*, p. 124. Article 20, on the other hand, could in its view be merged with article 16, *ibid.*, p. 111.

¹¹⁸ See Brownlie, *op. cit.*, p. 241.

¹¹⁹ Combacau, *loc. cit.*, p. 196. See also Dupuy, *loc. cit.*, pp. 47–48. See generally Zweigert and Kötz, *An Introduction to Comparative Law*, p. 538.

¹²⁰ *Yearbook ... 1977*, vol. II (Part Two), p. 12, para. (2) of the commentary to article 20, and p. 19, para. (1) of the commentary to article 21. See also Nguyen Quoc Dinh, Daillier and Pellet, *op. cit.*, referring to the “permissiveness with regard to means” as the decisive criteria of the distinction (p. 746, para. 473).

¹²¹ Thus Stern, “Responsabilité internationale”, p. 10, para. 64, describing the obligation of conduct incumbent to a State as “more restrictive, since it has both the obligation to achieve a certain result and the obligation to use, in so doing, certain means established by international rules”.

¹²² Combacau, *loc. cit.*, pp. 201–202.

nearly reversed its effect. But of course it does not follow that a distinction which has a clear meaning and rationale in national legal systems will necessarily be applied in the same way in international law. It is necessary to treat the issue in the terms adopted by the draft articles, even if these are not those of any particular system of national law.

(iii) *The distinction between obligations of conduct and result in the legal literature*

59. Even those writers familiar with the distinction as it is drawn in civil law systems express serious doubts as to its usefulness in the draft articles. According to Tomuschat, for example, “[d]ifficult to apply, the distinction between obligations of conduct and obligations of result provides little help to those having to determine whether a breach of an international obligation has occurred.”¹²³ The impact that the distinction may have on the determination of the time factor in the commission of an internationally wrongful act has often been mentioned.¹²⁴ Most writers, however, consider the distinction to be of limited value. For example, it has been stressed that “there is not always a clear-cut line between the two types of obligations, in addition to the fact that they may be intertwined to such an extent that they lose their distinguishing features”.¹²⁵ Overall, there is little support in the literature for retaining this distinction, at least in the manner adopted on first reading. Even though Combacau believes the distinction to be “indispensable in principle”,¹²⁶ he concludes his study by questioning

the validity of notions such as means, conduct, result, objective ... being applied to rules in cases where what at first appears to be the result of a behaviour is itself a behaviour, and where each of the means offered to the party fulfilling the obligation still provides for a choice of means.¹²⁷

(iv) *The distinction between obligations of conduct and result in international case law*

60. Given this indifferent response to articles 20–21, the question must be whether courts and tribunals have nonetheless found the distinction useful in deciding actual cases. In practice those articles have only occasionally been referred to. The distinction between obligations of conduct and of result was not adverted to in the *United States Diplomatic and Consular Staff in Tehran* case,¹²⁸

¹²³ Tomuschat, “What is a ‘breach’ ...?”, p. 335. See also Dupuy, loc. cit., p. 47, and Lysén, for whom “it would seem that the proposals by the ILC do not provide any workable tools but rather contribute to confusion”, *State Responsibility and International Liability of States for Lawful Acts: A Discussion of Principles*, p. 63.

¹²⁴ For Nguyen Quoc Dinh, Daillier and Pellet, in the case of an obligation of result, “It is necessary to ... wait until the various stages of a ‘complex ... State act’ have run their course before a breach of an international obligation can be determined” (op. cit., p. 748, para. 473). See also Combacau, loc. cit., p. 184, and Dupuy, loc. cit., pp. 44–45.

¹²⁵ Lysén, op. cit., p. 62, who also refers to articles 194 and 204, paragraph 1, of the United Nations Convention on the Law of the Sea, previously analysed for the same purposes by Dupuy (loc. cit., pp. 49–50). Examining the criteria as defined in the commentaries to articles 20–21, Combacau states that “the obligations of result in article 21 come down to a single type, and they are not easily distinguishable from the obligations of conduct in article 20” (loc. cit., p. 190).

¹²⁶ Loc. cit., p. 184.

¹²⁷ Ibid., p. 204.

¹²⁸ See footnote 31 above.

for example. But three cases may be mentioned in which the distinction was used, to some extent at least.

61. In the *Colozza* case,¹²⁹ the European Court of Human Rights was concerned with the trial *in absentia* of the claimant, who had no actual notice of the trial, was sentenced to six years’ imprisonment and had not been allowed subsequently to contest his conviction. He claimed that he had not had a fair hearing, contrary to article 6, paragraph 1, of the European Convention on Human Rights. The Court noted that:

The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6 §1 in this field. The Court’s task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved ... For this to be so, the resources available under domestic law must be shown to be effective and a person “charged with a criminal offence” who is in a situation like that of Mr. Colozza must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*.¹³⁰

The Court thus held that the applicant’s case “was at the end of the day never heard, in his presence, by a ‘tribunal’ which was competent to determine all the aspects of the matter”.¹³¹ But, as Tomuschat points out, it reached this conclusion not simply by comparing the result required (the opportunity for a trial in the accused’s presence) with the result practically achieved (the lack of that opportunity in the particular case). Rather the Court examined what more Italy could have done to make the applicant’s right “effective”.¹³² It is true that the obligation of result embodied in article 6, paragraph 1, might be expressed as an obligation to provide an effective right to be tried in one’s presence, but that simply reformulates the question to be decided. It is doubtful whether the distinction between obligations of conduct and result assisted the Court to decide that question.

62. Perhaps a more interesting example was the *ELSI* case,¹³³ decided by a Chamber of the Court including Judge Ago. The principal question there was whether the requisition of the *ELSI* plant by the Mayor of Palermo (which led to the *ELSI* bankruptcy and subsequent forced sale of assets at an undervaluation) was in breach of various provisions of a bilateral FCN Treaty and Supplemen-

¹²⁹ European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 89, *Case of Colozza and Rubinat* (Council of Europe, Strasbourg, 1985).

¹³⁰ Ibid., pp. 15–16, para. 30, citing *De Cubber*, *ibid.*, vol. 86, *Judgment of 26 October 1984*, p. 20, para. 35. Compare the case of *Plattform “Ärzte für das Leben”*, in which the Court gave the following interpretation of article 11:

“While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used ... In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved.”

(*Ibid.*, vol. 139, *Judgment of 21 June 1988* (Council of Europe, Strasbourg, 1988), p. 12, para. 34) In the *Colozza* case, by contrast, the Court used similar language but concluded that the obligation was an obligation of result.

¹³¹ Ibid., vol. 89 (see footnote 129 above), p. 16, para. 32.

¹³² Ibid., p. 14, para. 28.

¹³³ *Elektronica Sicula S.p.A. (ELSI)*, *Judgment*, *I.C.J. Reports 1989*, p. 15.

tary Agreement. The United States relied, inter alia, on article I of the Supplementary Agreement, which provided that:

The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party resulting particularly in: (a) preventing their effective control and management of enterprises ... or, (b) impairing their other legally acquired rights and interests in such enterprises ...¹³⁴

The requisition of the plant was subsequently held to be unlawful under Italian law and damages were awarded by the Italian courts. But the United States argued that, the requisition having been the actual trigger for the liquidation, those damages did not reflect the actual loss. Accordingly the requisition was an arbitrary measure contrary to article I.

63. In his dissenting opinion, Judge Schwebel supported this conclusion by reference to the distinction between obligations of conduct and result as embodied in articles 20 and 21. He classified article I as embodying an obligation of result, on the ground that:

The particular objects of the obligation not to subject such corporations to arbitrary or discriminatory measures are very specifically set out. But the particular means of achieving these objects are not. Thus ... the obligation of Article I would seem to be an obligation not of means but of result, as international treaty obligations concerning the protection of aliens and their interests normally are. Nevertheless, it does not follow ... that Italy is absolved of its arbitrary treatment of ELSI and the interests of its shareholders in ELSI by reason of the administrative and judicial proceedings which followed the requisition.

...

In the current case, Italy did not achieve the specified result, namely, relieving ELSI of the effects of the arbitrary measure of requisition. It did not achieve the specified result in general, or in respect of the very particular objects set out in subparagraphs (a) and (b) of Article I.

...

It may of course be maintained that, even in the absence of the requisition, ELSI would have gone bankrupt ... But this conclusion does not take account of the fact ... that, if the requisition had not been imposed when it was imposed, ELSI would have been enabled to realize materially more from its assets than in fact was realized ...

It accordingly follows that ELSI was not placed in the position it would have been in had there been no requisition. The equivalent result was not attained by Italian administrative and judicial processes, however estimable they were. Thus, in my view, those processes do not absolve Italy of having committed an arbitrary act within the meaning of the Treaty's Supplementary Agreement.¹³⁵

By contrast, the Chamber reached the opposite conclusion without any analysis of the distinction. It held, first, that, looking at the matter broadly and realistically, the loss of control over the assets of ELSI resulted from its insolvency and not from the requisition. Secondly, however, article I was to be read as a general prohibition of "arbitrary" or "discriminatory" measures, not limited to the specific purposes set out. The reason there had been no breach of article I, in the Chamber's view, was that the Mayor's decision, albeit unlawful under Italian law, was not "arbitrary" in the sense of article I.¹³⁶ Thus the majority did not need to decide whether the opportunity for appeal from that decision remedied the arbitrariness. Rather the fact that the decision "was consciously made in the

context of an operating system of law and of appropriate remedies of appeal" was a reason for not judging it to be arbitrary in the first place.¹³⁷

64. One can agree with Judge Schwebel that, if the requisition had been considered "arbitrary", and if it was the real cause of the ELSI loss, then the limited damages obtained some years later from the Italian courts would not have "cured" the breach. But how did it affect the outcome of the case to classify article I as an obligation not to produce the result of arbitrary treatment, as distinct from an obligation (of conduct or of means) not to engage in arbitrary conduct? There seems to have been a difference between the majority and the minority as to the interpretation of the term "arbitrary" in article I, and there was certainly a difference between them in the appreciation of the facts. But it does not seem that the distinction between obligations of conduct and result made any difference in either of these respects, or actually contributed to an analysis of the issues.

65. A third example is the recent decision of the Iran-United States Claims Tribunal in *Islamic Republic of Iran v. United States of America, cases Nos. A15(IV) and A24*.¹³⁸ The case involved an Iranian claim that the United States had breached its obligation, under General Principle B of the General Declaration contained in the Algiers Declarations of 19 January 1981, "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises ... and to bring about the termination of such claims through binding arbitration".¹³⁹ Rather than terminate cases pending before its courts, the United States acted to suspend them, the suspension to be lifted upon a decision of the Tribunal that it lacked jurisdiction over the claim.¹⁴⁰ The United States argued that this was the only practical method available to it, and that the linking of the termination of legal proceedings and of claims in General Principle B showed that its approach was reasonable. In other words (though neither party used the terminology of articles 20 and 21), it argued that General Principle B embodied an obligation of result—the result being the termination of pending proceedings—and that the means adopted within its own legal system were adequate to achieve that result in practice. This is reminiscent of the view, expressed in the commentary to article 21, that obligations of result are in some sense less onerous than obligations of conduct because of the element of discretion in achieving the result that is left to the State concerned.

66. The Tribunal held, on the interpretation of the General Declaration, that the obligation to terminate litigation applied only to cases falling within its own jurisdiction, but that the obligation to terminate cases that did fall within its jurisdiction was not satisfied by mere suspen-

¹³⁷ *Ibid.*, p. 77, para. 129.

¹³⁸ Award No. 590-A15(IV)/A24-FT, 28 December 1998, *World Trade and Arbitration Materials*, vol. 11, No. 2 (1999), p. 45. This was a decision of the Full Tribunal (Skubiszewski (President); Broms, Arangio-Ruiz, Noori, Aldrich, Ameli, Allison, Aghahosseini, Duncan (Members)).

¹³⁹ *International Legal Materials* (Washington, D.C.), vol. 20, No. 1 (January 1981), p. 224.

¹⁴⁰ See *Dames & Moore v. Regan*, 453 US 654 (1981), p. 22.

¹³⁴ *Ibid.*, p. 72.

¹³⁵ *Ibid.*, pp. 117 and 121.

¹³⁶ *Ibid.*, pp. 72, para. 121, and 75–77, paras. 126–130.

sion. In reaching this conclusion, it was not enough to rely on the apparently clear language of the Declaration:

The Tribunal must analyze the matter further. Obligations under General Principle B are, generally speaking, obligations of “result”, rather than of “conduct” or “means”. Although it could be said that the United States, by suspending the litigation rather than terminating it, failed to comply with its obligations under the Algiers Declarations, the Tribunal cannot confine itself to a strictly literal or grammatical interpretation of those Declarations but must also test the method chosen by the United States ... against the object and purpose of those Declarations. The answer to the question whether suspension fulfilled the function of termination depends on practice. Thus, the test is in factual evidence.

Unless otherwise agreed by treaty, general international law permits a state to choose the means by which it implements its international obligations within its domestic jurisdiction ... Nonetheless, a state’s freedom with respect to the choice of the means for implementing an international obligation is not absolute. The means chosen must be adequate to satisfy the state’s international obligation, and they must be lawful.¹⁴¹

The Tribunal went on to hold that, “by adopting the suspension mechanism provided for in Executive Order 12294, the United States adhered to its obligations under the Algiers Declarations only if, in effect, the mechanism resulted in a termination of litigation as required by those Declarations”.¹⁴² The test of whether the litigation had been “in effect” terminated was whether the Islamic Republic of Iran was “reasonably compelled in the prudent defense of its interests to make appearances or file documents in United States courts subsequent to 19 July 1981” in respect of pending litigation within the jurisdiction of the Tribunal, or any other claims filed with the Tribunal until they were dismissed for want of jurisdiction.¹⁴³ The costs of such prudent defence, including the reasonable costs of monitoring suspended cases, would be recoverable in a second phase of the proceedings.

67. Pending the determination of these factual issues, the case is incomplete, and detailed comment on it would not be appropriate. Two points can be made, however. First, the Tribunal did apply the distinction between obligations of conduct and result, very much in the way envisaged in the commentary to articles 20–21 (though it made no reference to those articles). The effect of doing so was to give the United States some flexibility in the way it implemented General Principle B, though it was still required to produce the “result” of termination for cases within the jurisdiction of the Tribunal.¹⁴⁴ Secondly, the Tribunal reached its conclusions exclusively by the interpretation of the relevant agreements in their context and having regard to their object and purpose; in other words, at that stage of the proceedings it was not concerned with the secondary rules of responsibility at all. To that extent the decision confirms that the distinction between obligations of conduct and result concerns the classification of primary obligations, i.e. it concerns primary not secondary rules of responsibility. Thirdly, however, it is not apparent

¹⁴¹ Award No. 590-A15(IV)/A24-FT (see footnote 138 above), paras. 95–96.

¹⁴² *Ibid.*, para. 99.

¹⁴³ *Ibid.*, para. 101.

¹⁴⁴ Thus, the Tribunal held, for the United States to allow new cases to be filed solely for the purposes of tolling limitations was a breach of General Principle B: tolling limitations could have been lawfully achieved by means other than allowing the filing of suit, but General Principle B specifically prohibited “all further litigation” in claims within the Tribunal’s jurisdiction for any reason at all (*ibid.*, para. 131).

that the Tribunal’s decision would have been any different in substance, if not in form, had it classified the obligation as an obligation of conduct (the conduct of terminating the litigation) rather than an obligation of result (the result of the litigation being terminated). Presumably, the same considerations would have applied to the obligation in either case.

68. This brief review suggests that the distinction between obligations of conduct and result can be used as a means of the classification of obligations, but that it is not used with much consistency. In each case the question was one of interpretation of the relevant obligation, and the value of the distinction lies in its relevance to the measure of discretion left to the respondent State in carrying out the obligation. That discretion was necessarily constrained by the primary rule, and the crucial issue of appreciation was, to what extent? The distinction may help in some cases in expressing conclusions on this issue: whether it helps in arriving at them is another matter.

(v) *Human rights obligations as “obligations of result”*

69. The commentary to article 21 insists that standard obligations as to the treatment of persons by the State, whether in the field of human rights or diplomatic protection, involve what might be called “extended obligations of result”, and that they are covered by article 21, paragraph 2. The consequence is that these obligations are not breached by the enactment of legislation until that legislation is definitively given effect. In other words, it is the application of the legislation in the particular case, taken together with the subsequent failure of the State to remedy any resulting grievance, that constitutes the breach. Until then, the breach is merely apprehended. This view is graphically represented by Combacau in the following terms:

[W]hen the International Covenant on Civil and Political Rights provides, on the one hand, that “No one shall be subjected to arbitrary arrest or detention” ... and, on the other hand, that “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation” ... it lays down two rules that have as their counterpart in domestic law two State obligations, the one primary and the other subsidiary; however, with regard to international law, it establishes only one, which provides that the State cannot lawfully fail to comply successively with both of these domestic obligations, and which—admitting the somewhat unpleasant nature of this formulation—is ultimately interpretable as follows: “No State may arbitrarily arrest or detain an individual *without offering him or her compensation.*”¹⁴⁵

But human rights courts and committees do not treat these rights in this way, as the following brief and selective survey shows.

70. Under the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), petitions may be lodged by “any person, non-governmental organization or group of individuals claiming to be the victim of a violation” of the rights in the Convention. In addition, inter-State cases may be referred to the Court in relation to “any alleged breach of

¹⁴⁵ Combacau, *loc. cit.*, p. 191. *Contra*, see for example Higgins, “International law and the avoidance, containment and resolution of disputes: general course on public international law”, pp. 203–204.

the provisions of the Convention” and Protocols.¹⁴⁶ Article 41 provides that:

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

This clearly implies that a violation of the Convention can be established prior to and independently of the question whether reparation for such a violation is available under the relevant internal law. And that proposition has never been doubted by the Convention organs. As the Court said in one case:

Article 25 [now 34] of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it ...¹⁴⁷

71. The International Covenant on Civil and Political Rights likewise distinguishes between individual and inter-State communications. Under article 1 of the Optional Protocol, individuals subject to the jurisdiction of a State party to the Protocol who “claim to be victims of a violation by that State Party” of rights set forth in the Covenant may present communications to the Human Rights Committee.¹⁴⁸ In considering those communications, the Committee has always required that the impact of State action be such that the person concerned is individually a “victim”, and it has refused to examine State legislation in the abstract. On the other hand, it does not require that a victim should necessarily have been prosecuted or otherwise penalized. In certain cases the mere existence of legislation may involve a breach of the Covenant; in other cases a sufficiently imminent and direct threat of action will justify treating a person as a victim. The test has been summarized in the following words:

[P]rovided each of the authors is a victim within the meaning of article 1 of the Optional Protocol, nothing precludes large numbers of persons from bringing a case under the Optional Protocol. The mere fact of large numbers of petitioners does not render their communication an *actio popularis* ...

For a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice.¹⁴⁹

These limitations derive from the provisions of the Optional Protocol, as interpreted by the Committee. Inter-

¹⁴⁶ European Convention on Human Rights (as amended by Protocol 11), arts. 33–34. Local remedies must be exhausted, and a petition must be brought “within a period of six months from the date on which the final decision was taken” (art. 35).

¹⁴⁷ *Norris case*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 142, *Judgment of 26 October 1988* (Council of Europe, Strasbourg, 1989), para. 31, citing the *Klass and Others case*, *ibid.*, vol. 28, *Judgment of 6 September 1978*, para. 33; the *Marckx case*, *ibid.*, vol. 31, *Judgment of 13 June 1979*, para. 27; and the *Johnston and Others case*, *ibid.*, vol. 112, *Judgment of 27 November 1986*, para. 42. See also, *inter alia*, the *Dudgeon case*, *ibid.*, vol. 45, *Judgment of 22 October 1981*, para. 41; and the case of *Modinos v. Cyprus*, *ibid.*, vol. 259, *Judgment of 22 April 1993*, para. 24.

¹⁴⁸ The exhaustion of local remedies rule applies (art. 5, para. 2 (b)).

¹⁴⁹ Human Rights Committee, Communication No. 429/1990, decision of 8 April 1993, *E. W. et al. v. The Netherlands* (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/48/40 (Part II))*, annex XIII.G), paras. 6.3–6.4. See also, *inter alia*, Human Rights Committee, Communication No. R.9/35, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius* (*ibid.*, *Thirty-*

State communications are subject to a different formula. Under article 41, paragraph 1, of the Covenant, such communications may be brought by a State Party which has accepted the procedure and which claims that another such State Party “is not fulfilling its obligations”.¹⁵⁰ So far this procedure has not been used, but it could conceivably involve a challenge to a law as such.

72. The Inter-American Court of Human Rights applies essentially the same principle in determining whether there has been a breach of the American Convention on Human Rights. In its advisory opinion on international responsibility for the promulgation and enforcement of laws in violation of the American Convention on Human Rights, the Inter-American Court was asked several general questions arising from a controversy about a draft law which, if enacted, would have clearly violated commitments of the State concerned under the Convention. On the question whether a mere law could of itself violate an obligation of result, the Court said:

[A] law that enters into force does not necessarily affect the legal sphere of specific individuals. The law may require subsequent normative measures, compliance with additional conditions, or, quite simply, implementation by state authorities before it can affect that sphere. It may also be, however, that the individuals subject to the jurisdiction of the norm in question are affected from the moment it enters into force ... Non-self-executing laws simply empower the authorities to adopt measures pursuant to them. They do not of themselves constitute a violation of human rights.

In the case of self-executing laws ... the violation of human rights, whether individual or collective, occurs upon their promulgation. Hence, a norm that deprives a portion of the population of some of its rights—for example, because of race—automatically injures all the members of that race.¹⁵¹

After analysing the specific provisions of the Convention, and referring with approval to the European jurisprudence, the Court concluded that:

The contentious jurisdiction of the Court is intended to protect the rights and freedoms of specific individuals, not to resolve abstract questions. There is no provision in the Convention authorizing the Court, under its contentious jurisdiction, to determine whether a law that has

sixth Session, Supplement No. 40 (A/36/40), annex XIII), para. 9.2; Communication No. R.14/61, *Leo R. Hertzberg and Others v. Finland* (*ibid.*, *Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex XIV), para. 9.3; Communication No. 163/1984, *Disabled and handicapped persons in Italy v. Italy* (*ibid.*, *Thirty-ninth Session, Supplement No. 40 (A/39/40)*, annex XV), p. 198, para. 6.2; Communications Nos. 359/1989 and 385/1989, *John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v. Canada* (*ibid.*, *Forty-eighth Session, Supplement No. 40 (A/48/40)*, annex XII.P), para. 10.4 (“where an individual is in a category of persons whose activities are, by virtue of the relevant legislation, regarded as contrary to law, they may have a claim as ‘victims’ within the meaning of article 1 of the Optional Protocol”); Communication No. 488/1992, *Nicholas Toonen v. Australia* (*ibid.*, *Forty-ninth Session, Supplement No. 40 (A/49/40)*, vol. II, annex IX.EE), para. 5.1; and Communication No. 645/1995, *Vaihere Bordes et al. v. France* (*A/51/40*), vol. II, annex IX.G, paras. 5.4–5.5.

¹⁵⁰ The requirement is stated slightly differently in article 41, paragraph 1 (a): “is not giving effect to the provisions of the present Covenant”. There is no requirement that the communication relate to any specified individual, but available local remedies must have been exhausted (art. 41, para. 1 (c)).

¹⁵¹ *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (arts. 1 and 2 of the *American Convention on Human Rights*), Inter-American Court of Human Rights Advisory Opinion OC–14/94 of 9 December 1994, Series A, No. 14, paras. 41–43.

not yet affected the guaranteed rights and freedoms of specific individuals is in violation of the Convention ...

The Court finds that the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to international responsibility for the state in question.¹⁵²

The suggestion in this passage that international responsibility arises, following a manifest violation of the treaty, only “if such violation affects the guaranteed rights and liberties of specific individuals” requires some explanation. Read literally, it suggests that there can be a violation of a treaty without any responsibility, which is not in accordance with the conception of State responsibility contained in the draft articles.¹⁵³ It seems however that the Court was distinguishing here between State responsibility for violation of the treaty per se and international responsibility under the Convention’s procedures for direct violation of the rights of individuals, which alone falls within the Court’s contentious jurisdiction.

73. To summarize, this brief review shows a substantially common approach to the problem on the part of the various human rights bodies.¹⁵⁴ Legislation itself, provided that it is directly applicable to individuals or that its application is directly threatened, can constitute a breach of the convention concerned, although whether it does so in a given case requires an examination of the facts of that case. Subsequent processes within the State may provide reparation for such a breach, but they are not constitutive of it.¹⁵⁵

74. A review of the field of diplomatic protection would also, it is believed, reach the same general conclusion. The point was succinctly made by the United Kingdom:

In general terms, the United Kingdom’s view is that in a case where international law requires only that a certain result be achieved, the situation falls under draft article 21, paragraph 2. The duty to provide a fair and efficient system of justice is an example. Corruption in an inferior court would not violate that obligation if redress were speedily available in a higher court. In the case of such obligations, no breach occurs until the State has failed to take any of the opportunities available to it to produce the required result. If, on the other hand, international law requires that a certain course of conduct be followed, or that a certain result be achieved within a certain period of time, the violation of in-

¹⁵² *Ibid.*, paras. 49–50; also in *International Legal Materials*, vol. XXXIV, No. 5 (September 1995), pp. 1199–1201.

¹⁵³ Especially articles 3 and 16; see paragraph 11 above.

¹⁵⁴ Under the 1981 African Charter on Human and Peoples’ Rights, there is provision both for communications from States and for other communications (arts. 47 and 55) to the Commission. There has so far been no public indication of the Commission’s approach to the questions discussed here. Although similarities may be found in that respect in the context of European Union law (see, for example, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland*, case C-46/93, *Reports of Cases before the Court of Justice and the Court of First Instance* (Luxembourg, Office for Official Publications of the European Communities, 1996), p. I-1029, especially paras. 51 and 56), the specific character of European law limits the value of the comparison. For a general approach to State liability under European law see, for example, Craig and de Búrca, *EU Law: Texts, Cases, and Materials*, pp. 240–282.

¹⁵⁵ On the possibility that the enactment of a legislation may per se constitute a breach by a State of its obligations, provided it has a direct application on the individual, see, among others, Amerasinghe, *Local Remedies in International Law*, pp. 209–210; Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, pp. 201–206; and Diplá, *La responsabilidad de l’État pour violation des droits de l’homme: problèmes d’imputation*, pp. 20–22. *Contra*, see Cahier, “Changements et continuité du droit international: cours général de droit international public”, pp. 261–263.

ternational law arises at the point where the State’s conduct diverges from that required, or at the time when the period expires without the result having been achieved. Denial of a right of innocent passage, or a failure to provide compensation within a reasonable period of time after the expropriation of alien property, are instances of violations of such rules. Recourse to procedures in the State in order to seek “correction” of the failure to fulfil the duty would in such cases be instances of the exhaustion of local remedies.¹⁵⁶

75. Of course, there may be specific contexts in which the State does have a right to affect the rights of individuals provided compensation is payable. This is, in general, the case with expropriation of property for a public purpose, and the reason is precisely because in that context the right of eminent domain is recognized. But there is no right of eminent domain in relation to the arbitrary treatment of persons. There are also cases where the obligation is to have a *system* of a certain kind, e.g. the obligation to provide a fair and efficient system of justice. There, systematic considerations enter into the question of breach, and an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act.¹⁵⁷ This is the example given by the United Kingdom in the passage quoted above. Systematic obligations have to be applied to the system as a whole. But many human rights obligations are not of this kind: for example, in cases of torture or arbitrary killing by State officials, the violation would be immediate and unqualified.¹⁵⁸

76. It may be (as the United Kingdom notes) that the problem which has been analysed here is more one of the commentary to article 21 than of the text itself.¹⁵⁹ But the analysis suggests a number of conclusions.

(vi) *The primacy of primary rules and of their interpretation*

77. First, while it may be possible accurately to classify certain obligations as obligations of conduct or result, and while that may illuminate the content or application of the norms in question, such a classification is no substitute for the interpretation and application of the norms themselves, taking into account their context and their object and purpose. The problem with articles 20–21 is that they imply the need for an intermediate process of classification of obligations before questions of breach can be resolved. But in the final analysis, whether there has been a breach of an obligation depends on the precise terms of the obligation, and on the facts of the case. For example, it makes a difference that the obligations of States in the field of humanitarian law are expressly “to ‘respect’”

¹⁵⁶ *Yearbook ... 1998* (see footnote 7 above), p. 124.

¹⁵⁷ Similarly, a temporary swamping of the system by litigation, causing unexpected delays, does not involve a breach “if the State takes appropriate remedial action with the requisite promptness” (*Union Alimentaria Sanders SA Case*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 157, *Judgment of 7 July 1989* (Council of Europe, Strasbourg, 1989), p. 15, para. 40.

¹⁵⁸ On further analysis it is probable that an obligation to provide a fair and efficient system of justice contains diverse elements, including certain obligations “of result” (e.g. the right to a judge) and others “of conduct”. In short, it is a hybrid. See Tomuschat, “What is a ‘breach’ ...?”, p. 328. Another clear example is the obligation of respect for family life: see the decision of the European Court of Human Rights as analysed in the *Marckx* case (footnote 147 above), and later decisions.

¹⁵⁹ The issue re-emerges, however, in the context of article 22 (Exhaustion of local remedies): see paragraphs 138–146 below.

and “to ensure respect” for the relevant norms.¹⁶⁰ In other contexts, where different language is used, the position may be different. Taxonomy may assist in the interpretation and application of primary rules, but is no substitute for it.

78. This conclusion follows also from the analysis of the obligation of States in relation to torture, given by the International Tribunal for the Former Yugoslavia in a recent case. The Tribunal said:

Normally, the maintenance or passage of national legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (*lato sensu*) only when such legislation is concretely applied. By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorizing or condoning torture or at any rate capable of bringing about this effect.¹⁶¹

In other words, whether the enactment of inconsistent legislation constitutes of itself a breach of international law depends on the content and importance of the primary rule.

(vii) *The diversity of primary rules*

79. Secondly, it is difficult to overstate the immense variety of primary rules and the very different ways in which they are formulated. The means for achieving a result can be stated with many degrees of specificity. The ends to be achieved may, depending on the circumstances, dictate the necessary means with precision. Means and ends can be combined in various ways.¹⁶² For example, take the common case of a “best efforts” obligation to achieve a particular result. This is quite precisely not an obligation of result, but rather, depending on its formulation, an obligation to take such steps as are reasonably required and available to the State concerned with a view to achieving the result specified. Provided the State takes some action to that end, not obviously inadequate or inappropriate, no issue of breach may arise. But if it becomes clear that the result is not likely to be achieved, and that there are further steps open to the State which would achieve it, then the incidence of the obligation in those circumstances may become more rigorous, and even tend towards an obligation of result.¹⁶³ Thus in practice, obligations of conduct and obligations of result present not a dichotomy but a spectrum.¹⁶⁴

¹⁶⁰ See *Military and Paramilitary Activities in and against Nicaragua* (footnote 68 above), p. 114, para. 220, referring to article 1 common to the four Geneva Conventions of 12 August 1949; see also Condorelli and Boisson de Chazournes, “Quelques remarques à propos de l’obligation des États de ‘respecter et faire respecter’ le droit international humanitaire en ‘toutes circonstances’”; and Levrat, “Les conséquences de l’engagement pris par les Hautes Parties contractantes de ‘faire respecter’ les Conventions humanitaires”.

¹⁶¹ *Prosecutor v. Anto Furundzija*, case No. IT-95-17/1-T, before Judges Mumba, Cassese and May, International Tribunal for the Former Yugoslavia, judgement of 10 December 1998, para. 150; see also paragraph 149 (*ibid.*).

¹⁶² A point made by Lysén, *op. cit.*, pp. 62–63.

¹⁶³ See paragraph 86 below.

¹⁶⁴ As pointed out in a number of Government comments (see paragraph 56 above).

(viii) *The particularity of the distinction between obligations of conduct and result*

80. Thirdly, not all obligations can be classified as either obligations of conduct or of result. There can be hybrids, for example, and the draft articles themselves distinguish a further “type”; obligations of prevention. Before reaching any conclusions on articles 20–21, it is useful to look at such obligations.

(f) *Article 23. Breach of an international obligation to prevent a given event*

81. Article 23 provides as follows:

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

82. Article 23 continues the analysis of the different kinds of obligations (obligations of conduct/obligations of result) covered by articles 20 and 21. The commentary deals with obligations of prevention in the following way:

The characteristic feature ... is precisely the notion of an event, i.e. an act of man or of nature which, as such, involves no action by the State ... [I]f the result which the obligation requires the State to ensure is that one or another event should not take place, the key indication of breach of the obligation is the occurrence of the event, just as the non-occurrence of the event is the key indication of fulfilment of the obligation ... [T]he non-occurrence of the event is the result that the State is required to ensure, and it is the occurrence of the event that determines that the result has not been achieved.¹⁶⁵

83. The commentary goes on to assert that in the cases of obligations of prevention, the mere failure to prevent is not a sufficient condition for responsibility, although it is a necessary one: “The State can obviously be required only to act in such a way that the possibility of the event is obstructed, i.e. to frustrate the occurrence of the event as far as lies within its power.”¹⁶⁶ Thus, obligations of prevention are inherently obligations to take all reasonable or necessary measures to ensure that the event does not occur. They are not warranties or guarantees that an event will not occur.¹⁶⁷

(i) *Government comments on article 23*

84. France remarks that “the somewhat obscurely worded draft article 23 ... relates to rules of substantive law, which classify primary obligations. It thus has no place in a draft of this kind”.¹⁶⁸ Germany agrees.¹⁶⁹ The United Kingdom regards article 23 as uncontroversial but also unnecessary; in its view it can be deleted or combined with article 21.¹⁷⁰

¹⁶⁵ *Yearbook ... 1978*, vol. II (Part Two), p. 82, commentary to article 23, para. (4).

¹⁶⁶ *Ibid.*, para. (6).

¹⁶⁷ On the other hand, neither are they “obligations of due diligence” in the ordinary sense. Such an obligation would be breached by a failure to exercise due diligence, even if the apprehended result did not occur (*ibid.*, para. (4), footnote 397).

¹⁶⁸ *Yearbook ... 1998* (see footnote 7 above), p. 126.

¹⁶⁹ *Ibid.*, p. 124.

¹⁷⁰ *Ibid.*, p. 126.

(ii) *The content of obligations of prevention*

85. It is tempting to analyse obligations of prevention as “negative” obligations of result. For such obligations, the result in question is not the occurrence of something but its non-occurrence. On the other hand, whether this is so depends on the interpretation of the particular primary rule. The commentary¹⁷¹ gives as an example of an obligation of prevention, article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations, which provides that:

The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

According to the commentary, this is an obligation “whose breach similarly takes place only if that result [i.e. intrusion, damage or disturbance] can be seen not to have been ensured”.¹⁷²

86. Although there are obligations of prevention in the sense explained in the commentary, it is clear that article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations is not such an obligation. If anything, it is an obligation of conduct. No doubt it does not involve a warranty or guarantee against intrusion; but it is a continuing obligation on the host State to take all appropriate steps to protect the mission, which becomes more demanding if for any reason the mission is invaded or disturbed. In the case concerning *United States Diplomatic and Consular Staff in Tehran*, ICJ referred to these and other provisions of the Convention as imposing on the receiving State “the most categorical obligations ... to take appropriate steps to ensure the protection of the United States” missions and their personnel.¹⁷³ It went on to hold that, through its inaction in the face of various threats from the militants:

[T]he Iranian Government failed altogether to take any “appropriate steps” to protect the premises, staff and archives of the United States’ mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion ... [I]n the opinion of the Court ... the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.

...

This inaction of the Iranian Government by itself constituted clear and serious violation of Iran’s obligations to the United States under the provisions of Article 22, paragraph 2 ...¹⁷⁴

Moreover, the interpretation of article 22, paragraph 2, favoured in the commentary is an undesirable

¹⁷¹ *Yearbook ... 1978*, vol. II (Part Two), p. 81, para. (3), and pp. 84–85, para. (12), of the commentary to article 23. See also the comments by Denmark (on behalf of the Nordic countries), cited above, para. 56.

¹⁷² *Ibid.*, p. 82, para. (4). According to the commentary, diplomatic protests made at an earlier time are concerned with securing performance of the obligation and do not raise issues of responsibility (*ibid.*).

¹⁷³ *I.C.J. Reports 1980* (see footnote 31 above), p. 30, para. 61.

¹⁷⁴ *Ibid.*, pp. 31–32, paras. 63 and 67. The Court concluded that the Iranian conduct “clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises” (*ibid.*, pp. 35–36, para. 76). See also Rosenne, *op. cit.*, pp. 50 and 67. This point was also

one in principle; States should not be able to neglect that “special duty” on the basis that intrusion, damage or disturbance has not yet occurred and may never occur.

87. A better example of an obligation of prevention, also mentioned in the commentary,¹⁷⁵ is the principle enunciated in the *Trail Smelter* arbitration, that a State should use its best efforts to prevent cross-border damage by pollution to a neighbouring State. The commentary goes on to assert that, “[e]ven in the specific case of an obligation to prevent an event, the presence of damage is not an additional condition for the existence of an internationally wrongful act”.¹⁷⁶ This is true if the situation which has to be prevented is not defined in terms of the occurrence of damage, but it *may* be so defined. States can assume obligations to prevent damage to particular persons or to the territory of other States, and it may be that on the proper interpretation of the particular obligation it is the occurrence of the damage which triggers responsibility, rather than the failure to take steps to prevent it.

(iii) *Conclusions on articles 20, 21 and 23*

88. For the reasons given above,¹⁷⁷ the Special Rapporteur believes that article 21, paragraph 2, is an over-elaboration and a possible source of misunderstanding, and that it should be deleted. The essential difficulty lies in the notion of an obligation of result which, notwithstanding a *prima facie* breach, nonetheless “allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State”. No doubt primary rules can take manifold forms, and a primary rule might allow a State to rescue itself from a breach by remedial action which would have the effect not merely of providing reparation but of cancelling out the earlier breach entirely. But this is unusual.¹⁷⁸ If the breach of an obligation is merely threatened, preventive or remedial action may be called for, but the breach will by definition not yet have occurred. If it has occurred, subsequent conduct may mitigate its effects, or may (by providing an effective local remedy) eliminate the underlying grievance. But it is misleading in the latter case to suggest that there was never a breach.

89. Turning to the basic distinctions between obligations of conduct, result and prevention, as set out in articles 20, 21, paragraph 1, and 23, there is clearly a strong case for simply deleting them. They have been criticized by a number of Governments as over-refined.¹⁷⁹ They have been widely criticized in the literature.¹⁸⁰ Their relation-

made by Germany in its comments on article 20 (*Yearbook ... 1998* (see footnote 7 above), pp. 123–124).

¹⁷⁵ *Yearbook ... 1978*, vol. II (Part Two), p. 84, para. (11) of the commentary to article 23. For the decision in the *Trail Smelter* case, see UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905.

¹⁷⁶ *Yearbook ... 1978*, vol. II (Part Two), p. 82, para. (5) of the commentary to article 23.

¹⁷⁷ See paragraphs 69–75 above.

¹⁷⁸ More usually, an obligation may specify alternative modes of compliance (e.g. the *aut dedere aut judicare* obligation in extradition law), in which case, even if one mode is precluded, the other remains. But human rights obligations do not take this form.

¹⁷⁹ See paragraphs 56 and 84 above.

¹⁸⁰ See paragraph 59 above.

ship to similar concepts under national law is obscure and even contradictory.¹⁸¹

90. Moreover, whatever their analytical value, the distinctions appear to relate to the content and meaning of the primary rules, and this may explain why, in a statement of secondary rules, they appear to be circular. For example, article 20 appears to say nothing more than that, when a State has assumed an obligation to engage in certain conduct, the obligation is breached if the State does not engage in that conduct. The position with respect to obligations of conduct and prevention may be different, because of the hidden significance of the phrase “by the conduct adopted” in articles 21, paragraph 1, and 23. As the commentary explains, this is intended to convey the idea that in the normal case of an obligation of prevention, two conditions are required for responsibility: the failure of the State to take all available steps to prevent the event in question occurring, and the occurrence of that event in circumstances such that, if the State had taken steps available to it, the event would not (or might well not) have occurred.¹⁸² But even here there is a difficulty, in that, while this may be the natural interpretation of an obligation of prevention, it is not the only possible interpretation. A State could, after all, give an undertaking that a certain result will not occur, save in situations of force majeure. Or it could give an unconditional guarantee; in other words, it could take the risk even of unforeseen events amounting to force majeure. The meaning of any particular obligation depends on the interpretation of the relevant primary rule, but this process of interpretation falls outside the scope of the draft articles. In other words, either articles 21, paragraph 1, and 23 are likewise circular (for primary rules of a certain content, this is their content), or they create a presumption of the interpretation of certain primary rules, which is not the function of the draft articles.

91. The case for deletion is a formidable one, but still there must be a hesitation, given the currency of the terms used,¹⁸³ their value in some cases, e.g. in determining when a breach has occurred, and the relative poverty of the conceptual framework of international law in matters relating to breach of obligation. Entities ought not to be unnecessarily multiplied, but there is something to be said for retaining existing concepts, even if those concepts are not comprehensive in their coverage. The task of explaining the concepts employed to describe international obligations has its own value; the commentaries to articles 20, 21 and, especially, 23 are useful, although they are in need of modification to accommodate the points made above.

92. The Commission is invited to express its view on whether to retain the distinction in the text of chapter III. To provide a focus for its debate, the Special Rapporteur proposes a single article embodying the substance of the distinction.¹⁸⁴ To express his own scepticism, however,

¹⁸¹ See paragraphs 57–58 above.

¹⁸² *Yearbook ... 1978*, vol. II (Part Two), pp. 82–83, para. (6) of the commentary to article 23.

¹⁸³ Not always in a very enlightening way: see the case concerning the *Gabčíkovo-Nagymaros Project* (footnote 51 above), p. 77, para. 135, where the Court referred to the parties having accepted “obligations of conduct, obligations of performance, and obligations of result”.

¹⁸⁴ For the purposes of determining whether there has been a breach (as distinct from the duration of a breach), it seems sufficient to treat

the Special Rapporteur has placed the article in square brackets.

(g) *Articles 18, paragraphs 3–5, and 24–26.*
Completed and continuing wrongful acts

93. The final three articles in chapter III deal with different aspects of the problem of wrongful acts continuing in time (referred to as the “Moment and duration of the breach of an international obligation”). They provide as follows:

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

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

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

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

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

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

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

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

As noted above, it is useful to consider in the same context the detailed provisions of article 18, paragraphs 3–5, which employs the same distinctions between continuing, composite and complex wrongful acts.¹⁸⁵

94. The commentary to these articles begins by noting that temporal questions apply both to “the determination of the moment when the existence of the breach of an international obligation is established and [to] the determination of the duration, or the continuance in time, of that breach”.¹⁸⁶ It notes the various consequences that

obligations of prevention in the same way as obligations of result. Whether the duration in time of breaches of obligations of prevention requires separate treatment is dealt with below (see paragraphs 132–134).

¹⁸⁵ For the text of article 18, see paragraph 35 above.

¹⁸⁶ *Yearbook ... 1978*, vol. II (Part Two), p. 86, commentary to article 24, para. (1).

can flow from such determinations, e.g. for the jurisdiction of tribunals, the nationality of claims or the application of the doctrine of extinctive prescription, stressing at the same time that these determinations have to be made by reference to legal rules and not only by reference to the facts.¹⁸⁷ In the case of “instantaneous acts” (e.g. the shooting down of a civilian airliner), their effects may last for a long time and may be relevant in judging the seriousness of the act. But the continuation of those effects has “no bearing on the duration of the State act that caused them—an act that will in any event remain an act that does not extend in time”.¹⁸⁸ For example, the commentary asserts that the PCIJ decision in *Phosphates in Morocco*¹⁸⁹ treated the relevant French decisions as instantaneous and not involving a continuing wrongful act.¹⁹⁰

95. As to the notion of a wrongful act extending in time, which is dealt with in article 25, the commentary introduces the distinction between continuing, composite and complex acts. A “continuing act” is one which “proceeds unchanged over a given period of time: in other words, an act which, after its occurrence, continues to exist as such and not merely in its effects and consequences”.¹⁹¹ The commentary notes that the notion of continuing wrongful acts (which is common to many national legal systems) owes its origins in international law to Triepel, and has frequently been applied by courts, especially the European Court of Human Rights.¹⁹²

96. A “composite” act is defined as “an act of the State composed of a series of individual acts of the State committed in connexion with different matters”.¹⁹³ According to the commentary, they “comprise a sequence of actions which, taken separately, may be lawful or unlawful, but which are interrelated by having the same intention, content and effects, although relating to different specific cases”.¹⁹⁴ Examples include a series of administrative decisions adversely affecting nationals of a particular State which establishes a pattern of discrimination, or a refusal to allow those nationals to participate in economic activity, contrary to an international obligation of the host State. Collectively such acts might be unlawful, whether or not the individual decisions are.¹⁹⁵ Some primary rules in terms require the repetition of conduct, e.g. systematic breaches of human rights. In such cases, the first act in the series does not suffice to establish that a wrongful act has been committed, but if it is followed by other similar acts, the wrongful conduct constituted by the series of acts will be regarded as commencing with the first.¹⁹⁶

¹⁸⁷ Ibid., pp. 86–87, para. (5).

¹⁸⁸ Ibid., p. 88, para. (7).

¹⁸⁹ *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10.

¹⁹⁰ *Yearbook ... 1978*, vol. II (Part Two), pp. 88–89, para. (10); see also the commentary to article 25 (ibid., pp. 86–87, para. (5)). For reasons explained below the Special Rapporteur does not agree with this view of the decision (see paragraph 146).

¹⁹¹ Ibid., p. 90, commentary to article 25, para. (2).

¹⁹² Ibid., pp. 90–92, paras. (4)–(7).

¹⁹³ Ibid., p. 90, para. (1).

¹⁹⁴ Ibid., p. 93, para. (9).

¹⁹⁵ Ibid., paras. (10)–(11).

¹⁹⁶ Ibid., para. (12).

97. Finally there is the concept of a “complex” act, which is defined as “an act of the State made up of a succession of actions or omissions in connexion with one and the same matter”.¹⁹⁷ A classic example is denial of justice to an alien. This is a complex act because it is not established by a single decision of an administrator or a lower court: “[T]he ‘complex’ internationally wrongful act is the collective outcome of all the actions or omissions by State organs at successive stages in a given case, each of which actions or omissions could have ensured the internationally required result but failed to do so.”¹⁹⁸ This likewise has consequences in terms of the duration of the wrongful act. In the case of a complex act, “[t]he time of commission of the breach must therefore be reckoned from the moment of occurrence of the first State action that created a situation not in conformity with the result required by the obligation, until the moment of the conduct that made that result definitively unattainable”.¹⁹⁹ In such a case, the breach is not established until the last act in the series, but the breach occurs from the beginning of the series, and thus has a certain retrospective effect.

98. This sequence of articles is concluded by article 26, dealing with the moment and duration of the breach of obligations of prevention. The commentary stresses the parallelism between article 26 and article 23. Since in the case of obligations of prevention the occurrence of the outcome in question is a necessary condition of breach, it follows that its occurrence “must also be the decisive factor for the determination of the moment and duration of the breach in that same case”.²⁰⁰ The idea that even a manifest and irreversible failure by the State to prevent the event occurring could itself amount to a breach is rejected. The breach cannot occur before the event itself occurs: “[L]ogic therefore precludes the idea that the moment of the breach could be any moment preceding the occurrence of the event.”²⁰¹ But the position after the prohibited event has occurred is different. If the event has a continuing character, then “it is logical to consider that the obligation to prevent [its] occurrence ... entails the obligation to ensure that it is terminated”.²⁰² Hence in the case of continuing events, the obligation of preventing them is itself a continuing obligation, and its breach extends for as long as the event continues.²⁰³

(i) *Government comments on articles 18, paragraphs 3–5, and 24–26*

99. Those Governments which have commented on these articles are somewhat divided. France favours the retention of the various classifications of breaches made in article 25 on the ground that they establish a useful “classification of breaches on the basis of how the breach is committed”, but suggests that a linkage be made to the

¹⁹⁷ Ibid., p. 90, para. (1).

¹⁹⁸ Ibid., p. 94, para. (15).

¹⁹⁹ Ibid., p. 95, para. (17). The commentary relies heavily on the Italian argument in the case concerning *Phosphates in Morocco* (as to which see footnote 189 above and paragraph 146 below) (ibid., pp. 95–96, para. (18)).

²⁰⁰ Ibid., p. 97, commentary to article 26, para. (1). For discussion of article 23 see paragraphs 85–87 above.

²⁰¹ Ibid., para. (2).

²⁰² Ibid., p. 98, para. (6).

²⁰³ Ibid., para. (7).

equivalent paragraphs of article 18.²⁰⁴ The United Kingdom, by contrast is:

concerned that the draft articles have moved too far in the direction of drawing fine distinctions between different categories of conduct. It hopes that the Commission will consider how far it is necessary, and how far it is helpful, to adopt articles defining with great analytical precision different categories of wrongful conduct. It may be preferable to have a simpler conception of wrongful conduct, and leave its application in concrete instances to be worked out in State practice.²⁰⁵

Along similar lines, the United States criticizes article 18 and articles 24–26 for establishing:

a complex series of abstract rules governing the characterization of an act of a State as a continuing, composite, or complex act ... Read together, however, these draft articles inject far more complexity into the draft than necessary and provide possible legal hooks for wrongdoing States to evade their obligations.

...

These provisions may serve to complicate rather than clarify determinations of responsibility.²⁰⁶

Germany makes an identical comment in relation to articles 24–26.²⁰⁷ Greece suggests that these provisions “should be worded more simply and more clearly”.²⁰⁸

(ii) *Overview of the issues raised*

100. The problem of identifying when a wrongful act begins and how long it continues is one which arises frequently in practice and is the subject of a considerable jurisprudence.²⁰⁹ The issue in such cases is often not one of responsibility per se so much as the jurisdiction of a court or other body, or the admissibility of an application.²¹⁰ But there are also potential consequences in the field of responsibility proper, and indeed one very important consequence, relating to cessation of wrongful acts, is dealt with in article 41 of the draft articles. The existing provisions may be complex, but it seems that at least some provision dealing with these subjects is called for.

101. It is proposed first to consider the question of when an internationally wrongful act may be said to have occurred. Even if that act is of a continuing character, there

must be a point in time at which the wrongful act already exists. Secondly, there is the question of the distinction between completed acts (acts not extending in time) and continuing acts. Thirdly, there is the question of accommodating, within the basic framework established by those distinctions, the further refinements introduced by the notions of composite and complex wrongful acts. In each context it is necessary to consider how the principle of the inter-temporal law affects responsibility in the case of continuing, composite and complex acts. Thus article 18, paragraphs 3–5 will be considered as part of this review.

(iii) *When does a breach of obligation begin? Distinguishing apprehended, imminent or “anticipatory” breaches from existing breaches*

102. An initial question, common to all three articles, is when a breach of international law exists (as distinct from being merely apprehended or imminent). In other words, when does the wrongful act “occur” in the first place? In principle that question can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct,²¹¹ incitement or attempt,²¹² in which case the threat, incitement or attempt is itself a wrongful act. Whether there are general secondary rules of international law in relation to such “ancillary” wrongful acts as incitement, complicity and such matters will be considered further in the context of chapter IV of part one of the draft articles. For present purposes, the question is when a wrongful act, defined by reference to the primary rule, can be said to have occurred.

103. That was an issue in the case concerning the *Gabčíkovo-Nagymaros Project*.²¹³ Following Hungary’s refusal to continue with the project, as provided for in a bilateral treaty of 1977, Czechoslovakia began actively planning for, and subsequently building, a unilateral substitute scheme (the so-called “Variant C”), using installations jointly constructed for the original project and some additional elements constructed on Czechoslovak territory. Variant C was actually implemented when the Danube was diverted by means of the new installations, in October 1992. The Court held that Variant C was unlawful for various reasons, notwithstanding the prior Hungarian breach of the 1977 Treaty. But the question was, at what point had the Czechoslovak breach occurred? This mattered, inter alia, because in May 1992 Hungary had purported to

²⁰⁴ *Yearbook ... 1998* (see footnote 7 above), p. 127.

²⁰⁵ *Ibid.*, comments on article 18. See also paragraph 56 above.

²⁰⁶ *Ibid.*, citing Brownlie, *op. cit.*, pp. 197–198.

²⁰⁷ *Ibid.*, comments on article 24.

²⁰⁸ A/CN.4/492 (reproduced in this volume), comments on article 26. See also the general remarks of Governments on chapter III, summarized in paragraph 4 above.

²⁰⁹ See, for example, *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35; *Phosphates in Morocco* (see footnote 189 above), pp. 23–29; *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, pp. 80–82; and *Right of Passage over Indian Territory* (footnote 67 above), pp. 33–36. The issue has often been raised before the organs of the European Convention on Human Rights (see Pauwelyn, *loc. cit.*, pp. 430–440); see, for example, the decision of the European Commission of Human Rights in the *De Becker* case (footnote 108 above), pp. 234 and 244); judgments of the European Court of Human Rights in the *Ireland v. United Kingdom* case, *Series A: Judgments and Decisions*, vol. 25, *Judgment of 18 January 1978*, p. 64; the *Papamichalopoulos and Others v. Greece* case, *ibid.*, vol. 260–B, *Judgment of 24 June 1993*, para. 40; and the *Agrotexim and Others v. Greece* case, *ibid.*, vol. 330–A, *Judgment of 24 October 1995*, para. 58.

²¹⁰ See, inter alia, Pauwelyn, *loc. cit.*; Salmon, “Le fait étatique complexe: une notion contestable”; and Wyler, “Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite”.

²¹¹ Notably, Article 2, paragraph 4, of the Charter of the United Nations prohibits the “threat or use of force against the territorial integrity or political independence of any state”. For the question of what constitutes a threat of force, see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 246–247, paras. 47–48; see also Sadurska, “Threats of force”.

²¹² A particularly comprehensive formulation is that of article III of the Convention on the Prevention and Punishment of the Crime of Genocide, which prohibits, in addition to actual genocide, conspiracy, direct and public incitement, attempt and complicity. Article III is of course primarily directed at individual criminal responsibility, but in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ noted that “the reference in Article IX to ‘the responsibility of a State for genocide or for any of the other acts enumerated in Article III’, does not exclude any form of State responsibility” (*Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 616, para. 32). This implies that States may be directly responsible themselves for incitement, conspiracy, complicity and attempt.

²¹³ *I.C.J. Reports 1997* (see footnote 51 above), p. 7.

terminate the Treaty, relying on Czechoslovakia's insistence on the construction of Variant C. Hungary pointed out that article 60 of the 1969 Vienna Convention does not preclude a party which is itself in breach of a treaty from terminating on the ground of the other party's breach, and it argued that, at least by April 1992, Czechoslovakia's determination to proceed with the illegal diversion of the Danube amounted to an existing breach, or alternatively a repudiation of the Treaty, entitling Hungary to terminate it.²¹⁴

104. The Court rejected this argument, holding (by a majority of 9 to 6) that the breach had not occurred until the actual diversion of the Danube in October. It noted:

that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.

Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act" ...²¹⁵

Accordingly the Court held that "Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992".²¹⁶ But since Hungary had purported to terminate the Treaty in May 1992, before it had been breached by Czechoslovakia and before Hungary had suffered any loss as a result of Czechoslovakia's conduct, the purported termination was "premature" and ineffective.²¹⁷

105. In any event, according to the Court, Hungary had prejudiced its right to rely on Czechoslovakia's breach, since it was itself responsible for an earlier and related breach of the same Treaty.²¹⁸ This aspect of the case involves the so-called *exceptio inadimpleti contractus*,

²¹⁴ In some legal systems, the notion of "anticipatory breach" is used to deal with the definitive refusal by a party to perform a contractual obligation, in advance of the time laid down for its performance. Confronted with an anticipatory breach, the party concerned is entitled to terminate the contract and sue for damages. See *Frost v. Knight* (1872) LR 7 Ex. 111; *White & Carter (Councils) Ltd. v. McGregor* (1962) AC 413; and Zweigert and Kötz, *op. cit.*, pp. 543–544. Other systems achieve similar results without using this concept, for example by construing a refusal to perform in advance of the time for performance as a "positive breach of contract" (*ibid.*, p. 531 (German law)). There appears to be no equivalent in international law, but article 60, paragraph 3 (a) of the 1969 Vienna Convention defines a material breach as including "a repudiation . . . not sanctioned by the present Convention", and it is clear that such a repudiation could occur in advance of the time for performance.

²¹⁵ *I.C.J. Reports 1997* (see footnote 51 above), p. 54, para. 79, citing the commentary to draft article 41. On this point six judges (President Schwebel; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek) dissented.

²¹⁶ *Ibid.*, p. 57, para. 88.

²¹⁷ *Ibid.*, pp. 66–67, paras. 108–109.

²¹⁸ *Ibid.*, p. 67, para. 110.

and will be dealt with in the context of chapter V of part one.

106. Thus the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Such conduct does not itself amount to a breach if it does not "predetermine the final decision to be taken".²¹⁹ But whether that is so in any given case will depend on the precise facts and on the content of the primary rule. There will be questions of judgement and degree, which it is not possible to determine in advance by the use of any particular formula. The term "occurs" used in draft articles 24–26 seems as good as any for this purpose.

(iv) *When does a breach of obligation continue? The distinction between continuing and completed wrongful acts*

107. The second question relates to the distinction between wrongful acts extending in time and those not so extending. On closer analysis, there may be two separate distinctions here. The first is the distinction between wrongful acts which occur, and are completed, at a particular moment in time, and those which take some period of time to perform. The second is the distinction between wrongful acts which have been completed (even though their effects may continue) and wrongful acts which are of a continuing character. The draft articles, especially articles 24–25, seem to telescope the two ideas.

108. It is no doubt possible for a wrongful act to be committed in an instant, the instant at which property is confiscated by operation of law, for example, or legislation comes into force. This is the lawyer's *punctum temporis* at which property is transferred from one person to another, or some other "act in law" is performed. In the contemplation of the law such acts may be instantaneous, but it is rare for acts not to extend at least for some period of time. It is, however, not clear that the distinction between an act that occurs in an instant of time and one that (even if it took five seconds, five minutes or five hours) is now complete, is ever likely to matter for the purposes of State responsibility. For practical purposes the distinction between completed and continuing wrongful acts seems more important. But that distinction is a relative one: a continuing wrongful act is one that has not been completed *yet*, i.e. at the relevant time.

109. This is not intended to diminish the importance of the distinction between continuing and completed wrongful acts, but rather to place it in its proper context. That the distinction is important and has legal consequences can be seen from the following non-exhaustive review:

(a) The *Rainbow Warrior* arbitration involved the failure of France to detain two agents on the French Pacific island of Hao for a period of three years, as required by an agreement between France and New Zealand for the settlement of the *Rainbow Warrior* incident. The Arbitral Tribunal referred with approval to articles 24 and 25, paragraph 1, of the draft articles and to the distinction between instantaneous and continuing wrongful acts,²²⁰ and said:

²¹⁹ *Ibid.*, p. 54, para. 79.

²²⁰ UNRIAA (see footnote 36 above), p. 264, para. 101.

Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach.

And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.²²¹

Indeed the Tribunal went on to draw further legal consequences from the distinction, in terms of the duration of French obligations under the agreement:

The characterization of the breach as one extending or continuing in time, in accordance with Article 25 of the draft on State Responsibility ... confirms the previous conclusion concerning the duration of the relevant obligations by France under the First Agreement ... France committed a continuous breach of its obligations, without any interruption or suspension, during the whole period when the two agents remained in Paris in breach of the Agreement.

If the breach was a continuous one ... that means that the violated obligation also had to be running continuously and without interruption. The "time of commission of the breach" constituted an uninterrupted period, which was not and could not be intermittent ... Since it had begun on 22 July 1986, it has to end on 22 July 1989, at the expiry of the three years stipulated.

Thus, while France continues to be liable for the breaches which occurred before 22 July 1989, it cannot be said today that France is *now* in breach of its international obligations.²²²

(b) The notion of continuing wrongful acts has also been applied by the European Court of Human Rights to establish its jurisdiction *ratione temporis* in a series of cases (as noted in the commentary). The issue arises because the Court's jurisdiction may be limited to events occurring after the respondent State became a party to the European Convention on Human Rights or the relevant Protocol and accepted the right of individual petition. Thus in *Papamichalopoulos and Others v. Greece*, a seizure of property not involving formal expropriation occurred some eight years before Greece recognized the Court's competence. The Court held that there was a continuing breach of the right to peaceful enjoyment of property under article 1 of the Protocol, and therefore upheld its jurisdiction over the claim.²²³

(c) In *Loizidou v. Turkey*, similar reasoning was applied by the European Court of Human Rights to the consequences of the Turkish invasion of Cyprus in 1974, as a result of which the applicant was denied access to her property in northern Cyprus. Turkey relied on the fact that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus (TRNC) of 1985, the property in question had been expropriated, and this had occurred prior to Turkey's acceptance of the Court's jurisdiction in 1990. The Court held that, in accordance with international law and having regard to the relevant Security Council resolutions, it could not attribute legal effect to the 1985 TRNC Constitution, so that the expropriation was not completed at that time and the property continued to belong to the Applicant. The conduct of the TRNC and of Turkish troops in denying the applicant access to her property continued after Turkey's acceptance of the Court's jurisdiction, and constituted a breach of

article 1 of the Protocol to the European Convention on Human Rights.²²⁴ But Judge Bernhardt, in a dissenting opinion shared in substance with some other members of the Court, took a different approach to the distinction between completed and continuing breach. He said:

The Convention organs have accepted the notion of "continuing violations" ... I entirely agree with this concept, but its field of application and its limits must be appreciated. If a person is kept in prison before and after the critical date ... [t]he essential fact ... is the actual behaviour of State organs which is incompatible with the commitments under the European Convention ...

The factual and legal situation is ... different when certain historical events have given rise to a situation such as the closing of a border with automatic consequences in a great number of cases. In the present case, the decisive events date back to the year 1974. Since that time, Mrs Loizidou has not been able to visit her property in northern Cyprus. This situation continued to exist before and after the adoption of the Constitution of the so-called "Turkish Republic of Northern Cyprus" ... Turkey has recognised the jurisdiction of the Court only "in respect of facts ... which have occurred subsequent to the date of deposit of the present declaration"; the closing of the borderline in 1974 is in my view the material fact and the ensuing situation up to the present time should not be brought under the notion of "continuing violation".²²⁵

(d) The Human Rights Committee has also endorsed the idea of continuing wrongful acts. For example, in *Sandra Lovelace v. Canada*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a band member, although the loss had occurred at the time of her marriage in 1970, and Canada only accepted the Committee's jurisdiction in 1976. The Committee noted that it was:

not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol ... In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status ... at the time of her marriage in 1970.

The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date.²²⁶

It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, were sufficient to constitute a breach of article 27 of the International Covenant on Civil and Political Rights after that date. Here the notion of a continuing breach was relevant not only to the Committee's jurisdiction but also to the selection of article 27 as the most directly relevant provision of the Covenant so far as the applicant was concerned.

(e) In the case concerning the *Gabčíkovo-Nagymaros Project*,²²⁷ both Hungary's refusal to continue with the

²²¹ Ibid.

²²² Ibid., pp. 265–266. But see the dissenting opinion of Sir Kenneth Keith (ibid., pp. 279–284).

²²³ See footnote 209 above.

²²⁴ *Loizidou v. Turkey*, European Court of Human Rights, *Judgment of 18 December 1996 (Merits)*, *Reports of Judgments and Decisions* 1996–VI (Council of Europe, Strasbourg, 1996), pp. 12–14, paras. 41–47, and pp. 19–20, paras. 63–64. See also *Loizidou v. Turkey*, *ibid.*, *Series A: Judgments and Decisions*, vol. 310 (*Preliminary Objections*), *Judgment of 23 March 1995* (Council of Europe, Strasbourg, 1995), pp. 33–34, paras. 102–105.

²²⁵ *Judgment of 18 December 1996* (see footnote 224 above), pp. 24–25, para. 2. Judges Lopes Rocha, Jambrek, Pettiti, Baka and Gölcüklü in substance agreed.

²²⁶ Human Rights Committee, Communication No. R.6/24, *Sandra Lovelace v. Canada*, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40)*, annex XVIII, p. 172, paras. 10–11.

²²⁷ See footnote 51 above.

project and Czechoslovakia's implementation and operation of Variant C were continuing wrongful acts, and this had consequences in various ways. For example, when Variant C was put into operation, this was done in the context of a continuing wrongful act by Hungary, and this had various consequences in terms of the survival of the 1977 Treaty.²²⁸ When Slovakia came into existence on 1 January 1993, it was confronted with the continuing wrongful conduct of both parties to the Treaty: the situation was accordingly different from that which might have applied had Slovakia been, as it were, the accidental inheritor of the consequences or effects of unlawful acts committed and completed earlier.²²⁹

110. As these cases show, conduct having commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including purposes within the realm of State responsibility. For example, the obligation of cessation contained in article 41 applies only to continuing wrongful acts. This is a sufficient basis to include the distinction between completed and continuing wrongful acts as an element of chapter III.

111. It may, however, be objected that the notion of a continuing wrongful act cannot be defined, or can only be defined in relation to the relevant primary rule. Certainly, no attempt at a definition is made in article 25, which refers only to "an act of the State having a continuing character". Both the primary rule and the circumstances of the given case will be relevant in deciding whether a wrongful act has a continuing character, and, again, it is probably the case that a detailed definition cannot be offered in the abstract. On the other hand, guidance can be offered in the commentary, and the difficulty of applying a valid distinction in particular cases is no reason to abandon the distinction.

112. This being so, it is not necessary for the Commission to take a position on the substantive issues which gave rise to a division of opinion in some of the cases outlined above.²³⁰ For example, in the *Rainbow Warrior* case, the Tribunal relied on article 25, paragraph 1, as a basis for holding that

²²⁸ See paragraphs 103–108 above.

²²⁹ See paragraph 104 above.

²³⁰ Nor is it necessary for the Commission to take a categorical position on a question on which two previous special rapporteurs have disagreed, viz. whether expropriation is a completed or continuing wrongful act. See *Yearbook ... 1988*, vol. II (Part One), document A/CN.4/416 and Add.1, p. 14, with references to earlier Commission work. To some extent that too depends on the content of the primary norm said to have been violated, and it certainly depends on the facts. In the view of the present Special Rapporteur, where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred under the *lex loci* and the property is actually taken, the expropriation itself will then be a completed act. The position with a de facto, "creeping" or disguised occupation, however, may well be different: see *Papamichalopoulos and Others v. Greece*, discussed above (para. 109 (b)). Exceptionally (as in *Loizidou v. Turkey* (para. 109 (c) above)), a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act. The example shows the complexity of individual cases, and the unwisdom of attempting to define such issues of interpretation and application in detail in the draft articles.

France's obligation to detain the two officers on the island of Hao had terminated in 1989. Normally, an obligation to do something by a certain date would be interpreted as involving two distinct obligations—to do the thing, and to do it timely—with the result that the failure to do the thing by a certain day (whether or not that failure is excusable) does not terminate the obligation. On the contrary, the State concerned would normally be in continuing breach of the main obligation after the due date for its performance.²³¹ It is true that, as France argued in that case, "there is no rule of international law extending the length of an obligation by reason of its breach".²³² But this is because the question is one of the interpretation of the relevant primary rule. One would not normally regard an obligation to maintain a situation for a specified period as "completed" if it had been breached for the whole of that period. But whatever the better interpretation of the primary rule may be, the secondary rules of State responsibility have nothing to say on the question.²³³

113. To summarize, in the Special Rapporteur's view, the importance of the concept of continuing wrongful acts clearly justifies the retention of provisions along the lines of articles 24 and 25, paragraph 1. Given that they relate to a single operative distinction, those provisions could perhaps be combined in a single article.²³⁴

(v) *The inter-temporal principle in relation to continuing wrongful acts: article 18, paragraph 3, in relation to article 25, paragraph 1*

114. It remains to consider how the inter-temporal principle applies to acts of a continuing character. According to article 18, paragraph 3, an act of a continuing character is only breached "in respect of the period during which the act continues while the obligation is in force for that State". This is plainly correct as to the aftermath of a continuing act. If the obligation ceases to exist, there can be no question of any new or continuing breach thereafter.²³⁵ Thus in the *Rainbow Warrior* arbitration, the disagreement related to the question whether the obligation had expired after the three-year period, not as to the legal consequences if it had expired.²³⁶

115. The position in respect of periods prior to the entry into force of the obligation is also clear. In accordance with the principle stated in article 18, paragraph 1, the conduct of a State is internationally wrongful only if the rule in question was in force for that State at the time of the conduct.²³⁷ In the several cases discussed above, either

²³¹ The position might be different if the conduct required was of no value to the obligee after the due date, e.g. an obligation to inform another State of the intention to do something, prior to doing it.

²³² UNRIAA (see footnote 36 above), p. 265.

²³³ In the case concerning the *Gabčíkovo-Nagyymaros Project* (see footnote 51 above), Hungary did not argue (and plainly could not have done so) that its obligation to construct installations had lapsed because the time for doing so had passed. The impact of circumstances precluding wrongfulness on the time for performance of the obligation is discussed under chapter V.

²³⁴ For the text proposed, see paragraph 158 below.

²³⁵ On the other hand, questions of restitution can still arise, and the distinction between cessation and restitution is not always easy to draw. The matter is considered in the context of article 41.

²³⁶ UNRIAA (see footnote 36 above), p. 266. See also the dissenting opinion of Sir Kenneth Keith, pp. 279–284.

²³⁷ See paragraphs 38–44 above.

the rule in question was not in force for the State at the time the wrongful conduct commenced, or the court had no jurisdiction over the State in respect of that time, and was therefore in no position to decide on its responsibility then. Article 25, paragraph 1, however, fails to refer to this case. It provides that a continuing breach “occurs at the moment when that act begins”, which is not true if the rule in question was not then in force.²³⁸ Article 25, paragraph 1, needs to be qualified accordingly, and the point can be further explained in the commentary. If this is done, it seems that the language of article 25, paragraph 1 (“and remains not in conformity with the international obligation”), is adequate to deal with the inter-temporal problem for continuing wrongful acts, in which case article 18, paragraph 3, can be deleted as unnecessary.

(vi) *The distinction between composite and complex acts: article 18, paragraphs 4–5; article 25, paragraphs 2–3*

116. Whether the further distinction in article 25, paragraphs 2–3, between composite and complex acts (and the related provisions of article 18, paragraphs 4–5, dealing with inter-temporal issues) needs to be retained is another question. As discussed above, a composite act is defined as “an act of the State, composed of a series of actions or omissions in respect of separate cases” (art. 25, para. 2). It is contrasted with a “complex act”, which is “a succession of actions or omissions by the same or different organs of the State in respect of the same case” (art. 25, para. 3). An example of a composite act would be the adoption of a policy of apartheid, which involves systematic governmental conduct towards a racial group, taking the form of conduct in a whole series of cases. This may be compared with an act of racial discrimination against one individual. This might well be a complex act because of collusion between different organs or conduct against the individual over a period of time, but it will have involved the “same” case throughout. It should be stressed that some of the most serious wrongful acts under international law are defined in terms of their composite character. This is true not only of genocide and apartheid but of crimes against humanity generally.²³⁹

117. This analysis shows that it is possible to draw a distinction between composite and complex acts; it also shows that in order to make such a distinction it is essential to focus on the relevant primary rule. But the problem is, of course, that the draft articles are not concerned, as such, to elaborate upon the primary rules. Different classifications of primary rules may have value, but they have a place in the draft articles only to the extent that they have *consequences* within the realm of responsibility. Moreover, as formulated, the distinction between composite and complex acts is a distinction unrelated to the content of the primary rule. It is concerned with the classification of acts in breach of any rule whatsoever. That was true also for the distinction between continuing and completed

wrongful acts, but as has been seen, that is a useful and now accepted distinction for the purposes of responsibility. Is this also true for composite or complex acts?

118. Before answering that question, it is necessary to draw a distinction between the necessary *elements* of a wrongful act and what might be required by way of evidence or proof that such an act has occurred. For example, an individual act of racial discrimination is unlawful, but it may be necessary to adduce evidence of a series of acts by State officials (involving the same person or other persons similarly situated) in order to show that any one of those acts was discriminatory rather than actuated by legitimate grounds. In other words, in its essence such discrimination is not a composite or even, necessarily, a complex act, but it may be necessary for the purposes of proving it to produce evidence of a practice amounting to such an act. Thus a clear and consistent distinction between complex and composite acts is difficult to draw in practice, and this difficulty is exacerbated by the language of article 25, paragraph 2, which refers to the accomplishment of the act or omission “which establishes the existence of the composite act”; the word “established” (French: “*établi*”) might be confused with “proved”, which was evidently not intended.

(vii) *The treatment of composite acts in articles 18, paragraph 4, and 25, paragraph 2*

119. Three propositions are affirmed in the draft articles in relation to “composite acts”:

(a) According to article 25, paragraph 2, a composite act “occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act”. For the reasons explained, this might be better formulated in the following terms: “when that action or omission of the series occurs which, taken with its predecessors, is sufficient to constitute the composite act”;

(b) Nevertheless, “the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act ... [for] so long as such actions or omissions are repeated” (art. 25, para. 2);

(c) According to article 18, paragraph 4, in such a case “there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State”.

120. It is not entirely easy to reconcile these propositions. If the act only “occurs” when that aspect of the “series” occurs which establishes the composite act, must the composite act necessarily be held to have commenced at an earlier date? (The position would no doubt be different if the word “establishes” meant “establishes as a matter of evidence”, but for the reasons already given, this would be a confusion.) In particular, does it not depend on the formulation and purpose of the primary rule, not only whether a composite act may be considered to have been constituted by the first or the fifth or the *n*th act in a series (a matter which is rightly left open by the draft articles),

²³⁸ Evidently this is drafting oversight: the commentary to article 25 makes the point clearly (*Yearbook ... 1978*, vol. II (Part Two), p. 90, para. (3), footnote 435).

²³⁹ The better view is that apartheid is a special case of crimes against humanity: see the Rome Statute of the International Criminal Court, art. 7, paras. 1 (j) and 2 (h).

but whether, so constituted, the period of the breach relates back to the first of these acts or omissions?

121. It is useful to examine these questions by reference to some concrete examples. The difficulty here is that virtually all the discussion of composite acts has been based on examples of primary rules which define systematic wrongs. A systematic primary rule is one which defines acts as wrongful in terms of their composite or systematic character (the prohibition against genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, etc.). But as noted above, article 25, paragraph 2, is not limited to breaches of obligations created by such rules. Thus it is necessary to take examples both of systematic and non-systematic primary rules in order to test the idea of a “composite wrongful act”.

122. The prohibition against genocide, formulated in identical terms in the Convention on the Prevention and Punishment of the Crime of Genocide and in later instruments,²⁴⁰ is a good example of a “systematic” primary rule, in the sense that it implies, if it does not actually require, that the responsible entity (including a Government) will have adopted a systematic policy or practice, and that the individual acts of murder etc., which together constitute genocide, would not or might not do so taken individually. According to article II (a) of the Convention, the prime case of “genocide” is “[k]illing members of [a national, ethnical, racial or religious] group” with the intent to destroy that group as such, in whole or in part. Both limbs of the definition contain systematic elements. Killing one person, whatever the motive, is not genocide; the killing has to be multiple.²⁴¹ And it has to be carried out with the relevant intention, aimed at physically eliminating the group as such. In that context, the idea of a composite wrongful act elaborated in articles 18, paragraph 4, and 25, paragraph 2, seems entirely appropriate. Genocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in article II. But once that threshold is crossed, it is reasonable to say that the time of commission extends over the whole period during which any of the acts was committed. Assuming that the inter-temporal law applies to genocide, it is also reasonable to say that genocide is committed if the acts committed during the period when the Convention was in force were sufficient to constitute genocide.²⁴²

²⁴⁰ See, for example, the Statute of the International Tribunal for the Former Yugoslavia, art. 4; the Statute of the International Tribunal for Rwanda, art. 2; and the Rome Statute of the International Criminal Court, art. 6.

²⁴¹ As Judge Lauterpacht acknowledged in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Counter-claims)*, *Order of 17 December 1997*, *I.C.J. Reports 1997*, p. 282. This does not mean that a camp guard who participated in genocidal acts but was personally responsible for killing only one member of the group would necessarily be innocent: such conduct committed with the necessary intent would clearly involve complicity in genocide contrary to article III (e) of the Convention.

²⁴² It is, however, very doubtful that the inter-temporal law applies to the Convention on the Prevention and Punishment of the Crime of Genocide *as such*, since according to article I of the Convention it is declaratory, and it is therefore probable that the obligation to prosecute relates to genocide whenever committed. ICJ clearly acted on this basis in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 212 above),

123. Take, on the other hand, a simple obligation in a bilateral boundary waters agreement that each party will take no more than a specified volume of water from a boundary river in a calendar year. Assume that one of the parties authorizes different users to take each month volumes of water that (while not themselves unlawful under the agreement) make it likely that over the year the total taken will exceed the quota. The conduct of the State concerned amounts to a composite act as defined in article 25, paragraph 2, but is the whole series of acts to be treated as unlawful? The approach of the majority in the case concerning the *Gabčíkovo-Nagymaros Project*²⁴³ suggests that at least until the act occurs which predetermines the final decision to exceed the quota, no wrongful act will have been committed. Indeed, it might be that no wrongful act is committed until the quota is actually exceeded, however clear it may be that this result is going to occur. Assuming that it does occur, is it then said that the commission of the breach began with the first taking of water in January? Perhaps if the State set out with the deliberate intention to violate the treaty and gave monthly permits accordingly, it might be said that the breach began in January. But the definition of a composite act in article 25, paragraph 2, does not require such a prior intent; it is satisfied if there is “a series of actions or omissions in respect of separate cases”, and in the example given, a breach might occur fortuitously, because different regional water authorities did not coordinate their licensing policies, or for some other reason. Of course, there is a breach when the annual quota is exceeded, but is there any reason to define in advance, in the secondary rules of State responsibility, that the breach began with the first act in the series? Does it not depend on the formulation and purpose of the primary rule?

124. These examples suggest that, if composite acts are to be dealt with, a distinction needs to be drawn between simple and composite or systematic obligations. Just because a simple obligation is breached by a composite act seems no reason for treating the breach as different in kind. No doubt composite acts are more likely to give rise to continuing breaches, but simple acts can cause continuing breaches as well (e.g. the detention of a diplomat). The position is different, however, where the obligation itself (and thus the underlying primary rule) fixes on the cumulative character of the conduct as constituting the essence of the wrongful act. Thus apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically motivated killing.

125. Such a distinction was drawn by the European Court of Human Rights in *Ireland v. United Kingdom*. There Ireland complained of a practice of unlawful treatment of detainees in Northern Ireland, which it said amounted to torture or inhuman or degrading treatment, and the case

p. 617, para. 34. Note also that, even in the case of a new substantive obligation, conduct committed prior to the entry into force of the obligation might be relevant *as facts*, e.g. for the purposes of determining intent. This is true, a fortiori, where the objection *ratione temporis* relates only to the jurisdiction of the court or tribunal, not the content of the applicable law: see, for example, *Zana v. Turkey*, European Court of Human Rights, *Judgment of 25 November 1997*, *Reports of Judgments and Decisions* (Council of Europe, Strasbourg, 1997). See also footnote 88 above.

²⁴³ Para. 106 above.

was held to be admissible on that basis. This had various procedural and remedial consequences. In particular, the exhaustion of local remedies rule did not have to be complied with in relation to each of the incidents cited as part of the practice. But the Court denied that there was any separate wrongful act of a systematic kind involved. It was simply that Ireland was entitled to complain of a practice made up by a series of breaches of article 7 of the European Convention on Human Rights, and to call for its cessation. As the Court said:

A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; *a practice does not of itself constitute a violation separate from such breaches.**

...

The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in Article 26 of the Convention, applies to State applications ... in the same way as it does to "individual" applications ... On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.²⁴⁴

By contrast, in the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed.

126. For these reasons, the Special Rapporteur is provisionally in favour of retaining the notion of "composite wrongful acts", as spelled out in articles 18, paragraph 4, and 25, paragraph 2, but of limiting it to what might be termed "systematic obligations". These are obligations arising under primary rules which define the wrongful conduct in composite or systematic terms (as in the case of genocide or crimes against humanity). Such systematic obligations are important enough in international law to justify special treatment, both in terms of the time of their commission and the application of the inter-temporal law. As to obligations under other primary rules, these issues can be adequately dealt with through the interpretation and application of the particular rule.

(viii) *The treatment of complex acts in articles 18, paragraph 5, and 25, paragraph 3*²⁴⁵

127. Complex acts are defined in articles 18, paragraph 5, and 25, paragraph 3, as acts "constituted by actions or omissions by the same or different organs of the State in respect of the same case". The treatment of complex acts in articles 18, paragraph 5, and 25, paragraph 3, is strongly influenced by the approach taken by the Special Rapporteur, Mr. Roberto Ago, to the question of exhaustion of local remedies (art. 22), which is discussed below. According to this approach, the failure of a local remedy is itself part of the complex act of State, with the consequence that, in cases where the exhaustion of local remedies rule applies, the wrong is constituted by

the failure of the local remedy, and prior to that point is merely apprehended.²⁴⁶

128. However, the notion of a complex act is not dependent for its validity on accepting this view of the local remedies rule, and there are examples of complex acts in the sense of article 25, paragraph 3, which do not involve the exhaustion of local remedies. For example, the guarantee against discrimination under article XIII, paragraph 1, of GATT could easily be breached by a complex act of the importing State. Similarly, in the case of a denial of justice, where the original wrong to the individual concerned was not itself attributable to the State,²⁴⁷ it may be the successive failure of the police, the lower courts and any available appellate courts collectively to redress the grievance that amounts to a denial of justice. Such a "complex act" of the State, if it falls short of the relevant international standard, will involve a breach of international law.

129. According to article 25, paragraph 3, in such cases the breach only occurs "at the moment when the last constituent element of that complex act is accomplished". However, the "time of commission of the breach extends over the entire period" of the complex act, and under article 18, paragraph 5, the principle of the inter-temporal law is satisfied if the first act in the series occurred when the obligation was in force for the State, even if the obligation then lapses.

130. These propositions may be tested against the facts of the *Gabčíkovo-Nagymaros Project* case. Czechoslovakia's conduct in implementing Variant C was clearly a complex act. It involved a series of actions by different organs of the State, and by a private company acting as the constructor and operator of the project. The Court held that the wrongful act was not committed until the Danube was actually diverted in October 1992.²⁴⁸ It is clear that in doing so it applied the law in force at that time, and not at any earlier time. If Hungary's argument based on termination in May 1992 (e.g. on grounds of fundamental change of circumstances) had succeeded, the law in force in October would have been different.²⁴⁹ Thus rather than treating the whole period from October 1991 onwards as the time of commission of the breach, the Court ascertained the time at which the breach was essentially accomplished, despite earlier preparations, and applied the law in force at that time to the breach.

131. Another hypothetical example suggests the same conclusion. Assume that State A agrees in a bilateral investment treaty that for a period of three years it will not expropriate a particular property and that thereafter it will pay a specified amount of compensation for any expropriation. Assume further that, two and a half years later, it begins to impose restrictions on the use of the property, and that, after the initial three-year period, a number of limitations have the effect of rendering the

²⁴⁶ See paragraphs 140–141 below.

²⁴⁷ Among many examples, see the *Janes* case, decision of 16 November 1925 (UNRIAA, vol. IV (Sales No. 1951.V.1)), p. 82, where the original murder of Janes was a purely private act.

²⁴⁸ See footnote 51 and paragraph 104 above.

²⁴⁹ A Boundary Waters Convention of 1976 would have governed the issue, but for the *lex specialis* of the 1977 Treaty.

²⁴⁴ European Court of Human Rights (see footnote 209 above), para. 159; see also page 63, para. 157.

²⁴⁵ See especially Salmon, "Le fait étatique complexe ...", pp. 709–738; and Wyler, op. cit., pp. 74–81.

property valueless, followed some months later by a formal taking. This process of expropriation is clearly a “complex act”, but of the three propositions contained in the draft articles, two at least do not apply to it. First of all, there is no reason to say that the last act in the series constitutes the time of the breach; on these facts it may very well be that the expropriation should be considered as completed at an earlier date. Secondly, however, if the restrictions imposed during the three-year period did not themselves amount to an expropriation,²⁵⁰ there would be no basis for applying the law in force during those three years to the later conduct of the State, and the remedy for expropriation would be the payment of the specified amount.

132. The treatment of “complex acts” in the draft articles is vulnerable in other respects as well. For example, a sharp distinction is drawn between composite and complex acts. In the case of composite acts, one looks for the first act in the series which, taken with the earlier ones, is sufficient to constitute the breach (call it the “culminating act”). In the case of complex acts, one looks to the last act in the series. Why such a difference should exist is not explained. At the time the culminating act is performed, it may not be clear that further acts are to follow and that the series is not complete. Yet if up to that point the injured State is justified in holding that a wrong has been committed, why should it not be able to act on that basis at that time? A similar objection can be made by reference to the inter-temporal law as provided in article 18, paragraph 5. Until the series is complete, one may not know precisely how to characterize the wrongful act: for example, in *Foremost Tehran, Inc v. Islamic Republic of Iran*, whether it is a case of discrimination against foreign shareholders or a de facto expropriation.²⁵¹ Yet the application of the law in force at the time the first act in the series occurs may depend on how the whole series is to be characterized. The issue of inter-temporal law is thus made uncertain and to some extent subjective. This is exacerbated in that the distinction between composite and complex acts depends on what is identified as the relevant “case”, yet this can be done in different ways. As in *Ireland v. United Kingdom*,²⁵² for example, the applicant may focus on a “practice” of which individual incidents are merely examples. Is the practice then the “case”, or is it the individual incidents which are adduced, non-exhaustively, to prove the practice?²⁵³ The distinction between complex and composite acts depends on the unspecified notion of a “case”, yet important consequences in terms of the inter-temporal law turn on the distinction. Issues of such importance should not depend on the way in which the injured State chooses to formulate the claim. In any event, it is far from clear why, in principle, the law in force at

the time of the first act in a series should apply to the whole series. Either the individual acts are to be assessed individually, in which case the law in force at the time each was committed should be applied, or they are to be assessed as a series, in which case the rule applicable to composite acts seems equally appropriate. On neither alternative is there any reason to freeze the applicable law as it was on the date when the complex act began.²⁵⁴

133. For these reasons, it is recommended that articles 18, paragraph 5, and 25, paragraph 3, be deleted and with them the notion of the “complex act”.²⁵⁵ International courts and tribunals seem to have had no difficulty in dealing with such acts, whether in terms of the time of their commission or the inter-temporal law, and no special provision for them seems to be required in the draft articles.

(ix) *The temporal classification of obligations of prevention: article 26*

134. Article 26 relates closely to article 23, and the comments made already with respect to article 23 apply here as well. It is true that there are “pure” obligations of prevention, of the kind described in the commentary. They are true obligations of prevention in the sense that unless the apprehended event occurs there is no breach. At the same time, the State has not warranted that the event will not occur; it has undertaken an obligation in the nature of best efforts to prevent it from occurring, the content and rigour of that obligation depending on the primary rule. As noted above, however, not all obligations directed towards preventing an event from occurring are of this kind, and it is not the function of the draft articles to force all such obligations into a single form.

135. There is a further difficulty with the formulation of article 26, in that it assumes that the occurrence of an event which has a continuing character will involve a continuing breach by the State which has wrongfully failed to prevent it. This may well be the case—for example, with the obligation to prevent transboundary damage by air pollution, articulated in the *Trail Smelter* arbitration,²⁵⁶ or the obligation to prevent intrusions onto diplomatic premises.²⁵⁷ But again, circumstances can be imagined where this is not so, e.g. where the event, once it has occurred, is irreversible, or its continuance causes no further injury to the injured State. An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation

²⁵⁰ See *Foremost Tehran Inc. v. Islamic Republic of Iran*, case No. 37, Award No. 220–37/231–1, 10 April 1986, where the Iran-United States Claims Tribunal held that the acts in question did not constitute an expropriation by the terminal date of the Tribunal’s jurisdiction (*Iran-United States Claims Tribunal Reports*, vol. 10 (Cambridge, Grotius, 1987), p. 228.

²⁵¹ *Ibid.*

²⁵² See footnote 209 above.

²⁵³ See also the United States counter-claim in the case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Counter-Claim, Order of 10 March 1998, *I.C.J. Reports 1998*, p. 190, which likewise focuses on a general situation rather than specific instances.

²⁵⁴ One unstated reason for the retrospective element in article 18, paragraph 5, was that this was necessary in order to defend article 22. According to that article, the exhaustion of local remedies is part of the breach and not only a condition to the admissibility of a diplomatic claim, and it involves a complex act. In such cases, however, it is clear that one looks to the law in force at the time when the injury occurred, not to the law in force when the local remedy was exhausted. See paragraphs 145–146 below.

²⁵⁵ Apart from the comments of Governments (reviewed in paragraph 99 above), this conclusion is strongly supported in the literature. Thus, Salmon, “Le fait étatique complexe ...”, p. 738, finds the notion of complex acts “[c]onfusing ... [d]angerous ... [and] useless”. Pauwelyn, *loc. cit.*, p. 428, describes article 25, paragraph 3, as “highly debatable”. See also Karl, *op. cit.*, p. 102; Wyler, *op. cit.*, p. 89; and Brownlie, *op. cit.*, p. 197 (“of doubtful value”).

²⁵⁶ See footnote 175 above.

²⁵⁷ See *I.C.J. Reports 1980* (footnote 31 above), pp. 35–36.

will not necessarily be of a continuing character, since it may be that once the information is published, the whole point of the obligation is defeated. It is thus necessary to qualify article 26 by the addition of the same phrase as is contained in article 25, paragraph 1, (“and remains not in conformity with the international obligation”).

136. Subject to this proviso, article 26 is a useful additional qualification to the proposed article dealing with completed and continuing wrongful acts. It is useful to emphasize that, in the case of obligations of prevention, the occurrence of the event in question will normally give rise to a continuing wrongful act (i.e. unless the event itself ceases, or the obligation ceases to apply to it). Indeed, in such cases the wrongful act may be progressively aggravated by the failure to suppress it. On this basis, it seems sensible to include this provision as a further paragraph in the proposed article dealing with the distinction between completed and continuing wrongful acts.

(x) *Conclusions on articles 18, paragraphs 3–5, and 24–26*

137. For these reasons, it is recommended that articles 18, paragraphs 3–5, and 24–26 be replaced by two articles, one dealing with the distinction between completed and continuing wrongful acts, the other dealing with breach of certain obligations of a systematic or composite character.²⁵⁸

(h) *Article 22. Exhaustion of local remedies*

138. Article 22 provides as follows:

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

139. According to its title, article 22 deals with the well-known principle of exhaustion of local remedies (“the treatment to be accorded to aliens, whether natural or juridical persons”). These are analysed within the framework of “complex” obligations of result, as dealt with in article 21, paragraph 2.

140. The lengthy commentary to article 22 emphasizes this point. In the case of obligations in the field of diplomatic protection:

If the [injured foreigners] take no action, the situation created by the initial conduct of the State running counter to the internationally desired result cannot be rectified by subsequent action of the State capable of replacing that situation by one in conformity with the result required by the obligation ... The case here is quite different from that in which, despite the necessary initiative having been taken by the individuals concerned to obtain redress, the situation created by the initial conduct

is confirmed by a new course of conduct of the State, which is likewise incompatible with the internationally required result.²⁵⁹

But this implies that the refusal of a local remedy will itself be internationally wrongful. This may be so, as where the local court discriminates against the foreigner, or acts arbitrarily, contrary to the applicable standards of treatment. But in other cases, the exhaustion of local remedies will not involve any new or continuing wrongful conduct. It will simply confirm that, in accordance with the internal laws and procedures of the respondent State, no further local remedy is available.²⁶⁰ In such cases the local remedy is a failed cure, not part of the illness itself.

141. The commentary goes on to argue that:

If, so long as the condition of exhaustion of local remedies has not been satisfied, the injured State has no faculty to claim reparation for an internationally wrongful act allegedly committed to its detriment in the person or property of its national, it is because for the time being its new right to reparation of an injury suffered by it has not yet been created. In other words, a breach of the obligation imposed by the treaty has not yet occurred or, at least, has not yet definitively occurred.²⁶¹

But the fact that the third State may not be able to espouse the claim in terms of reparation for injury to its nationals until local remedies have been exhausted does not mean that that State has no legal interest to protect at an earlier time.²⁶² For example, it may have a strong interest in the cessation of the wrongful act.

(i) *Government comments on article 22*

142. France suggests that it should be made clear that the exhaustion of local remedies “is limited to diplomatic protection”.²⁶³ Germany queries both the location of and the need for article 22, and notes that it should “not apply in cases of grave violations of the law on the treatment to be accorded to aliens that constitute, at the same time, violations of [their] human rights”.²⁶⁴ The United Kingdom goes further, arguing carefully for a “procedural” view of the exhaustion of local remedies rule.²⁶⁵ At the same time it suggests that the rule should be held to apply to injuries occurring outside the respondent State’s territory, except perhaps in cases of egregious breach.²⁶⁶

(ii) *The scope of the local remedies rule*

143. The local remedies rule was described by a Chamber of the Court in the *ELSI* case as “an important principle of customary international law”.²⁶⁷ In the context of a claim brought on behalf of a national (including a corporation)

²⁵⁹ *Yearbook ... 1977*, vol. II (Part Two), p. 30, para. (3) of the commentary to article 22.

²⁶⁰ See the local remedies considered in the *ELSI* case (footnote 133 above).

²⁶¹ *Yearbook ... 1977*, vol. II (Part Two), p. 35, para. (15) of the commentary to article 22.

²⁶² See *Phosphates in Morocco* (footnote 189 above), p. 28. See, however, *Yearbook ... 1977*, vol. II (Part Two), p. 50, para. (59) of the commentary to article 22.

²⁶³ *Yearbook ... 1998* (see footnote 7 above), p. 124.

²⁶⁴ *Ibid.*, p. 125.

²⁶⁵ *Ibid.* The same point was made by the Federal Republic of Germany in its comments of 1981 (*Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, pp. 75–76).

²⁶⁶ *Yearbook ... 1998* (see footnote 7 above), pp. 125–126.

²⁶⁷ *I.C.J. Reports 1989* (see footnote 133 above), p. 42, para. 50. See also the *Interhandel* case (footnote 67 above), p. 27.

²⁵⁸ See paragraph 158 below for the proposed text.

of the claimant State, the Chamber defined the rule succinctly in the following terms:

[F]or an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.²⁶⁸

The Chamber thus treated the rule as one relating to the admissibility of claims within the field of diplomatic protection. It treated the exhaustion of local remedies as being distinct, in principle, from “the merits of the case”.²⁶⁹ This is the orthodox understanding of the rule.

144. By contrast, article 22 conceives the exhaustion of local remedies within the framework of article 21, paragraph 2, in the following terms: “When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens ... but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State”. In such cases, according to article 22 the breach of obligation occurs only if, and when, the effective local remedies are exhausted. As to this, several points need to be made.

145. However, most of the situations covered by the exhaustion of local remedies rule are not of this character.²⁷⁰ For example, there is a general international obligation on all States not to discriminate arbitrarily against aliens. The precise content of this obligation need not be of concern here. The point is that it is clear (a) that the exhaustion of local remedies rule applies to claims for breach of this obligation; and (b) that, nonetheless, this is not a case where the State has a choice of discriminating against aliens, on condition that it offers them compensation.²⁷¹ It is obliged not to discriminate in the first place. In such cases, the breach of international law occurs at the time when the treatment occurs. The breach is not postponed to a later date when local remedies are exhausted, or when some equivalent redress is offered. In such cases, the breach of international law having already occurred, the exhaustion of local remedies is a standard procedural condition to the admissibility of the claim.²⁷²

146. It is true that there are cases where “the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State” (art. 22). An example is provided by the common provision

²⁶⁸ *I.C.J. Reports 1989* (see footnote 133 above), p. 46, para. 59.

²⁶⁹ *Ibid.*, p. 48, para. 63.

²⁷⁰ See paragraph 74 above.

²⁷¹ See paragraphs 62–63 above.

²⁷² Thus the exhaustion of local remedies rule can be waived, as the Chamber in the *ELSI* case noted (*I.C.J. Reports 1989* (footnote 133 above), p. 42, para. 50. See also the resolution on the exhaustion of local remedies rule, adopted in 1956 by the Institute of International Law, according to which “the rule does not apply ... in cases where its application has been waived by agreement of the States concerned” (*Annuaire de l'Institut de Droit International*, vol. 46 (Basel, 1956), p. 358). But if there is no breach, there would be no international claim in the first place. The same point might be made by reference to those cases where it was held that a State was estopped from raising the exhaustion of local remedies, by its failure to raise it at a preliminary stage, for example, *Aydin v. Turkey*, European Court of Human Rights, *Judgment of 25 September 1997*. See also the *Ireland v. United Kingdom* case (footnote 209 above), cited in paragraph 125 above.

in many bilateral investment protection treaties, to the effect that investments may not be expropriated “except for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and upon payment of compensation”.²⁷³ In a case where a non-discriminatory but uncompensated expropriation occurs, it is the failure to compensate which constitutes the gist of the breach, and this failure may be judged to have occurred at a time subsequent to the taking. Nonetheless, the failure is still analytically distinct from the exhaustion of local judicial remedies, and the breach in such a case would occur at the time the failure to compensate definitively occurred, whatever form that failure took.²⁷⁴

147. There may also be cases where the failure to provide an adequate local remedy is itself the relevant internationally wrongful act. This is so, for example, where the injury to the alien is caused by conduct not attributable to the State,²⁷⁵ or where the violation involves a breach of due process standards, laid down in a treaty or by general international law, which occurs at the time of seeking the remedy.²⁷⁶ But this is clearly not the situation to which article 22 is directed, since in such cases the basis of the claim brought to the State court is not itself a “situation not in conformity with the result required of [the State] by an international obligation”. Rather, that situation occurs subsequently, when the court’s own action conflicts with the State’s obligation.

(iii) *When is a breach of international law involving the treatment of aliens committed?*

148. The formulation in article 22 is strongly reminiscent of the Italian argument in the *Phosphates in Morocco* case.²⁷⁷ In that case France had only accepted the jurisdiction of PCIJ with respect to “situations or facts subsequent to” 1931. Part of Italy’s claim related to the dispossession of certain Italian nationals arising from a

²⁷³ See, for example, the Agreement between the Government of the People’s Republic of China and the Government of the French Republic concerning the Reciprocal Encouragement and Protection of Investments, art. 4, para. 2 (*International Legal Materials*, vol. XXIV, No. 3 (May 1985), p. 553).

²⁷⁴ For example, the enactment of a law expropriating property and expressly excluding any compensation would constitute a breach of such a treaty provision, but the exhaustion of local remedies rule would be a prerequisite to the admissibility of an international claim on behalf of any person so expropriated. Thus, for example, the affected owner might need to challenge the constitutionality of the law, if such a challenge were available. See, for example, the judgement of the European Court of Human Rights in the case of *Lithgow and Others*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 102, *Judgment of 8 July 1986* (Council of Europe, Strasbourg, 1987), p. 74, para. 206; and the decision of the European Commission of Human Rights, No. 27/55 of 31 May 1956, *Documents and Decisions, 1955–1956–1957* (The Hague, Martinus Nijhoff, 1959), pp. 138–139.

²⁷⁵ See the decisions of the Mexico/United States of America General Claims Commission in *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 60–66, and the *Janes* case, *ibid.*, pp. 82–98.

²⁷⁶ See, for example, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; article 2, paragraph 3, of the International Covenant on Civil and Political Rights; article 13 of the European Convention on Human Rights; and article 25 of the American Convention on Human Rights.

²⁷⁷ See footnote 189 above. For discussion of the case, see *Yearbook ... 1977*, vol. II (Part Two), pp. 38–40, paras. (25)–(28) of the commentary to article 22.

decision of the Mines Department of Morocco in 1925. It was argued that the decision of 1925 “only became definitive as a result of certain acts subsequent to the crucial date and of the final refusal to remedy in any way the situation created in 1925”, and that this refusal only occurred after 1931.²⁷⁸ The Court rejected this argument (by 11 votes to 1). In its view, the 1925 decision was the unlawful act, and the subsequent refusal to alter that decision merely marked “a phase in the discussion which had arisen” following the decision of 1925, and was not an independent source of complaint:

[I]t is in this decision that we should look for the violation of international law—a definitive act which would, by itself, directly involve international responsibility. This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States. In these circumstances the alleged denial of justice ... merely results in allowing the unlawful act to subsist.²⁷⁹

As this language implies, the Court was not concerned with the question whether the allegedly unlawful conduct of France on behalf of Morocco involved a continuing unlawful act; indeed the Court implied that there was such an act.²⁸⁰ The question was whether the alleged illegality arose prior to 1931 for the purposes of applying France’s Optional Clause reservation, and the Court held that it did. This holding (although concerned with the Court’s jurisdiction rather than the substance of State responsibility) directly contradicts the language of article 22.²⁸¹

(iv) *Conclusions on article 22*

149. For these reasons (in addition to those given in relation to articles 21 and 25, paragraph 3), article 22 cannot stand. The question is whether it should simply be deleted or replaced by some other provision dealing with the exhaustion of local remedies. There is a case for simple deletion, since it is not in general the function of the draft articles to deal with questions of the admissibility of international claims. Moreover, the satisfactory formulation of the local remedies rule would require more than a single article. Issues to be considered include the definition of “local remedies” and of their exhaustion,²⁸² the distinction between “direct” State-

to-State claims (to which the rule does not apply) and “indirect” claims to diplomatic protection (to which it does apply),²⁸³ the application of the local remedies rule to other cases, e.g. those involving breaches of human rights irrespective of nationality,²⁸⁴ the application of the rule to injuries occurring outside the territory of the respondent State,²⁸⁵ whether there should be an exception to the rule for cases of egregious breach, or for mass violations,²⁸⁶ and the issue of waiver.²⁸⁷ These questions will be considered further by the Commission in its work on the topic of diplomatic protection.²⁸⁸ On the other hand, claims on behalf of aliens have historically been a major basis for State responsibility, and the exhaustion of local remedies rule does constrain claims for the breach of an international obligation, which is the subject matter of chapter III. A satisfactory balance would be achieved if article 22 were reformulated as a “without prejudice” clause, leaving its detailed operation to be dealt with by the Commission in its work on diplomatic protection.²⁸⁹

150. As to the placement of the proposed article, there is a case for including it in part two of the draft articles, since it relates to the implementation of responsibility more than to its origins. For the time being, however, the article can remain part of chapter III. The question of its placement can be reconsidered once the content of part two is determined.

3. OTHER ISSUES RELATING TO BREACH OF AN INTERNATIONAL OBLIGATION

151. Two further issues need to be considered within the framework of chapter III.

(a) *The spatial effect of international obligations and questions of breach*

152. The first concerns the potential relevance of considerations *ratione loci* for the breach of an

²⁷⁸ *Phosphates in Morocco* (see footnote 189 above), pp. 24 and 27.

²⁷⁹ *Ibid.*, p. 28.

²⁸⁰ On this point Judge van Eysinga agreed. His dissent turned on the interpretation of the French declaration (*ibid.*, pp. 34–35). Judge Cheng Tien-Hsi stressed that “[t]he monopoly, though instituted by the dahir of 1920, is still existing to-day ... If it is wrongful, it is wrongful not merely in its creation but in its continuance” (*ibid.*, p. 36). This was no doubt correct, but it fails to address the point at issue. The French reservation was in the following terms: “... any disputes which may arise after* the ratification of the present declaration with regard to situations or facts subsequent to such ratification**” (*ibid.*, p. 34). The Court, adopting a restrictive interpretation of the French reservation, held that the dispute both related to and arose from situations or facts prior to the critical date (*ibid.*, pp. 24 and 26–27). For the Court, it was not relevant that those situations or facts gave rise to a continuing wrongful act extending in time after the critical date. No new dispute arose after that date, but only the continuation of an existing dispute.

²⁸¹ See also the *Claim of Finnish Shipowners against Great Britain in respect of the use of certain Finnish vessels during the war*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1484; and *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 4.

²⁸² Briefly discussed in *Yearbook ... 1977*, vol. II (Part Two), pp. 47–48, commentary to article 22, paras. (47)–(51).

²⁸³ An associated question is whether the exhaustion of local remedies rule applies to injuries to State organs, agents and corporations (*ibid.*, pp. 45–46, paras. (43)–(45)).

²⁸⁴ The Commission decided that it was premature to express a view on this issue, noting that the human rights treaties contained an express stipulation to that effect (*ibid.*, p. 46, para. (46)). On the exhaustion of local remedies rule in relation to violations of human rights obligations, see, among others, Amerasinghe, “The rule of exhaustion of domestic remedies in the framework of international systems for the protection of human rights”, p. 257; Cançado Trindade, *op. cit.*; Guinand, “La règle de l’épuisement des voies de recours internes dans le cadre des systèmes internationaux de protection des droits de l’homme”, p. 471; Sulliger, *L’épuisement des voies de recours internes en droit international général et dans la Convention européenne des droits de l’homme*; and Wyler, *op. cit.*, pp. 65–89.

²⁸⁵ This is discussed in detail in *Yearbook ... 1977*, vol. II (Part Two), pp. 43–45, paras. (38)–(42) of the commentary to article 22.

²⁸⁶ *Ireland v. United Kingdom* (see footnote 209 above).

²⁸⁷ On the exhaustion of local remedies rule generally, see further Amerasinghe, *op. cit.*; Cançado Trindade, “The birth of State responsibility and the nature of the local remedies rule”; Chappetz, *La règle de l’épuisement des voies de recours internes*; Doehring, “Local remedies, exhaustion of”; and Perrin, “La naissance de la responsabilité internationale et l’épuisement des voies de recours internes dans le projet d’articles de la Commission de droit international”.

²⁸⁸ See *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/484, especially pp. 312–313, para. 18, and p. 317, para. 55.

²⁸⁹ For the text of the proposed provisions, see paragraph 158 below.

international obligation. Articles 12–13 (as adopted on first reading) dealt with the conduct of a third State or organization on the territory of a State. They provided that the location of such conduct was not, as such, a ground for it to be attributed to the host State. But there is no article in part three that deals with “the spatial dimension of wrongfulness”.²⁹⁰ This is slightly paradoxical. It is difficult to conceive of location as decisive for attribution (either conduct is that of the State or it is not),²⁹¹ whereas there is no doubt that where an act has occurred (within the territory of a State, or at least on territory within its jurisdiction or control) can be very relevant to the question whether there has been a breach of an obligation. The link between the two found its classical expression in the dictum of Arbitrator Max Huber in *British Claims in the Spanish Zone of Morocco*, where he said that “State responsibility, in certain conditions, vis-à-vis another State with regard to nationals of the latter State seems to have always been understood as being limited to events taking place within the territory of the responsible State. Responsibility and territorial sovereignty are interdependent”.²⁹² A more recent formulation is that of ICJ in the *Namibia* case, when it said that “[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States”.²⁹³ Many primary rules are formulated by reference to the territoriality of the conduct: for example, the rule invoked by the Court in the *Corfu Channel* case that every State has an obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States”.²⁹⁴

153. Support for the inclusion of a provision on this issue might be sought from article 29 of the 1969 Vienna Convention, which deals with the territorial scope of treaties. It provides that:

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 29 might be taken to imply, *a contrario*, that treaties are prima facie not binding on their parties in respect of conduct occurring outside their territory. But this is certainly not the case. Whether a treaty covers conduct of a State party abroad depends on the interpretation of the treaty, and there does not appear to be any presumption one way or the other. In some cases (e.g. uniform law

treaties, or rules with respect to the treatment of foreign investment), it will be clear from the treaty or from its object and purpose that the only conduct expected of the State is conduct in its own territory. But in many other cases, the State will have assumed responsibility with respect to its conduct wherever occurring. For example, the obligations on States not to commit genocide or torture apply to their conduct anywhere in the world.²⁹⁵ On the other hand, it is true that the *incidence* of certain obligations may be different in respect of the territory of a State than in respect of its conduct abroad; for example, there is a broader range of situations in which a State can use armed force on its own territory as compared with a use of force on the territory of a foreign State or on the high seas.

154. Thus, rather than dealing with the general question of the scope of treaty obligations *ratione loci* (as it might appear to do), article 29 of the 1969 Vienna Convention is really concerned with the question of whether a State is bound by a treaty with respect to all its component territories (including component units of a federal State, overseas territories, etc.). This is a matter expressly addressed in many treaties, but unless it is addressed, the treaty applies to the whole territory of each State party. Thus a State cannot claim an exemption from compliance with a treaty in respect of conduct occurring, for example, within a component colony or province. Article 29 does not address the question whether the treaty obligation only applies in respect of particular territory or whether it applies to conduct of the State wherever occurring.²⁹⁶

155. Article 29, like specific territorial application clauses in treaties, is concerned with the scope of the obligation and not with issues relating to its breach. The draft articles take as they find them the primary rules of international law giving rise to obligations. They are not concerned with questions of the territorial scope of primary rules any more than with other questions of their content or interpretation. It is true that developments in the past 15 years—for example, the *Soering* case,²⁹⁷ the *Loizidou* case²⁹⁸ and the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case²⁹⁹—have shown the potential scope *ratione loci* of many primary rules which may have been thought to apply

²⁹⁰ To use the description of Wyler, in one of the few treatments of the problem, *op. cit.*, pp. 92–119.

²⁹¹ It was partly for that reason that the deletion of articles 12–13 was recommended and provisionally accepted by the Commission in 1998 (*Yearbook ... 1998* (footnote 2 above), pp. 49–51, paras. 249–259).

²⁹² UNRIAA, vol. II (Sales No. 1949.V.1), p. 636. At issue was the responsibility of Spain for the conduct of its nationals in the international zone of Tangier. Subsequently, in Claim No. XXVIII, the Arbitrator held that:

“Since the harm was caused in the international zone, responsibility may be attributed to the authorities in the Spanish zone in only two cases: either where they have tolerated the organization on their territory of gangs of bandits who have penetrated the international zone, or where they have failed in their duties concerning the prosecution of offences committed by persons located in the zone under their administration.”

(*Ibid.*, pp. 699–700. See, further, pages 707–710.)

²⁹³ *I.C.J. Reports 1971* (see footnote 85 above), p. 54, para. 118, and see the discussion in *Yearbook ... 1998* (footnote 2 above), pp. 49–50, paras. 250–251.

²⁹⁴ *I.C.J. Reports 1949* (footnote 11 above).

²⁹⁵ As the Court held in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 212 above), p. 616, para. 31.

²⁹⁶ In its commentary to that provision (art. 25 in the 1966 draft, *Yearbook ... 1966*, vol. II, p. 180), which read: “Unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party”, the Commission mentioned proposals made by Governments to cover in the article the issue of the extraterritorial application of treaties. But it added that “[t]he article was intended ... to deal only with the limited topic of the application of a treaty to the territory of the respective parties ... In its view, the law regarding the extra-territorial application of treaties could not be stated simply in terms of the intention of the parties or of a presumption as to their intention; and it considered that to attempt to deal with all the delicate problems of extra-territorial competence in the present article would be inappropriate and inadvisable” (*ibid.*, pp. 213–214, para. (5)).

²⁹⁷ European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 161, *Judgment of 7 July 1989* (Council of Europe, Strasbourg, 1989), pp. 35–36, para. 91.

²⁹⁸ *Loizidou v. Turkey* (see footnote 224 above), paras. 52 and 62 respectively.

²⁹⁹ *I.C.J. Reports 1996* (see footnote 212 above), p. 595.

exclusively to the territory of the State itself. In each case, however, it was a question of the content or interpretation of the relevant primary rule that was at stake, and not any secondary rule of responsibility. These developments might usefully be mentioned in the commentary to article 16, but there does not seem to be any basis to formulate any article (parallel to article 29 of the 1969 Vienna Convention) dealing with the question of responsibility *ratione loci* for the breach of an obligation.

(b) *Possible distinctions between breaches by reference to their gravity*

156. Secondly, many legal systems draw distinctions for various purposes between more and less serious breaches of obligation, and international law is no exception. Thus only a “material breach” gives a right to terminate a bilateral treaty,³⁰⁰ and under part two of the draft articles the seriousness of a breach is relevant for various purposes, including the extent and form of reparation and the proportionality of possible countermeasures. In State responsibility cases more generally, courts and tribunals sometimes take the opportunity to stigmatize a breach as particularly serious,³⁰¹ or, less often, to mention possibly mitigating factors.³⁰² This is quite apart from cases where the primary rule is defined in terms of a certain level of seriousness,³⁰³ or where more serious breaches are singled out for additional consequences.³⁰⁴

157. However, there does not appear to be any basis for distinguishing between different degrees of breach, at least for the purposes of chapter III. The jurisprudence of claims tribunals, of the Iran-United States Claims Tribunal

³⁰⁰ 1969 Vienna Convention, art. 60, para. 1. Material breach is defined as an unlawful repudiation, or a violation of any “provision essential to the accomplishment of the object or purpose of the treaty” (ibid., art. 60, para. 3 (b)). The focus is on the significance of the provision, not of the violation, which seems slightly odd. Under most national legal systems, the materiality of a breach would require consideration of both factors. But see the commentary to this provision (art. 57 in the 1966 draft), in which it is said that “the right to terminate or suspend must be limited to cases where the breach is of a serious character” (Yearbook ... 1966, vol. II, p. 255, para. (9)).

³⁰¹ See, for example, the case concerning *United States Diplomatic and Consular Staff in Tehran* (footnote 31 above), p. 42, para. 91, in which the Court notes that “what has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised”.

³⁰² In the case concerning the *Gabčíkovo-Nagymaros Project*, the Court began its examination of Slovakia’s responsibility by referring to “the serious problems with which Czechoslovakia was confronted as a result of Hungary’s decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty” (*I.C.J. Reports 1997* (see footnote 34 above), p. 52). But the Court concluded that Slovakia’s responsibility was nonetheless engaged by its conduct after the suspension and withdrawal of its consent by Hungary.

³⁰³ See, for example, article 7 (Obligation not to cause significant harm) of the United Nations Convention on the Law of the Non-navigational Uses of International Watercourses.

³⁰⁴ See, for example, the notion of “grave breaches” referred to in the four Geneva Conventions of 12 August 1949 (art. 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; art. 51 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; art. 130 of the Geneva Convention relative to the Treatment of Prisoners of War; art. 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War).

and of human rights courts and committees suggests that there is no systematic distinction between more and less serious breaches in terms of the existence (as distinct from the consequences) of a breach. In part two of the draft articles, different distinctions are drawn between the degrees of seriousness of breaches for different purposes,³⁰⁵ and further distinctions may be needed. But no systematic distinction between more and less serious breaches seems to be necessary in chapter III itself.

4. SUMMARY OF PROPOSALS CONCERNING
CHAPTER III

158. For the reasons given, the Special Rapporteur proposes the following articles in chapter III. The notes appended to each article explain very briefly the changes that are proposed.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 16. Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State does not comply with what is required of it under international law by that obligation, regardless of the source (whether customary, conventional or other) or the content of the obligation.

Note

1. Article 16 embodies the substance and most of the language of article 16 as adopted on first reading, with the addition of elements from articles 17 and 19, paragraph 1. See paragraphs 5–34 above.

2. Rather than the term “not in conformity with”, the term “does not comply with” is preferred, on the ground that it is more comprehensive and more apt to cover breaches both of obligations of specific conduct and obligations of result. The term “under international law” has been added, following the suggestion of one Government, to indicate that the content of obligations is a systematic question under international law, and not only the result of a given primary rule taken in isolation. Further consideration may have to be given to whether the language of article 16 is consistent with the provisions of part five dealing with circumstances precluding wrongfulness.

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

Note

Article 17 as adopted on first reading was not a distinct rule but rather an explanation of article 16. Its substance is included in article 16. See paragraphs 16–26 above.

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

No act of a State shall be considered internationally wrongful unless it was performed, or continued to be performed, at a time when the obligation in question was in force for that State.

Note

1. Article 18 is a reformulated version of article 18, paragraph 1, as adopted on first reading. It states the basic principle of the inter-

³⁰⁵ See articles 45, paragraph 2 (c), and 49.

temporal law as it applies to State responsibility. It is not concerned with ancillary questions such as jurisdiction to determine a breach, but only with the substantive question whether the obligation was in force at the relevant time. See paragraphs 38–44 above.

2. Article 18, paragraph 2, dealt with the impact of peremptory norms on State responsibility. Those issues will be considered elsewhere, especially in relation to chapter V of part one, and part two. See paragraphs 45–51 above.

3. Article 18, paragraphs 3–5, dealt with inter-temporal issues associated with continuing composite and complex acts and have been transferred, as far as necessary, to the articles dealing with those concepts. See articles 24–25 below.

Article 19. International crimes and international delicts

Note

The substance of article 19, paragraph 1, as adopted on first reading has been incorporated in article 16. Article 19, paragraphs 2–3, relating to the distinction between international crimes and international delicts, has been set aside pending further clarification. See paragraphs 27–33 above.

[Article 20. Obligations of conduct and obligations of result

1. An international obligation requiring a State to adopt a particular course of conduct is breached if that State does not adopt that course of conduct.

2. An international obligation requiring a State to achieve, or prevent, a particular result by means of its own choice is breached if, by the means adopted, the State does not achieve, or prevent, that result.]

Note

1. This article replaces former articles 20–21, concerned with the distinction between obligations of conduct and of result. See paragraphs 52–91 above. Paragraph 2 treats obligations of prevention in the same way as obligations of result, thereby allowing the deletion of former article 23.

2. Whether a particular obligation is one of conduct or result depends on the interpretation of the relevant primary rule. The statement of the distinction between such obligations does not exclude the possibility that a particular primary rule may give rise to obligations both of conduct and of result.

3. Article 20 is placed in square brackets at this stage because it may be thought to relate to the classification of primary rules, and because it is unclear what further consequences the distinction has within the framework of the draft articles. See paragraph 92 above.

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

Note

The substance of article 21, paragraph 1, has been incorporated in article 20, paragraph 2. Former article 21, paragraph 2, has been deleted, for reasons explained in the report. See paragraphs 69–76 above.

Article 22. Exhaustion of local remedies

Note

Article 22 has been reformulated and relocated as article 26 *bis* below.

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

Note

The breach of obligations of prevention, dealt with in former article 23, is now covered in article 20, paragraph 2, on the basis that obligations of prevention are a form of obligation of result. See paragraphs

81–87 above. The inter-temporal aspect of obligations of prevention is addressed in article 24, paragraph 3.

Article 24. Completed and continuing wrongful acts

1. The breach of an international obligation by an act of the State not having a continuing character occurs when that act is performed, even if its effects continue subsequently.

2. Subject to article 18, the breach of an international obligation by an act of the State having a continuing character extends from the time the act is first accomplished and continues over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and its continuance remains not in conformity with the international obligation.

Note

1. Article 24 combines the essential elements of former articles 24, 25, paragraph 1, and 26, together with article 18, paragraph 3. See paragraphs 93–115 above.

2. The proposed articles avoid the use of the word “moment”. So-called “instantaneous” acts are rarely momentary, and it will rarely be necessary to date them to a precise moment. The essential distinction is between continuing wrongful acts and acts which, though their effects may continue, were completed at, or by, a particular time past.

3. In accordance with paragraph 3, corresponding to former article 26, breach of an obligation of prevention will normally be a continuing wrongful act, unless the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), or the obligation in question has ceased. Both qualifications are intended to be covered by the phrase “and its continuance remains not in conformity with the international obligation”.

Article 25. Breaches involving composite acts of a State

1. The breach of an international obligation by a composite act of the State (that is to say, a series of actions or omissions specified collectively as wrongful in the obligation concerned) occurs when that action or omission of the series occurs which, taken with its predecessors, is sufficient to constitute the composite act.

2. Subject to article 18, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act and for so long as such actions or omissions are repeated and remain not in conformity with the international obligation.

Note

1. Article 25 incorporates the substance of former articles 25, paragraph 2, and 18, paragraph 4, dealing with “composite acts”. However, for the reasons explained in the report, the notion of composite acts is limited to composite acts defined as such in the relevant primary norm. See paragraphs 116–126 above.

2. The proviso “Subject to article 18” is intended to cover the case where the relevant obligation was not in force at the beginning of the course of conduct involved in the composite acts but came into force thereafter. In such case the “first” of the acts or omissions in the series, for the purposes of State responsibility, is the first occurring after the obligation came into force. But this need not prevent a court taking into account earlier acts or omissions for other purposes (e.g. in order to

establish a factual basis for the later breaches). See paragraph 123 above.

3. The notion of “complex acts”, formulated in articles 18, paragraph 5, and 25, paragraph 3, does not seem necessary, and these provisions are accordingly deleted. See paragraphs 127–133 above.

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

Note

Former article 26 has been incorporated as article 24, paragraph 3.

Article 26 bis. Exhaustion of local remedies

These articles are without prejudice to the requirement that, in the case of an international obligation concerning the treatment to be accorded by a State to foreign nationals or corporations, those nationals or corporations should have exhausted any effective local remedies available to them in that State.

Note

1. Article 22 as adopted on first reading dealt with the exhaustion of local remedies in the framework of the concept of “complex acts”. In all cases where the exhaustion of local remedies applied, the wrongful act was taken to include the failure of the local remedy. Although there may be cases where the wrongful act is constituted by the failure of the local remedy, there are other cases (e.g. torture) where this is not so, and for this and other reasons the notion of a “complex act” has been deleted. See paragraphs 138–150 above.

2. Nonetheless it is desirable to make it clear in chapter III that the occurrence of a breach of obligation is without prejudice to any requirement to exhaust local remedies that may exist under general international law. The more precise formulation of the local remedies rule can be left to be dealt with by the Commission under the topic of diplomatic protection.

3. The placement of article 26 bis may need to be reconsidered in the light of further work on the implementation of international responsibility, in chapter III of part two.

B. Part one, chapter IV. Implication of a State in the internationally wrongful act of another State

1. INTRODUCTION

(a) *The scope of chapter IV*

159. In accordance with the general principle stated in article 3, State responsibility arises when conduct attributable to a State breaches an international obligation of that State. But there may be cases where conduct of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of part one seeks to define the exceptional cases where this is so.

160. Three situations are covered in chapter IV. Article 27 deals with what in national law would be termed “complicity”, i.e. where one State provides aid or assistance to another State, thereby facilitating the commission of a wrongful act by the latter. Article 28, paragraph 1, deals with cases where one State is responsible for the internationally wrongful act of another State because it has assumed powers of direction or control over the latter, e.g. by treaty, or as a result of belligerent occupation of the

latter’s territory. Article 28, paragraph 2, deals with the extreme case where one State deliberately coerces another into committing an act which is or (but for the coercion) would be an internationally wrongful act on the part of the coerced State.³⁰⁶ In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting State, and is (or but for the coercion, would be³⁰⁷) a breach of that State’s international obligations. The “implication” of the second State in that breach arises from the special circumstance of its willing assistance in, its direction or control over, or its coercion of, the conduct of the acting State. But there are also important differences between the three cases. Under article 27, the primary wrongdoer is the acting State and the assisting State has a supporting role. By contrast, in the case of coercion under article 28, paragraph 2, the coercing State is the *fons et origo* of the conduct, and the coerced State is its instrument. As formulated, article 28, paragraph 1, deals with a spectrum of cases, ranging from those where direction or control has actually been exercised by the dominant State, with the subordinate State merely following orders, to cases where the initiative has been taken by the latter and the responsibility of the dominant State derives merely from the failure to exercise a “power of direction or control”.

(b) *Accessory responsibility and cognate concepts*

161. In his seventh report on State responsibility, Mr. Ago settled on two cases to be dealt with in the chapter. The first was participation by one State in the wrongful act of another. The second was “indirect responsibility” based on the relationship between a State which directs or compels a wrongful act and the State which performs it.³⁰⁸ No general justification was, however, offered for dealing with these two cases as compared with others that might be envisaged, and the commentary is largely silent on the point. But it is useful to place the specific situations currently dealt with in chapter IV in the broader context of cooperation between several States in the commission of internationally wrongful conduct. At least the following might be envisaged:

(a) *Joint conduct.* State A combines with State B in carrying out together an internationally wrongful act. For example, if two States combine to carry out a cer-

³⁰⁶ For the *travaux* of article 27, see *Yearbook ... 1978*, vol. II (Part One), document A/CN.4/307 and Add.1 and 2, pp. 52–60; *ibid.*, vol. I, 1518th meeting, pp. 232–237 (plenary debate) and pp. 269–270 (report of the Drafting Committee). For the *travaux* of article 28, *Yearbook ... 1979*, vol. II (Part One), document A/CN.4/318 and Add.1–4, pp. 4–27; *ibid.*, vol. I, 1532nd meeting, pp. 4–31 (plenary debate), and 1567th meeting, pp. 169–174 (report of the Drafting Committee). For discussions of the problem, see Padelletti, *Pluralità di stati nel fatto illecito internazionale*; Brownlie, *op. cit.*, pp. 189–192; Quigley, “Complicity in international law: a new direction in the law of State responsibility”; Noyes and Smith, “State responsibility and the principle of joint and several liability”; and Graefrath, “Complicity in the law of international responsibility” (which is especially useful). Earlier discussions of State “complicity” in the literature and the case law were concerned rather with problems of attribution or of the substantive standard of responsibility for the acts of private persons: see, for example, Brierly, “The theory of implied State complicity in international claims”.

³⁰⁷ This qualification is necessary because, if a State has really been coerced, the wrongfulness of its act may be precluded by force majeure: see article 31 (para. 252) and paragraph 204 below.

³⁰⁸ *Yearbook ... 1978*, vol. II (Part One), document A/CN.4/307 and Add.1 and 2, pp. 52–53, paras. 52–53.

tain operation, they may be described as acting jointly in respect of the operation as a whole, although terms such as “joint”, “joint and several”, “solidary”, derived from national legal systems, must be used with care;

(b) *Action via a common organ.* States A and B act together through a common organ in performing an act. In such a case,³⁰⁹ the organ is at the same time an organ of both States, in accordance with article 5 of the draft articles, and the conduct is attributable to both;

(c) *Agency.* State A acts on behalf of or as agent for State B in carrying out internationally wrongful conduct, but nonetheless retains its own role and responsibility for the conduct of its own organs.³¹⁰ For example, State B may request State A to perform certain acts on its behalf in the exercise of the right of collective self-defence. If the acts in question exceed what is permitted by Article 51 of the Charter of the United Nations, it may be that both the requesting and the acting State are responsible;³¹¹

(d) *Independently wrongful conduct involving another State.* State A engages in conduct, contrary to its own international obligations, in a situation where another State is involved, and the conduct of the other State is relevant or even decisive in assessing whether State A has breached its own international obligations. For example, in the *Soering* case, the European Court of Human Rights held that the United Kingdom was responsible for extraditing a person to a State not a party to the European Convention, where he would suffer inhuman or degrading treatment or punishment.³¹² Thus a State may be internationally responsible for its own conduct in allowing someone to be subjected to harmful treatment, even if the harmful treatment is inflicted on its own account by another State.³¹³ Or a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from such conduct;³¹⁴

(e) *Voluntary assistance in the commission of a wrongful act.* State A in some way assists State B in carrying out conduct which violates State B's international obliga-

tions, for example by knowingly providing an essential facility, or by financing the activity in question. This is the situation addressed by article 27. It differs from the *Soering*-type situation in that here the reason why State A's conduct is wrongful is its relationship to the wrongful conduct of State B;³¹⁵

(f) *Incitement of wrongful conduct.* State A incites or encourages State B to carry out internationally wrongful conduct, but without materially assisting it to do so;³¹⁶

(g) *Direction, compulsion or coercion.* State A compels or coerces State B to carry out internationally wrongful conduct, or State B acts under the direction and control of State A in carrying out such conduct. These cases are addressed by article 28. So too is the case of a failure to prevent wrongful conduct by State B in a field in which State A had the power to direct or control State B;

(h) *Assistance given after the wrongful conduct.* State A assists State B in escaping responsibility for internationally wrongful conduct, or in maintaining the benefits of such conduct, but without having had any involvement in the wrongful conduct itself. This is known as an “accessory after the fact” in common-law terminology;

(i) *Conduct of several States separately causing aspects of the same harm or injury.* A further possibility is that parallel wrongful conduct of several States can contribute to causing loss which, if only one of those States had acted, might not have occurred. For example, several States might contribute to polluting a river by pollutants which are much more significant, collectively and in combination, than they would have been if only one of those States had engaged in the conduct.

162. These situations are not mutually exclusive but can combine in different ways. For example, the case concerning *Certain Phosphate Lands in Nauru* concerned the responsibility of Australia towards Nauru for acts performed by it on the “joint behalf” of the three States (Australia, New Zealand, United Kingdom) which together constituted the Administering Authority for the Trust Territory of Nauru.³¹⁷ This was both a case of “joint” conduct (situation (a) above) and a case where in terms of day-to-day administration one of the States acted on behalf of the other two States as well as on its own behalf (situation (c) above).

³⁰⁹ Referred to by Mr. Ago, *ibid.*, p. 54, para. 58.

³¹⁰ If the relevant organ of State A is “placed at the disposal” of State B, in the sense provided for in article 9 of the draft articles, then only State B will be responsible for the act in question. See *Yearbook ... 1998* (footnote 2 above), p. 46, para. 230. But there are many cases where the organs of State A retain some control over the acts they perform as agent for another State, and are not merely acting ministerially. This was true, for example, of Australia in the case concerning *Certain Phosphate Lands in Nauru* (see footnote 76 above), p. 240.

³¹¹ See the case concerning *Military and Paramilitary Activities in and against Nicaragua* (footnote 68 above); and *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility*, *I.C.J. Reports 1988*, p. 69.

³¹² European Court of Human Rights (see footnote 297 above), pp. 33–36.

³¹³ The *Soering* principle has been applied by the Court in subsequent cases, although with some care: see, for example, *Cruz Varas and Others v. Sweden*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 201, *Judgment of 20 March 1991* (Council of Europe, Strasbourg, 1991); and *Vilvarajah v. the United Kingdom*, *ibid.*, vol. 215, *Judgment of 30 October 1991* (Council of Europe, Strasbourg, 1992).

³¹⁴ Thus the basis of Albania's responsibility in the *Corfu Channel* case was its failure to warn of the presence of mines in its waters which had been laid by a third State. See *I.C.J. Reports 1949* (footnote 11 above), p. 4.

³¹⁵ In the *Soering* case (footnote 297 above), the Court stressed that the conditions in the receiving country were considered as a question of fact. It said (p. 36): “[T]here is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.” Indeed it may be that, so far as the receiving State is concerned, the treatment in question is internationally lawful.

³¹⁶ See *Yearbook ... 1978* (footnote 308 above), pp. 54–56, paras. 61–65, arguing against mere incitement as a basis for responsibility. There are specific treaty obligations on States to prohibit incitement in certain contexts, e.g. Convention on the Prevention and Punishment of the Crime of Genocide, art. III (e); International Convention on the Elimination of All Forms of Racial Discrimination, art. 4 (incitement to racial hatred or discrimination).

³¹⁷ *I.C.J. Reports 1992* (see footnote 76 above), p. 240.

163. A special kind of “collective” conduct occurs where several States cooperate in establishing and maintaining an international organization to act on their behalf or, conversely, where one or more States acts on behalf of an international organization for some purpose of the organization. This raises questions of the extent to which the States concerned may be responsible either for the acts of the organization, or for the acts of individual member States carried out with its authority. For reasons explained above, however, the draft articles should not deal with cases of the responsibility of international organizations, or of member States for the acts of international organizations (including what may be termed “secondary responsibility”).³¹⁸ Thus it is not necessary to consider such questions as who is responsible for the performance of mixed agreements of the European Union, where both the European Community and its member States are parties to the agreement and issues of the division of competence arise.³¹⁹

164. Setting to one side issues of the responsibility of or for the acts of international organizations, the question is which of the cases surveyed above should be dealt with in the draft articles, and specifically in chapter IV. According to articles 1 and 3, each State is responsible for its own conduct, i.e. for conduct, attributable to it under chapter II, which is in breach of its own international obligations, the element of breach being specified in chapter III. The question is then to identify, from the different forms of joint or concerted actions of several States identified in paragraph 161 above, those which are not adequately resolved by this general principle. It seems that situations (a)–(d) and (i) do not raise any particular problems for the purposes of part one of the draft articles, although they may raise issues under part two as to the extent of reparation which each State is to bear. That leaves situations (e)–(h). Chapter IV proceeds on the basis that incitement of wrongful conduct (situation (f)) and assistance to a State after the conduct in question has been committed (situation (h)) are not generally wrongful in international law, or at any rate do not call for treatment in part one.

165. It is, however, necessary to consider the situations actually covered by articles 27–28 before asking whether any additional cases of collective, ancillary or inchoate responsibility should be dealt with, in chapter IV or elsewhere.³²⁰

³¹⁸ See *Yearbook ... 1998* (footnote 2 above), p. 46, para. 231, p. 51, para. 259, and draft article A as proposed by the Drafting Committee in 1998. In the *Certain Phosphate Lands in Nauru* case it was agreed that the “Administering Authority” for Nauru was not a separate legal person, i.e. it was not an international organization distinct from the three participating States: see *I.C.J. Reports 1992* (footnote 76 above), p. 258.

³¹⁹ See MacLeod, Hendry and Hyett, *The External Relations of the European Communities*, pp. 158–160; and Tomuschat, “Liability for mixed agreements”. For judicial authorities, see the opinion of Advocate General Jacobs in case C–316/91, *European Parliament v. Council of the European Union, Reports of Cases before the Court of Justice and the Court of First Instance*, 1994–3 (Luxembourg), especially paras. 69 et seq.; and the opinion of Advocate General Tesouro in case C–53/96, *Hermès International v. FHT Marketing Choice BV*, *ibid.*, 1998–6, paras. 14 and 20.

³²⁰ See paragraph 213 below.

(c) *Chapter IV as a statement of secondary rules?*

166. One obvious feature of article 27, and perhaps also of article 28, is that they specify that certain conduct is internationally wrongful. Article 27 says that aid or assistance “itself constitutes an internationally wrongful act”, while article 28 says that the international responsibility of one State is entailed by the wrongdoing of another in certain cases. Yet the draft articles are based upon a distinction between primary and secondary rules, and it is not their function “to define a rule and the content of the obligation it imposes”.³²¹ Article 27, at least, seems to do that, even though it does so by reference to the wrongful act by another State.

167. This aspect of chapter IV is neither stressed nor excused in the commentary, which says only that chapter IV is concerned with cases where one State is implicated in the internationally wrongful conduct of another.³²² But it may be justified in that responsibility under chapter IV is, in a sense, derivative.³²³ In national legal systems, rules dealing, for example, with conspiracy, complicity and inducing breach of contract may be classified as falling within the “general part” of the law of civil or criminal obligations, as the case may be. Moreover, the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in chapter II. In certain circumstances, it may be justified to attribute the wrongfulness of State A’s conduct to State B, which is implicated in that conduct because of assistance given or direction or coercion exercised. Depending upon the scope of the responsibility defined by chapter IV, it is thus possible to defend articles 27–28 as falling within the scope of a draft concerned with the secondary rules of State responsibility. Care is needed to ensure that the articles do not go beyond the scope of “implication”, turning into substantive and possibly controversial primary rules. Whether they do so, however, depends upon their content rather than their classification.

2. REVIEW OF SPECIFIC ARTICLES

(a) *Article 27. Aid or assistance by a State to another State for the commission of an internationally wrongful act*

168. Article 27 provides as follows:

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

169. Literally interpreted, article 27 posits a rather extensive principle of responsibility of one State for the acts of another. It treats as wrongful any “[a]id or assistance

³²¹ To use the words of the Special Rapporteur, Mr. Ago, *Yearbook ... 1970*, vol. II, document A/8010/Rev.1, p. 306, para. 66 (c), cited in *Yearbook ... 1998* (see footnote 2 above), p. 6, para. 13. For a discussion of the distinction, see paragraphs 12–18 (*ibid.*, pp. 6–7).

³²² *Yearbook ... 1978*, vol. II (Part Two), p. 98, para. (1) of the commentary to chapter IV.

³²³ Cf. the term “responsabilité dérivée” as used by Arbitrator Max Huber in *British Claims in the Spanish Zone of Morocco* (footnote 292 above), p. 648.

... rendered for the commission of an internationally wrongful act” carried out by the second State. The “mental element” of assistance is not specified in the article: what degree of awareness is required that the assisted State is engaging in an internationally wrongful act? Nor is any distinction made between degrees or types of “[a]id or assistance”, which might vary from the indispensable to the incidental.

170. The commentary to article 27 clarifies these matters considerably. First it distinguishes between participation in the wrongful act of another State and cases where “a State is or becomes a co-perpetrator of an internationally wrongful act”.³²⁴ Then it distinguishes between cases of advice, encouragement or incitement, on the one hand, and cases of actual assistance. “In the international legal order ... it is more than doubtful that the mere incitement by one State of another to commit a wrongful act is in itself an internationally wrongful act.”³²⁵ Incitement is thus to be distinguished from complicity, especially in international relations. For different reasons, cases of direction and coercion are also distinguished from complicity, and are dealt with in article 28. Thus article 27 is concerned with the case where the one State acts alone, and is primarily responsible, but another State materially assists it in the commission of a wrongful act.³²⁶

171. The commentary notes that certain forms of assistance are independently prohibited by international law. For example, the General Assembly’s Definition of Aggression defines as aggression, inter alia, the “action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State”.³²⁷ But according to the commentary, aiding and assisting the wrongful act of another State is itself wrongful, even though this is not expressly stated in any primary rule. Indeed, this is the case, irrespective of whether the principal act is a crime or a delict,³²⁸ or of whether the aid or assistance itself constitutes a wrongful act. It is sufficient that the assisting State has “an intent to collaborate in the execution of” a wrongful act.³²⁹ This is satisfied, for example, where the assisting State has “knowledge of the specific purpose for which the State receiving certain supplies intends to use them”.³³⁰ Most of the examples of State practice given in the commentary involve assistance by one State in a use of armed force by another, e.g. through allowing overflight or landing rights in the course

of a military operation by another State which is said to constitute aggression or intervention.³³¹ It should be noted that all of the examples given involve the breaches of obligations arising under primary rules by which the assisting State was itself bound.

172. Thus the Commission concluded, partly as a matter of progressive development, that a general rule prohibiting complicity or participation in the wrongful act of another State should be included in part one.³³² Such participation was not necessarily a wrong of the same gravity as the conduct assisted. Its gravity would depend, inter alia, on “the extent and seriousness of the aid or assistance actually furnished to the author of the principal wrongful act”, and this was a further reason for distinguishing it from the principal act.³³³ But for article 27 to apply, the assistance given had to be material, and it had to be given “with *intent* to facilitate the commission” of the wrongful act by the other State.³³⁴ Moreover, the assisted State must actually commit a wrongful act, so that the illegality of the conduct of the assisting State was strictly dependent on that of the assisted State.³³⁵

(i) *Comments of Governments on article 27*

173. Germany doubts whether existing international law goes as far as article 27, and calls for more precision both of the term “rendered for the commission” and of the necessary element of intent.³³⁶ The United States in substance agrees.³³⁷ Switzerland argues that article 27 “has no basis in positive law” and should be deleted.³³⁸ In an earlier comment, Sweden too questioned the breadth of article 27 as formulated, and queried whether it was not a primary rule.³³⁹

174. The United Kingdom, by contrast, supports the “basic principle” but raises a series of drafting points, which nonetheless raise issues of principle about article 27 as such. For the United Kingdom, the fundamental issue is the need to distinguish between cases where the act of the assisting State is independently wrongful and those where it is not. If it is independently wrongful, there is no need for article 27. If it is not, the principle of responsibility needs to be clearly expressed.³⁴⁰ Japan likewise is supportive of article 27 but calls for a clearer definition of the principle.³⁴¹ In an earlier comment, Mali noted that various factors had to be taken into account in determining whether aid had been rendered “for the commission of an internationally wrongful act”, but it nonetheless strongly supported the article.³⁴²

³²⁴ *Yearbook ... 1978*, vol. II (Part Two), p. 99, commentary to article 27, para. (2).

³²⁵ *Ibid.*, para. (3). In paragraph (4) are cited the conclusions of the Board of Commissioners under the Convention of 4 July 1831 between the United States of America and France, refusing to hold France responsible for acts of Denmark done under its influence and incitement but nonetheless independently. See Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, pp. 4473 et seq.

³²⁶ *Yearbook ... 1978*, vol. II (Part Two), pp. 101–102, commentary to article 27, para. (11).

³²⁷ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex, art. 3 (f), cited in *Yearbook ... 1978*, vol. II (Part Two), p. 102, commentary to article 27, para. (13).

³²⁸ *Yearbook ... 1978*, vol. II (Part Two), p. 102, commentary to article 27, para. (13).

³²⁹ *Ibid.*, p. 103, para. (14).

³³⁰ *Ibid.*

³³¹ *Ibid.*

³³² *Ibid.*, para. (16).

³³³ *Ibid.*

³³⁴ *Ibid.*, p. 104, para. (17).

³³⁵ *Ibid.*, para. (19).

³³⁶ *Yearbook ... 1998* (see footnote 7 above), p. 128.

³³⁷ *Ibid.*, p. 129.

³³⁸ *Ibid.*, p. 128.

³³⁹ *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, p. 77.

³⁴⁰ *Yearbook ... 1998* (see footnote 7 above), pp. 128–129.

³⁴¹ A/CN.4/492 (reproduced in the present volume), comments on article 27.

³⁴² *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/328 and Add.1–4, p. 101.

(ii) *Article 27 as a case of derived responsibility: two preliminary issues*

175. Article 27 provides for derived responsibility in two distinct ways. First, the assisting State is only responsible if the assisted State has actually committed an internationally wrongful act. As the commentary makes clear, the responsibility of the assisting State only arises if and when the assisted State carries out the wrongful act. Secondly, the assisting State is only responsible if it is established that the assistance was “rendered for the commission of an internationally wrongful act”. What is required is a specific intent to assist in the commission of the wrongful act by the assisted State. This raises questions both of definition and of principle, but two preliminary difficulties should first be mentioned.

176. One is the procedural difficulty of establishing the responsibility of the assisting State in judicial proceedings in the absence of the assisted State. ICJ has repeatedly affirmed that it cannot decide on the international responsibility of State A if, in order to do so, “it would have to rule, as a prerequisite, on the lawfulness” of the conduct of State B, in the latter’s absence and without its consent. This is the so-called *Monetary Gold* principle.³⁴³ By definition that principle will apply to cases under article 27, since it is of the essence of the responsibility of the assisting State that the assisted State has committed an internationally wrongful act. The wrongfulness of the assistance given by the former is dependent upon the wrongfulness of the conduct of the latter (as well as upon the former’s awareness of its wrongfulness). But although this may present practical difficulties in some cases in establishing the responsibility of the assisting State, it is not a good reason for rejecting article 27. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings. Diplomatic protests have been made in cases of wrongful assistance given to another State, and this is proper, since States are entitled to assert complicity in the wrongful conduct of another State even though courts may be incompetent to rule on the charge in the absence of that other State. In addition, the principle does not always apply even in judicial proceedings. For example, it does not apply in cases where the responsibility of the assisted State has already been established by a competent international body.³⁴⁴

177. A second difficulty relates to the development of specific substantive rules prohibiting one State from providing assistance in the commission of certain wrongful acts by other States, or even requiring third States to prevent or repress such acts. Paragraph 3 (f) of the General Assembly’s Definition of Aggression has been referred to

³⁴³ *East Timor (Portugal v. Australia)* (see footnote 26 above), p. 105, para. 35; see also *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32; and *Certain Phosphate Lands in Nauru* (footnote 76 above), p. 261, para. 55.

³⁴⁴ In the *East Timor* case, Portugal argued that the legal position of Indonesia had already been authoritatively established by earlier resolutions of the Security Council and the General Assembly. The Court denied that the resolutions went so far (*I.C.J. Reports 1995* (footnote 26 above), p. 104, para. 32). By implication, a clear and binding resolution of a competent organ might avoid the *Monetary Gold* principle: see *Legal Consequences for States of the Continuing Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (footnote 85 above), p. 54, para. 117.

above, and there are other examples.³⁴⁵ These texts do not rely on any general principle of derived responsibility. Do they, by implication, deny the existence of any general principle?³⁴⁶ It does not seem so. Specific rules generated at different times prohibiting assistance to wrongdoing States may show the importance of preventing assistance in those contexts, but it goes too far to infer from them, *a contrario*, the non-existence of any general rule. It was not the function of the Definition of Aggression to deal with the general law of State responsibility, and to have remained silent on the point in formulating the text of article 3 would not have served the purpose of defining aggression. As to other treaty provisions (e.g. Article 2, paragraph 5, of the Charter of the United Nations), again these have a specific rationale which goes well beyond the scope and purpose of article 27 of the draft articles.

178. For these reasons, neither the procedural difficulty presented by the *Monetary Gold* principle nor the existence of specific primary rules overlapping with article 27 in certain fields provides grounds for rejecting the general principle.

179. A much more serious objection, however, relates to the scope of the principle. According to the very cryptic formulation of article 27, the aid or assistance must be shown to have been “rendered for the commission of an internationally wrongful act”*, but the one word “for” raises a number of questions. When is assistance rendered “for” such a purpose? Assistance can range from the indispensable to the incidental: how significant must it be in achieving the purpose? Must the assisting State be fully aware not only of the purpose but also of its illegality? Beyond these questions of formulation and definition lie more basic issues. In particular, does it matter that the assisting State is not itself bound by the rule whose breach it helps to achieve? If not, can such assistance ever be justified? The range of examples given in the commentary to article 27 is relatively narrow, and is limited to breaches of fundamental rules such as Article 2, paragraph 4, of the Charter of the United Nations. But article 27 itself is not so limited. Is a general rule, applicable equally to bilateral treaties and to peremptory norms, desirable? Does it have a place in the draft articles?

(iii) *The problem of intention or knowledge of wrongfulness*

180. It is clear that to impose on the assisting State a standard of strict responsibility is too harsh. A State providing material or financial aid to another should not be required to take the risk that the aid will be used to carry out an internationally wrongful act. In any event, it can be very difficult to show that particular resources were so used—especially financial resources or information. The commentary to article 27 stresses that the responsible organs of the assisting State must be aware that the assistance will be used for an unlawful purpose and must intend that result. In other words, the assistance must be given:

³⁴⁵ See paragraph 171 and footnote 326 above. See also Article 2, paragraph 5, of the Charter of the United Nations: “All Members shall . . . refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.”

³⁴⁶ See the comments of Switzerland and Germany (para. 173 above).

with the specific object of facilitating the commission of the principal internationally wrongful act in question ... [I]t is not sufficient that aid or assistance provided without such intention could be used by the recipient State for unlawful purposes, or that the State providing aid or assistance should be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal internationally wrongful act. Nor is it sufficient that this intention be "presumed"; as the article emphasizes, it must be "established".³⁴⁷

The explanation is helpful, but it is clear that, if article 27 is to be retained, these requirements should be expressed in the text of article 27 and not only in the commentary.³⁴⁸ Given the nature of inter-State relations and the great diversity of situations which may be involved,³⁴⁹ article 27 should cover only those cases where the assistance is clearly and unequivocally connected to the subsequent wrongful act. So far as the element of "intention" is concerned, this means that the relevant State organ(s) must have been aware that the conduct in question was planned, and must further have intended, by the assistance given, to facilitate its occurrence.

181. There is a further question as to intention. Must the assisting State not only be aware that the conduct will occur, but also know of its internationally wrongful character? Does "ignorance of the law" by the State officials who give the aid or assistance excuse the assisting State? Ignorance of international law is not generally an excuse for wrongful conduct by States. Is it, exceptionally, an excuse in the context of article 27? If so, does the assisting State have a duty of reasonable inquiry as to the illegality, or is it sufficient to exonerate it that the relevant officials turned a blind eye to the illegality? These are difficult questions,³⁵⁰ and they are, moreover, substantive questions. It is proposed to return to them below.³⁵¹

(iv) *The nexus between assistance and wrongful act*

182. A second issue, which is not resolved by any definition of intention, relates to the link required between the assistance and the wrongful act. A State might intend to assist in a wrongful act, fully aware of the circumstances, yet its assistance might be really irrelevant, amounting to little more than incitement or encouragement (which article 27 does not seek to cover). On the other hand, the assistance might be vital, as with the provision of a forward military base or refuelling facilities to aircraft otherwise out of range of their target. According to the commentary, "the aid or assistance must have the effect of making it *materially* easier for the State receiving the aid or assistance in question to commit an internationally wrongful act".³⁵² In principle this must be correct.

³⁴⁷ *Yearbook ... 1978*, vol. II (Part Two), p. 104, para. (18) of the commentary to article 27.

³⁴⁸ See the comments of various Governments to this effect (paras. 173–174 above).

³⁴⁹ For example, the use of military bases or of territory generally, overflight, military procurement, economic aid, training of personnel, provision of confidential information, etc.

³⁵⁰ Despite Article 102, paragraph 1, of the Charter of the United Nations, one State cannot be expected to be aware of the bilateral treaty obligations of another. If notice of wrongfulness is required, a formula analogous to article 46 of the 1969 Vienna Convention would be appropriate.

³⁵¹ See paragraphs 186–188 below.

³⁵² *Yearbook ... 1978*, vol. II (Part Two), p. 104, para. (17) of the commentary to article 27. See also paragraph (18).

To require that the aid should have been an indispensable prerequisite to the wrongdoing would invite speculation as to other contingencies, and might create loopholes to the application of the rule.³⁵³ But the term "materially" is problematic, if only because of its connection with the notion of "material breach" under article 60 of the 1969 Vienna Convention, which is defined as "the violation of a provision essential to the accomplishment" of the treaty. If the aid or assistance does not have to be essential to the accomplishment of the wrongful act, the word "materially" should be avoided. On balance it is sufficient to use the term "aids or assists", and to explain it in this sense in the commentary.

(v) *Must the assisting State be bound by the primary rule in question?*

183. Even assuming a satisfactory formulation of article 27 along the lines explained in the commentary, substantive issues remain. As currently formulated, article 27 would cover assistance by State A in the breach of an obligation by State B to which State A is not privy. As article 17 makes clear, the draft articles cover breaches of treaties as well as of obligations under other sources of international law. They cover breaches of obligations under unilateral commitments or bilateral treaties as well as obligations *erga omnes*.³⁵⁴ Yet it is far from clear that the same rule prohibiting assistance should apply to these different cases.³⁵⁵ Take the case of a bilateral treaty between State B and State C under which the two States agree not to export certain materials or technology to, or not to trade with, State A. In the language of national trade practices law, this is a secondary boycott. State A, the target State, is of course not bound by the treaty.³⁵⁶ Why should it be legally responsible if, knowing of the treaty, it assists State C in breaching? Article 27 could thereby become a vehicle by which the effect of well-publicized bilateral obligations was extended to the rest of the world. The position is surely different if the assisting State is bound by the primary rule, for example, if a party to a nuclear non-proliferation treaty assists another party in acquiring weapons from a third State in breach of the treaty. This suggests that article 27 should be limited to obligations which are binding upon or opposable to the assisting State.

184. One possible argument for the broader formulation of article 27 derives from analogies with national law. Under many national legal systems it is a civil wrong knowingly to assist another person in violating the latter's contractual obligations.³⁵⁷ No doubt analogies with national law can

³⁵³ To similar effect, see Quigley, *loc. cit.*, pp. 121–122.

³⁵⁴ See paragraphs 17, 20–21 and 26 above.

³⁵⁵ As noted by Sweden in an earlier comment, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, p. 77.

³⁵⁶ See the 1969 Vienna Convention, arts. 34–35.

³⁵⁷ The issue is not discussed in the commentary, nor indeed in the literature generally. Bouvé ("Russia's liability in tort for Persia's breach of contract") discusses a case of responsibility of a State for inducing, by coercion, a breach of a State's contract with a national of a third State, which is a different issue. Sir Hersch Lauterpacht relied on municipal analogies in arguing for the invalidity of a later treaty conflicting with an earlier one: see "The covenant as the 'higher law'" and "Contracts to break a contract", pp. 374–375. A fortiori he would have supported the view that inducing breach of a bilateral treaty is a delict. His position as to the invalidity of conflicting treaties was, however, not accepted in

be misleading, but the existence of a general principle of liability for inducing breach of contract could provide support for the breadth of article 27. The annex to the present report contains a brief comparative survey of the legal position with respect to inducing breach of contract in some national legal systems. The survey suggests that, while there is some comparative support for a general principle creating liability for inducing breach of an agreement with a third party, this support is heavily qualified. First of all, the principle is not recognized in some legal systems (e.g. those based on Islamic law), and only to a very limited extent by others (e.g. German law). In those systems where it is recognized in principle (e.g. French law, the common law), it is subject to important qualifications. In particular, the contract concerned must be lawful, the interference with it must be intentional and there must be no independent justification for the interference.

185. Moreover, even if the support to be drawn from domestic analogies such as inducing breach of contract were less equivocal than it is, there are difficulties in applying such a general principle to international relations. Treaties reflect the particular policies of the States entering into them, and international law has a strict doctrine of privity in relation to treaties. Moreover, treaties have proliferated, and many obligations to provide finance, materials or technology are incorporated in treaties. National legal systems have more rigorous controls on the legality of contracts than international law currently has for treaties,³⁵⁸ and there are ways under national law by which third parties can challenge the legality of contracts adversely affecting them which do not yet exist for treaties.³⁵⁹

186. All these considerations suggest that the principle in article 27 cannot be applied to bilateral obligations in an unqualified form. Take a case where finance or goods are to be provided pursuant to a treaty by State A to State B, and State A realizes that to comply with the treaty will produce a breach of State B's obligation to State C. Under international law both treaties are presumably valid, although this is without prejudice to the international responsibility of State B. In such circumstances, why should State A be the judge of State B's compliance? If State B insists upon performance of its treaty with State A, is State A entitled to refuse? Yet under article 27, it would appear that if State A knowingly provides the assistance, it is responsible to State C.³⁶⁰ Or take a case where a few

the 1969 Vienna Convention. Instead questions of State responsibility arise for the State with conflicting obligations: see paragraph 9 above, and Rosenne, *op. cit.*, pp. 87–89 and 93.

³⁵⁸ For example, in the context of competition law, *ultra vires* contracts of public authorities, contracts offending public policy, etc. For a comparative review, see von Mehren, "A general view of contract", pp. 29–40; and Marsh, *Comparative Contract Law: England, France, Germany*, pp. 87, 91 and 99–100.

³⁵⁹ Under articles 65 and 66 of the 1969 Vienna Convention, the procedure for invoking *jus cogens* to invalidate a treaty is apparently available only to the parties to the treaty in question, not to affected third States. In the *East Timor* case (see footnote 26 above), p. 90, Portugal did not purport to challenge the validity of the 1989 Treaty. See paragraphs 9 and 176 above.

³⁶⁰ It might be argued that State A's intention here is not to injure State C, but rather to comply with its obligations to State B. The fact remains that State A knows that its assistance will produce a breach of State B's obligation. Refined judgements of the "intention" of States, based on casuistical doctrines such as "double effect", are not a very secure

States, the only producers of a particular strategic good or raw material, enter into a treaty to limit sales and increase prices. Why should purchasers, who are not bound by that treaty, be potentially liable for inducing one of the treaty parties to sell to them at a reduced price?

(vi) *Conclusions on article 27*

187. There is a case for the deletion of article 27, on the ground that it states a primary rule and thus falls outside the scope of the draft articles.³⁶¹ Certainly, if the breadth of the article is to be maintained, it would be necessary to address the questions identified above, for example, as to the awareness of the assisting State of the legal obligations of the assisted State, or as to the existence of possible justifications for action in cases where there are conflicting obligations. Whatever view may be taken on these issues, it seems clear that they are substantive ones, which fall outside the scope of the secondary rules of State responsibility.

188. On the other hand, article 27 may be justified in the framework of chapter IV if it is limited to aid or assistance in the breach of obligations by which the assisting State is itself bound. It may be that the assisting State should not be required to judge the legal obligations of the assisted State, but it has notice of and must take responsibility for its own legal obligations. For State A deliberately to procure the breach by State B of an obligation by which both States are bound cannot be justified; a State cannot do by another what it cannot do by itself. Seen in this more limited light, the inclusion of article 27 in the draft articles can be justified, since it deals with the implication of one State in the commission of a wrongful act by another—that is to say, an act which is wrongful so far as both States are concerned.³⁶² For all these reasons, article 27 should be retained, but it should be limited to cases where the aid or assistance is given by the assisting State with knowledge of the circumstances of the internationally wrongful act; the aid or assistance materially advances the commission of that act, and the act in question would have been internationally wrongful if committed by the assisting State itself.³⁶³

basis for State responsibility. A broad rule such as that specified in article 27 could only work satisfactorily if it were open to the assisting State to justify its assistance, e.g. on the ground of an equally valid moral or legal duty. But to enact a principle of justification would plainly involve legislating in the field of the primary rules of responsibility.

³⁶¹ See Switzerland's comments in paragraph 173 above.

³⁶² This conclusion is consistent with criticisms in the literature of the breadth of article 27, although the specific solution proposed is slightly different. Thus Padelletti, *op. cit.*, would limit article 27 to obligations *erga omnes*, in view of their importance and of the fact that all the limited practice relates to such obligations. But other multilateral obligations are also important; why should parties to a multilateral treaty be able to assist each other to do what neither could lawfully do alone? Graefrath, *loc. cit.*, would also limit complicity to wrongful acts which affect the international community as a whole, and would create a presumption of intent to assist. The proposal in the text retains the element of intent, which can be demonstrated by proof of rendering aid or assistance with knowledge of the circumstances. Quigley, *loc. cit.*, generally supports article 27 as drafted, but advocates imposing upon the assisting State a duty of care to ensure that aid is not used for illegal means in case of doubt. He fails, however, to address the problem of obligations by which the assisting State is not bound.

³⁶³ For the proposed text of article 27, see paragraph 214 below.

(b) *Article 28. Responsibility of a State for an internationally wrongful act of another State*

189. Article 28 provides as follows:

1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.

2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.

3. Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other provisions of the present articles, of the State which has committed the internationally wrongful act.

(i) *Comments of Governments on article 28*

190. Switzerland points to the need for coordination between this provision and the provisions of chapter V dealing with coercion or duress.³⁶⁴ France notes that paragraph 1 reflects “a historically dated situation”; in paragraph 2, the term “coercion” is too wide, and should be limited to coercion under conditions which are contrary to international law.³⁶⁵ In an earlier comment, Mongolia doubted “the appropriateness of the present drafting” of article 28, and especially the unqualified use of the term “coercion”.³⁶⁶

191. Article 28 deals with two distinct cases, one involving situations of dependency (e.g. international protectorates or belligerent occupation), and one involving cases of coercion of one State by another. It is necessary to deal with them separately.

(ii) *Article 28, paragraph 1. Responsibility arising from actual or potential direction or control*

192. The commentary to paragraph 1 points to three different cases where there may be a relationship of dependency between one State and another, such as to warrant treating the dominant State as internationally responsible for the wrongful acts of the dependent State. These are: (a) international dependency relationships, especially “suzerainty” and international protectorate; (b) relationships between a federal State and States members of the federation which have retained their own international personality; (c) relationships between an occupying State and an occupied State in cases of territorial occupation.³⁶⁷ It contrasts these with situations of pure representation, where one State has assumed, even on an exclusive basis, responsibility for representing another State in international relations, but without any power of direction or control over the decision-making process of the dependent State.³⁶⁸

³⁶⁴ *Yearbook ... 1998* (see footnote 7 above), p. 129.

³⁶⁵ *Ibid.*

³⁶⁶ *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1-4, p. 76.

³⁶⁷ *Yearbook ... 1979*, vol. II (Part Two), p. 97, commentary to article 28, para. (10).

³⁶⁸ *Ibid.*, pp. 95-97, paras. (5)-(8), distinguishing the decision of Arbitrator Max Huber in *British Claims in the Spanish Zone of Morocco* (see footnote 292 above), p. 648, on the basis that the relationship between Spain and Morocco was not one of mere representation.

193. As to cases of international dependency (such as international protectorates), the commentary cites the decision of an arbitral tribunal in the *Brown* case in support of the proposition that “indirect responsibility ... 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 has been 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”.³⁶⁹ Such situations are admittedly dated, but according to the commentary this is no reason not to include such a well-established rule in the draft articles.³⁷⁰

194. As to relationships between a federal State and its component units possessing separate international personality, the commentary applies similar reasoning to conclude that “the federal State should be responsible for internationally wrongful acts attributable to the member State if they were committed in a sphere of activity subject to the control or direction of the federal State”, but not otherwise.³⁷¹

195. Finally, as to belligerent occupation, the same rule is again affirmed, relying on earlier diplomatic precedents as well as on the decision of the Franco-Italian Conciliation Commission in the *Duc de Guise* case.³⁷² In such cases the occupying State is responsible for the acts of the occupied State provided “(a) that the occupied State continued to exist as a separate subject of international law; and (b) that the internationally wrongful act was committed by the occupied State in an area of activity in which that State was subject to the direction or control of the occupying State”. This is so, irrespective of the legality of the occupation.³⁷³

196. The general rule in article 28, paragraph 1, is formulated on the basis of these three situations. According to article 28, paragraph 3, the responsibility of the dominant State is without prejudice to the responsibility of the dependent State, although the wrongfulness of the latter’s conduct might be attenuated or even precluded under chapter V, e.g. because of force majeure.

(iii) *The proper scope of paragraph 1 in the framework of the draft articles*

197. A wide range of dependency relationships is discussed in the commentary. But it must be stressed that chapter IV is only concerned with the responsibility of one State for the conduct of another State, and this has implications for the scope of article 28, paragraph 1:

(a) *Exclusion of dependent territories or component units of federal States which are not themselves States.* In most relationships of dependency between one territory and another, the dependent territory, even if it possesses some international personality, is not a State. This

³⁶⁹ *Yearbook ... 1979*, vol. II (Part Two), p. 98, commentary to article 28, para. (14), citing the *Brown* case, UNRIAA, vol. VI (Sales No. 1955.V.3), pp. 130-131.

³⁷⁰ *Ibid.*, pp. 98-99, paras. (15)-(17).

³⁷¹ *Ibid.*, p. 99, para. (18).

³⁷² See *International Law Reports* (London), vol. 18 (1951), p. 426.

³⁷³ *Yearbook ... 1979*, vol. II (Part Two), p. 101, para. (24) of the commentary to article 28.

is equally true of existing federal States. Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right (and not by delegation from the federal State), the component unit is not itself a State in international law. So far as State responsibility is concerned, the position of federal States is no different from that of any other States. The normal principles specified in articles 5 and 10 of the draft articles apply,³⁷⁴ and the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal Constitution;³⁷⁵

(b) *Disappearance of older cases of international dependency.* A further limitation on the scope of article 28 results from developments in international relations since the 1970s. Almost without exception, the older international dependency relationships have been terminated (as with the British protected States in the Arabian peninsula). Those that remain have mostly been reformulated so as to reduce or eliminate areas of uncertainty or dependency.³⁷⁶ The links between, for example, Italy and San Marino, Switzerland and Liechtenstein or New Zealand and Western Samoa are based on representation, and do not involve any legal right to direction or control on the part of the representing State. As the commentary to article 28 emphasizes, in pure cases of representation the represented entity remains responsible for its own international obligations, even though diplomatic communications may be channelled through another State.³⁷⁷

198. Nonetheless, instances exist, or can still be envisaged, where one State has the power to direct or control the activities of another State, whether by treaty, or as a result of a belligerent occupation, or for some other reason, and thus the issues raised by article 28, paragraph 1, do need to be addressed. Article 9 of the draft articles deals with the situation where the organ of one State is placed at the disposal of another, so that it acts under the sole direction or control of the receiving State.³⁷⁸ Article 28, paragraph 1, is concerned with what is almost the converse situation, where the organs of a dependent State are subject to the direction or control of another State in breaching international obligations owed by the dependent State to a third State.

(iv) *Is the criterion for implicated responsibility actual direction or the power to direct?*

199. The first point is that article 28, paragraph 1, takes as the criterion for responsibility not only actual direction or control but also the power to direct or control. If the conduct occurred “in a field of activity in which [the

dependent] State is subject to the power of direction or control of another State”, then the responsibility of the other State is engaged. There is, however, little authority for such a wide rule in cases where the “dependent” State survives as a separate State in international law:³⁷⁹

(a) *Robert E. Brown (United States) v. Great Britain.* The Arbitral Tribunal in this case held that the authority of Great Britain, as suzerain over the South African Republic prior to the Boer war, “fell far short of what would be required to make her responsible for the wrong inflicted upon Brown”. It went on to deny that Great Britain possessed power to interfere in matters of internal administration. But it also said that there was no evidence “that Great Britain ever did undertake to interfere in this way”. Accordingly the relation of suzerainty “did not operate to render Great Britain liable for the acts complained of”.³⁸⁰ The commentary infers that the existence of a mere power to interfere, even if not exercised, would have been enough to attract British responsibility, but the Tribunal did not actually say that. It was sufficient for its purposes to hold that there was neither a power to intervene nor any commitment by Great Britain to do so;

(b) *The Duc de Guise case.* The Franco-Italian Conciliation Commission held that Italy was responsible for a requisition carried out by Italy in Sicily at a time when it was under Allied occupation. But it did not base its decision on the absence of Allied power to requisition the property, or to stop Italy from doing so (which power certainly existed at the time). Rather the majority pointed to the absence in fact of any “intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees”.³⁸¹ In other words, the focus was on the exercise of power rather than its mere existence;

(c) *Drozd and Janousek v. France and Spain.* This decision of the European Court of Human Rights was discussed in the context of article 9.³⁸² The majority of the Court held that France was not responsible for decisions of the courts of Andorra, unless by its own participation in them, or by its subsequent endorsement and implementation of a flagrant denial of justice, it assumed its own responsibility for them.³⁸³ Unlike the minority, the Court was not prepared to infer French responsibility from the existence of any reserve powers France then may have possessed (itself or through the French co-prince), in the absence of any evidence of actual interference on its part.

³⁷⁴ See *Yearbook ... 1998* (footnote 2 above), pp. 50–51, paras. 253–259.

³⁷⁵ As ICJ had occasion to emphasize in the case of *LaGrand (Germany v. United States of America)*, *Provisional Measures, Order of 5 March 1999*, *I.C.J. Reports 1999*, p. 28. See also Opeskin, “International law and federal States”, p. 1.

³⁷⁶ See Duursma, *Fragmentation and the International Relations of Micro-States*, for details in relation to the European micro-States, which are now all States Members of the United Nations.

³⁷⁷ *Yearbook ... 1979*, vol. II (Part Two), pp. 94–95, para. (4) of the commentary to article 28.

³⁷⁸ See *Yearbook ... 1998* (footnote 2 above), pp. 44–46, paras. 219–231.

³⁷⁹ If the separate legal personality of the dependent State is not maintained, the case falls outside the scope of chapter IV altogether.

³⁸⁰ See footnote 369 above.

³⁸¹ See *International Law Reports* (footnote 372 above), discussed in *Yearbook ... 1979*, vol. II (Part Two), p. 101, para. (22) of the commentary to article 28.

³⁸² *Series A: Judgments and Decisions*, vol. 240, *Judgment of 26 June 1992* (Council of Europe, Strasbourg, 1992), discussed in *Yearbook ... 1998* (see footnote 2 above), p. 45, paras. 225–226.

³⁸³ *Series A: Judgments and Decisions* (see footnote 382 above), para. 110 (“the Convention does not require the Contracting Parties to impose its standards on third States or territories”). See also *Iribarne Pérez v. France*, European Court of Human Rights, *ibid.*, vol. 325–C, *Judgment of 24 October 1995*.

200. These and other cases³⁸⁴ do not support the broad proposition that whenever one State has the power to prevent another from committing an internationally wrongful act, it is responsible for failing to do so. Moreover, that proposition is undesirable in principle, since it would place a premium on intervention in the affairs of “dependent” States which are, *ex hypothesi*, still responsible for their own wrongful acts.³⁸⁵ Of course, the dominant State will have obligations of its own in relation to a dependent State or to territory under its control or occupation. But the mere fact of its having power over the dependent State in some field is not a sufficient basis for imputing to it all the wrongful acts of the dependent State in that field.³⁸⁶ Article 28, paragraph 1, should be limited to cases where a dominant State actually directs or controls conduct which is a breach of an international obligation of the dependent State.

(v) *Must the obligation breached be opposable to the dominant State?*

201. Since the dominant State must direct or control the commission of the wrongful act, there is no need to specify further a nexus between its conduct and that of the State committing the wrongful act (as was necessary for article 27).³⁸⁷ Two questions do remain, however. What information must the dominant State have of the circumstances amounting to the wrongful act which it directs or controls? Must the dominant State itself be bound by the obligation which is transgressed? The former question really only arises if a negative answer is given to the second. If the directing State is only to be responsible for conduct which would have been wrongful for itself, it will be on notice that the conduct it is directing another State to perform is or may be wrongful. On the other hand, if that State is to be considered as indirectly “bound” by the international obligations of the dependent State, the position may be different.

202. On this issue the position seems less clear than it was for article 27, since aid or assistance covers such a wide spectrum of cases and involves conduct which is very often neutral in character, whereas the concept of direction or control of wrongful conduct is already a more specific one. On balance, and for ease of application, the Special Rapporteur suggests that the same proviso be applied to article 28, paragraph 1, as to article 27. Thus the directing State should only be responsible for acts which would have been wrongful if it had carried out those acts itself. It should be stressed that this condition is of limited significance. All the cases referred

³⁸⁴ See, for example, the *Lighthouses case (Affaire relative à la concession des phares de l'Empire ottoman)*, decision of 24/27 July 1956 (*France v. Greece*), UNRIIAA, vol. XII (Sales No. 63.V.3), p. 155), claim Nos. 11 and 4. See also *International Law Reports* (London), vol. 23 (1956), especially p. 90.

³⁸⁵ For the position where the directing State is exclusively responsible for the conduct of the external affairs of the dependent State, see *British Claims in the Spanish Zone of Morocco* (footnote 292 above), pp. 648–649.

³⁸⁶ It may be that the fact of the dependence of one State upon another is relevant in terms of the burden of proof, since the mere existence of a formal apparatus of State does not mean that control was not exercised in fact by an occupying Power. See *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)*, Kammergericht of Berlin, *International Law Reports*, vol. 44 (1965), pp. 340–342.

³⁸⁷ See paragraph 182 above.

to in the commentary or in the discussion of article 28, paragraph 1, involved conduct (e.g. breaches of human rights or of obligations to aliens) which would have satisfied this condition.

(vi) *Article 28, paragraph 2. Responsibility arising from coercing another State to commit an internationally wrongful act*

203. Article 28, paragraph 2, deals with cases of coercion of one State by another. For the coercing State to be internationally responsible, article 28, paragraph 2, requires that the wrongful act should have been committed “as the result of coercion exerted ... to secure the commission of that act”. In other words, the act must actually have been committed, it must have been committed as a result of the coercion and this must have been intended by the coercing State. In such cases, the coercing State is implicated in the internationally wrongful act of the State which has been coerced.

204. There is a verbal difficulty with this formulation.³⁸⁸ If the acting State has truly been coerced, it will have been subjected to “an irresistible force” and the wrongfulness of its conduct will be precluded by force majeure under article 31. It is odd to speak of the wrongfulness of a coerced act, when the coercion amounts to force majeure, which is a circumstance precluding wrongfulness. As noted in discussing article 16, there is a problem with the relationship of chapter V to chapter III, and the existing language of article 28 reflects that problem.³⁸⁹ The proposal for article 28 set out below resolves the problem by referring to “an act which, but for the coercion, would be an internationally wrongful act”.

205. Turning to the substance of paragraph 2, the commentary suggests that, despite the nature of coercion as a form of imposition of will on the part of the coercing State, nonetheless the act of the coerced State remains its own act. Even if the coercion is itself unlawful,

the act [of the coercing State] will not for all that be identical with the act committed by the coerced State against a third State. The responsibility of the coercing State for the internationally wrongful act committed by the State coerced can therefore only be described as responsibility for the internationally wrongful act of another State.³⁹⁰

In conformity with this view, the commentary makes it clear that coercion for the purposes of article 28 is not limited to unlawful coercion:

[F]or the purposes of the present article, “coercion” is not necessarily limited to the threat or use of armed force, and should cover any action seriously limiting the freedom of decision of the State which suffers it—any measure making it extremely difficult for that State to act differently from what is required by the coercing State.³⁹¹

Although the commentary is clear on this point, the question whether coercion ought to be limited to unlawful conduct has been raised by a number of Governments.³⁹²

³⁸⁸ As noted by Switzerland (*Yearbook ... 1998* (footnote 7 above), p. 129; see also paragraph 190 above).

³⁸⁹ See paragraphs 11 and 14 above.

³⁹⁰ *Yearbook ... 1979*, vol. II (Part Two), p. 103, commentary to article 28, para. (28).

³⁹¹ *Ibid.*, para. (29).

³⁹² See the comments of France and Mongolia (para. 190 above).

(vii) *Should coercion for the purposes of article 28, paragraph 2, be limited to unlawful coercion?*

206. The choice between the alternatives is affected by questions relating to the scope of article 28, and in particular the meaning of coercion. In the Special Rapporteur's view, coercion for this purpose is nothing less than conduct which forces the will of the coerced State, giving it no effective choice but to comply with the wishes of the coercing State. It is not enough that compliance with the obligation is made more difficult or onerous. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the coerced act make it more difficult for the coerced State to comply with some other obligation.

207. But if that is the correct understanding of article 28, paragraph 2, then it does not seem necessary to limit article 28, paragraph 2, to unlawful coercion. Most cases of coercion meeting the suggested definition will be unlawful, e.g. because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention (i.e. coercive interference) in the affairs of another State. But even if coercion may be lawful in certain cases,³⁹³ article 28, paragraph 2, is concerned with the specific notion of coercion deliberately exercised to procure the breach of one State's obligation to another State. It is difficult to imagine any circumstances in which such coercion could be justified.

208. No doubt there are cases where a State is lawfully coerced. For example, a State may be compelled to withdraw from territory it has invaded by successful measures taken against it in self-defence. But the Charter of the United Nations does not envisage that measures will be taken in self-defence in order to coerce a State to breach a valid obligation to another State, so the hypothesis of self-defence can be excluded. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in part two of the draft articles, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.³⁹⁴

209. This analysis suggests that, having regard to the strictness of the conception of coercion underlying article 28, paragraph 2, it is unnecessary to limit that provision to coercion which is contrary to article 2, paragraph 4, of the Charter of the United Nations. By the same token, there is no reason why article 28, paragraph 2, should be limited to breaches of obligations by which the coercing State is also bound. If a State deliberately sets out to procure by coercion a breach of State B's obligations to State C, it should be held responsible to State C for the consequences. Moreover, in such a case, the wrongfulness of State B's conduct vis-à-vis State C will likely be precluded by distress or force majeure, so that State C's only remedy will be against State A. For these reasons, article 28, paragraph 2, should be retained,

³⁹³ On the debate about the definition and lawfulness of coercion, see Reuter, *op. cit.*, pp. 180–182, paras. 271–274.

³⁹⁴ See also the remarks of ICJ on the proper purposes of countermeasures in the case concerning the *Gabíkovo-Nagymaros Project* (footnote 51 above), pp. 55–57, paras. 83–87.

with appropriate drafting amendments to reflect the points made in the commentary.³⁹⁵

(viii) *Article 28, paragraph 3. Preserving the responsibility of the acting State*

210. Finally, paragraph 3 preserves the responsibility of the State which has committed the internationally wrongful act, albeit under the direction or control or subject to the coercion of another State. As noted by France, the same savings clause would be appropriate for article 27.³⁹⁶ In addition, it should be made clear that the provisions of chapter IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State.

3. CONCLUSIONS AS TO CHAPTER IV

211. On balance there seems to be support for the retention of chapter IV as such, and for the main elements in articles 27–28, but with the clarifications and limitations that have been explained above. To summarize, all three bases of implicated or derived responsibility need to be articulated further, largely incorporating explanations given in the commentary, but also, in the case of articles 27 and 28, paragraph 1, limiting responsibility to cases of obligations opposable to the assisting or directing State. Since articles 27 and 28, paragraph 1, have more in common with each other than they do with article 28, paragraph 2, they could conveniently be combined in a single article, leaving the distinct issue of coercion to be dealt with in article 28.

212. The remaining issue is whether other elements of ancillary or inchoate responsibility ought to be included in chapter IV. In some national legal systems, complicity and “indirect responsibility” are associated in a chapter of the law with other forms of accessory responsibility such as incitement, conspiracy and attempt. This is a field where national legal traditions diverge substantially. But one common feature appears to be that ancillary responsibility is more a feature of criminal law than it is of civil law.³⁹⁷ So far as international law is concerned, if there is to be a developed distinction between international crimes and international delicts, one might expect that ancillary responsibility would likewise be more extensive for crimes. But in common with the rest of part one (other than article 19, paragraphs 2–4, itself), chapter IV makes no such distinction.

213. Cases of inchoate responsibility do not involve the implication by one State in the wrongful conduct of another, and do not therefore fall within the scope of chapter IV. In any event, there does not seem to be any general international law rule dealing with attempts to commit wrongful conduct.³⁹⁸ Other possibilities should, however, be briefly referred to.

³⁹⁵ See paragraph 205 above.

³⁹⁶ *Yearbook ... 1998* (see footnote 7 above), p. 129.

³⁹⁷ The same is true of inchoate responsibility. Thus an attempt to commit a crime may be unlawful, whereas an attempt to commit a delict or to breach a contract is usually not. For the question when an internationally wrongful act is actually committed, as distinct from planned or prepared, see paragraphs 102–106 above.

³⁹⁸ See paragraphs 104 and 106 above.

(a) *Incitement.* Conduct by a State in inciting another to commit an internationally wrongful act was deliberately excluded from chapter IV. Only if it materially assists or actually directs or coerces another State to commit a wrongful act is a State implicated in that act.³⁹⁹ This position seems to have been approved in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, where ICJ noted that it was not concerned with “the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement”;⁴⁰⁰

(b) *Conspiracy.* Where two States conspire to commit an internationally wrongful act, it is usually in the context of the subsequent joint commission of that act. At least, one of the conspiring States may well aid or assist the other, and depending on the facts, the planning might itself constitute such assistance. However, there does not seem to be any need for a general concept of “conspiracy” in international law, and certainly there is no need for such a notion in chapter IV;

(c) *Assistance given after the commission of the wrongful act.* In certain circumstances, assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that wrongful act by the former State. In such cases it may assume responsibility for that act pursuant to article 15 *bis* as provisionally adopted in 1998.⁴⁰¹ Again, however, there seems to be neither call nor need for a separately identified notion of “complicity after the fact” in chapter IV. Specific problems (e.g. in the field of money-laundering) can be dealt with by appropriately tailored primary rules;

(d) *Other cases of joint or collective action by States.* Reverting to the catalogue of cases of possible joint or collective action by several States, set out in paragraph 161 above, the analysis contained in the commentaries to chapter IV and in the present report does not identify any further situation which needs to be dealt with in this chapter. Issues may arise, however, in terms of reparation for conduct caused jointly by two or more States. Such issues will be addressed in the context of part two of the draft articles.

214. For the reasons given, the Special Rapporteur proposes the following articles in chapter IV:

CHAPTER IV

RESPONSIBILITY OF A STATE FOR THE ACTS OF ANOTHER STATE

Note

The earlier title for this chapter was “Implication of a State in the internationally wrongful act of another State”. The new title proposed

³⁹⁹ See *Yearbook ... 1979*, vol. II (Part Two), pp. 100–101, paras. (6)–(7) of the commentary to article 27. See also Quigley, *loc. cit.*, pp. 80–81.

⁴⁰⁰ *I.C.J. Reports 1986* (see footnote 68 above), p. 129, para. 255. See also, and more categorically, Judge Schwebel, dissenting, *ibid.*, p. 388, para. 259 (“Customary international law does not know the delict of ‘encouragement’”).

⁴⁰¹ See *Yearbook ... 1998* (footnote 2 above), pp. 54–55, paras. 278–283.

is both shorter and more accurate, since what the various cases in chapter IV have in common is that State A is responsible for conduct which is actually performed by State B. Moreover, in the case where State B’s conduct is coerced by State A, the wrongfulness of that conduct may be precluded so far as State B is concerned.

Article 27. Assistance or direction to another State to commit an internationally wrongful act

A State which aids or assists, or directs and controls, another State in the commission of an internationally wrongful act is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Note

1. Article 27 as adopted on first reading covered all aid or assistance “rendered for the commission of an internationally wrongful act carried out by” the assisted State. Such aid or assistance was internationally wrongful even if, taken alone, it would not have amounted to a breach of an international obligation. As now formulated, article 27 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself. The first two limitations correspond to the intention of article 27 as adopted on first reading; the third is new. See paragraphs 179–188 above.

2. A State is not responsible for aid or assistance under article 27 unless the internationally wrongful act is actually committed by the assisted State. Article 27 does not address questions of the admissibility of judicial proceedings to establish the responsibility of the assisting State in the absence of or without the consent of the assisted State. See paragraph 176 above.

3. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act. On the other hand, mere incitement or encouragement, unaccompanied by aid or assistance, is not enough to give rise to responsibility under this article. See paragraphs 182 and 213 above.

4. The words “if it is established that”, which appeared in article 27 as adopted on first reading, are unnecessary. It is clear from article 27 that each of the specified elements must be sufficiently established for ancillary responsibility to arise, quite apart from the general rule that State responsibility has to be established and is not to be presumed. See *Yearbook ... 1998* (footnote 2 above), pp. 8–9, paras. 36–38.

5. In addition, article 27 now covers the situation which was previously dealt with under article 28, paragraph 1, *viz.* where one State directs and controls another to breach its international obligation to a third State. The same qualifications apply to the conduct of a State in directing and controlling wrongful conduct as apply to aid or assistance, that is to say, the directing State must be aware of the circumstances making the conduct of the assisted State internationally wrongful, and the completed act must be such that it would have been wrongful had it been committed by the directing State itself. See paragraphs 197–202 above.

6. Although article 27, paragraph 1, used the term “direction or control” disjunctively, in the context of a narrower formulation of the principle, it seems desirable to limit the responsibility of a third State to cases where it “directs and controls” the conduct in question. By contrast with article 28, paragraph 1, as adopted on first reading, the direction or control must actually be exercised for responsibility to arise.

Article 28. Responsibility of a State for coercion of another State

A State which, with knowledge of the circumstances, coerces another State to commit an act which, but for the coercion, would

be an internationally wrongful act of the latter State is internationally responsible for the act.

Note

1. Article 28, paragraph 2, as adopted on first reading dealt with coercion exercised by one State with a view to procuring conduct by another State which (if that State had not been coerced) would be a breach of that State's international obligations. It was not necessary that the coercion should have been independently unlawful, although in most cases it would be. This provision has been retained in a separate article. The commentary to former article 28, paragraph 2, made it clear that the coercing State had to be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct, and although this requirement might be thought to be implicit in the notion of coercion to commit a wrongful act, it is now spelled out in the article.

2. In the circumstances where coercion is used for this purpose, there is no reason to require that the act in question would have been unlawful if committed by the coercing State itself. There can be no justification for coercing another State to violate an international obligation, especially since, in circumstances where coercion has been used, the acting State may well be able to rely on the coercion as a circumstance precluding wrongfulness, thereby depriving the injured State of a remedy. See paragraphs 206–210 above.

Article 28 bis. Effect of this chapter

This chapter is without prejudice to:

(a) **The international responsibility, under the other provisions of the present articles, of the State which committed the act in question;**

(b) **Any other ground for establishing the responsibility of any State which is implicated in that act.**

Note

1. Article 28, paragraph 3, as adopted on first reading provided that that article was without prejudice to the responsibility of the State which had actually committed the wrongful act. This is equally true of article 27, and the savings clause has accordingly been applied to chapter IV as a whole.

2. Chapter IV is also without prejudice to the application of any other rule of international law defining particular conduct as wrongful, and this is made clear in paragraph (b). See paragraph 210 above.

C. Part one, chapter V. Circumstances precluding wrongfulness

1. INTRODUCTION

(a) *Overview*

215. Chapter V of part one specifies six circumstances precluding the wrongfulness of conduct otherwise internationally wrongful.⁴⁰² They are consent (art. 29); coun-

⁴⁰² For the *travaux* of chapter V, see *Yearbook ... 1979*, vol. II (Part One), document A/CN.4/318 and Add.1–4, pp. 27–66; *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/318/Add.5–7, pp. 14–70; *Yearbook ... 1979*, vol. I, pp. 31–63, 184–187 and 195–208; *Yearbook ... 1980*, vol. I, pp. 153–194, 220–223, 227–231 and 235–240 (plenary debate); *Yearbook ... 1979*, vol. I, pp. 169–175 and 233–236; and *Yearbook ... 1980*, vol. I, pp. 270–273 (report of the Drafting Committee). For discussions of the justifications or excuses for international illegality in general, see Jagota, "State responsibility: circumstances precluding wrongfulness"; Salmon, "Les circonstances excluant l'illicéité"; and Lowe, "Precluding wrongfulness or responsibility: a plea for excuses". For discussion of circumstances precluding wrongfulness in relation to human rights, see Wyler, *op. cit.* pp. 183–219.

termeasures (art. 30); force majeure and fortuitous event (art. 31); distress (art. 32); necessity (art. 33); and self-defence (art. 34). Chapter V is completed by article 35, which reserves the possibility of compensation for damage to an injured State by an act otherwise wrongful, but the wrongfulness of which is precluded under articles 29 and 31–33. That possibility is not envisaged for countermeasures or self-defence.

216. Consistently with the philosophy underlying the draft articles, these "justifications", "defences" or "excuses", as they might variously be termed, are *prima facie* of general application. Unless otherwise provided,⁴⁰³ they apply to any internationally wrongful act, whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act, or by reason of its membership in an international organization or from any other source.

(b) *The evolution of chapter V*

217. The statement of the general justifications or excuses for non-compliance with an international obligation is a matter of first-rate importance, both for what is included and for what is excluded. The development of the current list of the grounds for non-performance seems to have been as follows:

(a) *The Hague Conference for the Codification of International Law of 1930*. In view of the replies made by Governments to the questionnaire on the responsibility of States for damages to foreigners, the Preparatory Committee of the 1930 Hague Conference drafted a number of Bases of Discussion.⁴⁰⁴ Under the heading "Circumstances under which States can decline their responsibility", it listed two:

[T]he immediate necessity of self-defence against a danger with which the foreigner threatened the State or other persons" (Basis of discussion No. 24);

[C]ircumstances justifying the exercise of reprisals against the State to which the foreigner belongs" (Basis of discussion No. 25).⁴⁰⁵

The Preparatory Committee considered that the extent of a State's responsibility in the context of diplomatic protection could also be affected by the "provocative attitude" adopted by the injured person (Basis of discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces "in the suppression of an insurrection, riot or other disturbance" (Basis of discussion No. 21). However, these issues were not taken to any conclusion;

(b) *Proposals of Mr. García Amador*. In dealing with international responsibility for injuries to aliens, Mr. García Amador proposed the following cases under the

⁴⁰³ For example, by a treaty to the contrary, which would constitute a *lex specialis* (see article 37).

⁴⁰⁴ League of Nations publication, *V. Legal*, 1929.V.3, p. 19. The Bases of Discussion are reproduced in *Yearbook ... 1956*, vol. II, document A/CN.4/96, annex 2, p. 223–225.

⁴⁰⁵ *Ibid.* Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

heading “Exoneration from responsibility; extenuating and aggravating circumstances”:⁴⁰⁶

- (i) Force majeure;
- (ii) State of necessity;
- (iii) Fault on the part of the alien.⁴⁰⁷

On the other hand, he excluded some particular “grounds or circumstances”, either as falling outside the scope of his draft (self-defence) or as being “inadmissible” (reprisals, non-recognition of a State or Government and severance or suspension of diplomatic relations);⁴⁰⁸

(c) *Commission work on the law of treaties*. Sir Gerald Fitzmaurice in his fourth report on the law of treaties identified the following list of “circumstances justifying non-performance”:⁴⁰⁹

- (i) Acceptance of non-performance by the other party or parties;
- (ii) Impossibility of performance (force majeure);
- (iii) Legitimate military self-defence;
- (iv) Civil disturbances;
- (v) Major emergencies arising from natural causes;
- (vi) Previous non-performance by another party;⁴¹⁰
- (vii) Non-performance by way of legitimate reprisals;
- (viii) Incompatibility with a new rule (in the nature of *jus cogens*).

Among this list, items (c) (iii) and (vii) correspond to articles 34 and 30 of chapter V; items (c) (ii), (iv) and (v) are subsumed, more or less, in article 31 (force majeure and fortuitous event). Consent, distress and necessity (arts. 29, 32 and 33) did not appear in Sir Gerald’s list, or at least were not separately identified. On the other hand, chapter V does not deal with his items (c) (i) (unless it be subsumed under consent), (vi) or (viii). The question whether they should do so is discussed in due course below.⁴¹¹

(c) *Comments of Governments on chapter V as a whole*

218. France suggests that a single article enumerating the six circumstances precluding wrongfulness might be

⁴⁰⁶ *Yearbook ... 1958*, vol. II, document A/CN.4/111, p. 72. For the discussion of the circumstances by Mr. García Amador, see his third report, *ibid.*, pp. 50–55, and his report on international responsibility in *Yearbook ... 1956* (footnote 404 above), pp. 203–209.

⁴⁰⁷ These three cases were included in article 13, paragraphs 1–2 of the draft, article 13, paragraph 3, stating that “if not admissible as grounds for exoneration from responsibility, [they could] constitute extenuating circumstances in the determination of the quantum of reparation”. Mr. García Amador had also addressed with approval the notion of extinctive prescription (*Yearbook ... 1956* (footnote 404 above), p. 209).

⁴⁰⁸ *Yearbook ... 1958* (footnote 406 above), pp. 53–55.

⁴⁰⁹ *Yearbook ... 1959* (see footnote 6 above), pp. 43–47, and for his commentary, pp. 63–74.

⁴¹⁰ This is often referred to by reference to the Latin phrase “*exceptio inadimpleti contractus*” (more fully, “*exceptio inadimplenti non est adimplendum*”). Sir Gerald Fitzmaurice tended to the view that it was an implied condition in all treaties, unless expressly excluded, rather than a separate principle of law (*ibid.*, p. 70).

⁴¹¹ See paragraphs 306–331.

included in chapter III.⁴¹² But it also goes to point out the conceptual difference between some of those circumstances (consent, countermeasures and self-defence) and the others,⁴¹³ and this difference would be obscured by including all six circumstances in a single article.

219. The United Kingdom analyses at some length the nature of the “defences” provided for in chapter V. Like France, it suggests that consent, countermeasures and self-defence are in a different legal category from the others, since they render the conduct covered entirely lawful, and accordingly exclude any question of compensation to the other State concerned. Necessity and distress, by contrast, relate to conduct which is not involuntary and “do not entirely preclude the wrongfulness of the conduct”. Obligations of cessation (as soon as possible) and reparation for any injury caused should subsist in these cases.⁴¹⁴

220. Japan supports maintaining chapter V as an exhaustive list of the circumstances precluding wrongfulness: these need to be clearly defined and faithfully to reflect customary international law. It agrees with the idea of distinguishing between circumstances which mean that no issue of wrongfulness arises at all, from those which merely “preclude” wrongfulness, but would place force majeure and distress in the former category.⁴¹⁵

221. Both the United Kingdom and the United States observe that a State may by treaty expressly or impliedly exclude one of the circumstances precluding wrongfulness as an excuse for conduct not in conformity with an obligation. This possibility could be met, according to the United States, by making article 37 (*lex specialis*) applicable to part one as well as part two.⁴¹⁶

222. In the light of these comments, it is proposed to discuss the general conception of “circumstances precluding wrongfulness”, to deal in turn with articles 29–34, to consider whether any other justifications or excuses for wrongful conduct merit inclusion in chapter V and finally to consider whether any specific procedural or other consequences should flow from the invocation of chapter V.

2. THE CONCEPT OF “CIRCUMSTANCES PRECLUDING WRONGFULNESS”

223. The commentary stresses that the circumstances listed in chapter V do not “at least in the normal case” preclude responsibility that would otherwise result from an act wrongful in itself. Rather they preclude the characterization of the act as wrongful in the first place.⁴¹⁷ Chapter V is said to derive its title as well as its basic idea from the fundamental distinction “between the idea of ‘wrongfulness’, indicating 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

⁴¹² *Yearbook ... 1998* (see footnote 7 above), pp. 129–130.

⁴¹³ *Ibid.*, p. 130.

⁴¹⁴ *Ibid.*

⁴¹⁵ A/CN.4/492 (reproduced in the present volume), comments by Japan on chapter V.

⁴¹⁶ *Yearbook ... 1998* (see footnote 7 above), p. 133.

⁴¹⁷ *Yearbook ... 1979*, vol. II (Part Two), commentary to chapter V, p. 106, para. (2).

another ('secondary') rule of international law attaches to the act of the State constituted by such conduct".⁴¹⁸ The commentary concedes that, despite the general language of article 1, there could be circumstances precluding responsibility which did not preclude the wrongfulness of the act in question, but which preclude the State in question from being held responsible for it. But it denies that there would be any point in characterizing an act as wrongful without holding some State responsible.⁴¹⁹

224. Consistently with this approach, the commentary goes on to explain that the six circumstances enumerated "have one essential feature in common: that of rendering definitively or temporarily inoperative the international obligation in respect of which a breach is alleged".⁴²⁰ These are to be distinguished from attenuating or aggravating circumstances, which should be dealt with in part two of the draft articles.⁴²¹

(a) *Some preliminary distinctions*

225. The concept underlying chapter V is to be distinguished from several other arguments which may have the effect of allowing a State to avoid a claim of responsibility but which do not "preclude wrongfulness" in the sense explained in the commentary. First, and most obviously, these circumstances have nothing to do with any question of the jurisdiction of a court or tribunal over a dispute, or the admissibility of a dispute.⁴²² Secondly, they are to be distinguished from the constituent requirements of the obligation, i.e. those elements which have to exist for the issue of wrongfulness to arise in the first place, and which are in principle specified by the obligation itself. In this sense "circumstances precluding wrongfulness" operate like general defences or excuses in national legal systems, and indeed many of the circumstances identified in chapter V are similar to defences or excuses recognized by some or many legal systems (e.g. self-defence, necessity, force majeure).

226. A third distinction concerns the effect of circumstances precluding wrongfulness, as compared with the effect of the termination of the obligation itself. Here again it seems that the circumstances in chapter V operate more as a shield than a sword. While they may protect the State against an otherwise well-founded accusation of wrongful conduct, they do not strike down the obligation, and the underlying source of the obligation, the primary rule, is not affected by them *as such*. The distinction, which has not always been clearly perceived, was formulated by Sir Gerald Fitzmaurice as follows:

[S]ome of the grounds justifying non-performance of a particular treaty obligation are identical with some of those causing or justifying the *ter-*

⁴¹⁸ *Ibid.*, p. 107, para. (3).

⁴¹⁹ *Ibid.*, para. (5).

⁴²⁰ *Ibid.*, p. 108, para. (9).

⁴²¹ *Ibid.*, p. 109, para. (11). In fact, there was no systematic consideration of attenuating or aggravating circumstances in part two, but see articles 42, paragraph 2, and 45, paragraph 2 (c), which deal incidentally with such circumstances.

⁴²² Conversely, a treaty exception for conduct necessary to preserve the essential security interests of a party operates as a specific conventional "circumstance precluding wrongfulness" so far as the treaty is concerned, and does not go to the jurisdiction of a court or tribunal. See the case concerning *Oil Platforms* (footnote 69 above), p. 811, para. 20.

mination of a treaty. Yet ... the two subjects are quite distinct, if only because in the case of termination ... the treaty ends altogether, while in the other [case] ... it does not in general do so, and (if a paradox is permissible) the non-performance is not only justified, but "looks towards" a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present ...⁴²³

This emerges clearly from two major cases decided since chapter V was first adopted, in both of which the distinction between non-performance and termination of an obligation was considered:

(a) Relevant aspects of the *Rainbow Warrior* arbitration have already been discussed.⁴²⁴ The Tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while it was in force (including the question whether the wrongfulness of any apparent breach was precluded);⁴²⁵

(b) ICJ was even more incisive in the *Gabčíkovo-Nagymaros Project* case. In purporting to terminate the 1977 Treaty in May 1992, Hungary had relied, inter alia, on the state of necessity, which it had already invoked in 1989–1990 as a circumstance precluding the wrongfulness of its conduct in discontinuing work on the Project. The Court crisply rejected the argument:

[E]ven if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but—unless the parties by mutual agreement terminate the Treaty—it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.⁴²⁶

227. In the light of these distinctions, it is necessary to revert to the effect of chapter V as described in the commentary, namely, that of "rendering definitively or temporarily inoperative the international obligation" in question.⁴²⁷ The first point is that, while the same facts may amount, for example, to force majeure under article 31 and to a case of supervening impossibility of performance under article 61 of the 1969 Vienna Convention, they are analytically distinct.⁴²⁸ Force majeure justifies non-performance of the obligation for so long as the event exists; a case of supervening impossibility justifies the termination of the treaty (or its suspension). One operates in respect of the particular obligation; the other with respect to the treaty which is the source of that obligation. Thus the scope of application of the two doctrines is different. So too is their mode of application. A fortuitous event itself justifies non-performance, as it were by operation of law. By contrast, a treaty is not terminated by supervening impossibility: at least one of the parties must decide to terminate it. As to obligations arising under general international law, these normally cannot be "terminated" by the unilateral act of one State even in cases such as material breach by another State or fortuitous event.

⁴²³ *Yearbook ... 1959* (see footnote 6 above), p. 41, para. 8.

⁴²⁴ See paragraph 109 above.

⁴²⁵ UNRIIAA (see footnote 36 above), pp. 251–252, para. 75.

⁴²⁶ *I.C.J. Reports 1997* (see footnote 51 above), p. 63, para. 101; see also page 38, para. 47.

⁴²⁷ *Yearbook ... 1979*, vol. II (Part Two), commentary to chapter V, p. 108, para. (9).

⁴²⁸ *Ibid.*

228. Thus it is doubtful whether a circumstance precluding wrongfulness could ever render *definitively* inoperative any primary obligation. What it can do is to provide a justification for non-compliance which lasts as long as the conditions for relying on the given circumstance are met. If the primary obligation terminates, then so too does the need to rely on chapter V. Similarly, if the act which would otherwise be a breach ceases, no further question of wrongfulness arises. Chapter V is only relevant for so long as the obligation, the conduct inconsistent with it and the circumstance precluding the wrongfulness of that conduct coexist. Rather than saying that a circumstance precluding wrongfulness renders the obligation “definitively or temporarily inoperative”, it is clearer to distinguish between the existence of the primary obligation, which remains in force for the State concerned unless otherwise terminated,⁴²⁹ and the existence of a circumstance precluding the wrongfulness of conduct not in conformity with that obligation. This also avoids the oddity of saying that conduct, the wrongfulness of which is precluded by, say, necessity, is “in conformity” with the primary obligation. The conduct does not conform, but if the circumstance precludes the wrongfulness of the conduct, neither is there a breach.⁴³⁰ This was the approach taken by ICJ to chapter V of the draft articles in the *Gabčíkovo-Nagymaros Project* case. In dealing with the Hungarian plea of necessity it said:

The state of necessity claimed by Hungary—supposing it to have been established—thus could not permit of the conclusion that ... it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.⁴³¹

229. Of the six circumstances in chapter V, the one which presents the greatest difficulty for this analysis is consent, since it is clear that consent could itself definitively render an obligation “inoperative” and bring it to an end. However, for reasons given below, the Special Rapporteur does not believe that consent belongs within the framework of chapter V.⁴³²

(b) *Circumstances precluding wrongfulness or responsibility?*

230. Thus chapter V provides a shield against an otherwise well-founded claim for the breach of an obligation. But it is not clear that the different circumstances covered by chapter V apply in the same way or to the same extent. It seems that some (for example, self-defence and consent) render the conduct in question lawful; in other words, they preclude wrongfulness. Action which meets the requirements for self-defence as referred to in Article 51 of the Charter of the United Nations is lawful

⁴²⁹ If it is a treaty obligation, it can only be terminated under the law of treaties. If it is a unilateral obligation, it can only be terminated under the law (whatever it may be) relating to the termination of unilateral obligations. If it is an obligation arising under general international law, it can only be terminated in accordance with the relevant rules of that law concerned with the termination of customary obligations. None of this is the province of the law of State responsibility.

⁴³⁰ See paragraphs 10–14 above for a discussion of this issue in the context of article 16.

⁴³¹ *I.C.J. Reports 1997* (see footnote 51 above), p. 39, para. 48.

⁴³² See paragraphs 232–243 below.

as an exercise of an “inherent right”, as between the defending State and its aggressor.⁴³³ The position with such circumstances as distress or necessity is less clear, as a number of Governments have pointed out.⁴³⁴ It does not seem right to say that in a case of necessity or distress, the obligation in question is “inoperative”. Not merely does the obligation subsist, but it continues to exercise an influence on the situation, such that the interest of the other State or States concerned must be taken into account in determining whether the circumstances really do amount to a state of necessity or to distress.

231. This suggests that at least two categories of circumstances are covered by chapter V, a conclusion implicitly confirmed by article 35, which allows the possibility of compensation to an “injured” State in four of the cases covered by chapter V but not in two others (self-defence and countermeasures). However, before considering whether the draft articles should make a more explicit distinction between justifications (such as self-defence), which preclude wrongfulness, and excuses (such as necessity), which may have some lesser effect, it is necessary to review the actual provisions of chapter V.⁴³⁵

3. REVIEW OF SPECIFIC ARTICLES

(a) *Article 29. Consent*

232. Article 29 provides as follows:

1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.

2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

233. The commentary asks whether the principle *volenti non fit injuria* applies in international law, and gives a qualified affirmative answer to that question. For the purposes of chapter V, the question is not one of suspending, still less abrogating, the primary rule which gives rise to the obligation. Article 29 is concerned with the case where the other State (or other international legal person) concerned “consents not to general suspension of the rule ... but to non-application of the obligation provided for by the rule in a specific instance”. Normally the rule will continue to apply in future; the obligation has simply been dispensed with in a given case.⁴³⁶ But this can only be done by a valid consent, that is, by a consent which is not inconsistent with a peremptory norm. In addition, it may be that for some purposes the consent of a number

⁴³³ This does not mean that *all* international obligations in force between the two States are rendered “inoperative” by legitimate self-defence. See paragraphs 298–301 below.

⁴³⁴ See paragraphs 218–221 above.

⁴³⁵ See paragraph 355 below.

⁴³⁶ *Yearbook ... 1979*, vol. II (Part Two), commentary to article 29, p. 109, para. (2).

of States is required, in which case the consent of State C does not preclude wrongfulness in relation to State B.⁴³⁷ The examples given in the commentary mostly relate to the use of force on the territory of a State to suppress a coup, the stationing of troops abroad, humanitarian relief and rescue operations, or the arrest or detention of persons on foreign territory.⁴³⁸ But the commentary also refers to the decision in the *Russian Indemnity* case of 1912, where the Permanent Court of Arbitration held that, by accepting repayments of principal alone over 20 years without protest or reservation of its rights, Russia had waived the payment of moratory interest.⁴³⁹

234. For consent to amount to a circumstance precluding wrongfulness, it must be “*valid in international law, clearly established, really expressed (which precludes merely presumed consent), internationally attributable to the State and anterior to the commission of the act to which it refers*”.⁴⁴⁰ Moreover, the conduct must fall within the limits of the consent given.⁴⁴¹ The commentary goes on to develop these requirements in some detail, relying heavily on the requirements for a valid consent under the law of treaties.⁴⁴²

(i) *Comments of Governments on article 29*

235. As to paragraph 1, Austria queries the use of the qualifying phrase “in relation to that State”, since consent may render conduct lawful generally.⁴⁴³ France doubts the value of the term “validly given”, with its overtones of the law of treaties.⁴⁴⁴ The United Kingdom denies that consent can validly be given by all those persons whose conduct is attributable to the State under chapter II, despite a statement in the commentary apparently to that effect.⁴⁴⁵ For example, consent by an insurrectional movement would not bind the State for the purposes of article 29, even if the conduct of that movement might be attributable to the State under article 15. Secondly, in its view, the Commission should consider the question of implied or retrospective consent, especially where humanitarian action is taken in an emergency.⁴⁴⁶

⁴³⁷ *Ibid.*, para. (5), citing the issue of Austrian consent to the Anschluss of 1938, as dealt with by the International Military Tribunal at Nürnberg (United Kingdom, *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, Cmd. 6964 (London, HM Stationery Office, 1946), pp. 17 et seq.; and H. Lauterpacht, ed., *Annual Digest and Reports of Public International Law Cases being a Selection from the Decisions of International and National Courts and Tribunals and Military Courts given during the year 1946* (London, Butterworth, 1951), pp. 208–210. The Tribunal denied that Austrian consent had been given, and noted that the Anschluss was in any event illegal in the absence of the consent of the parties to the Treaty of Versailles and the Peace Treaty of Saint-Germain-en-Laye.

⁴³⁸ *Yearbook ... 1979*, vol. II (Part Two), commentary to article 29, pp. 110–111, paras. (6)–(9), citing on the question of arrest on foreign territory the decision of the Permanent Court of Arbitration in the *Savarkar* case of 1911 (UNRIAA, vol. XI (Sales No. 61.V.4), pp. 252–255).

⁴³⁹ UNRIAA (see footnote 438 above), p. 446.

⁴⁴⁰ *Yearbook ... 1979* (see footnote 438 above), p. 112, para. (11).

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.*, para. (12).

⁴⁴³ *Yearbook ... 1998* (see footnote 7 above), p. 130.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ *Ibid.*, p. 131, citing commentary to article 29, para. (15).

⁴⁴⁶ *Ibid.*

236. As to paragraph 2, Austria asks whether the issue of peremptory norms (*jus cogens*) needs to be raised,⁴⁴⁷ a question which France answers firmly in the negative.⁴⁴⁸ The United Kingdom agrees with France, pointing to the uncertainties surrounding peremptory norms.⁴⁴⁹

(ii) *The place of consent in chapter V*

237. Most of the comments of Governments on article 29 relate to the formulation of the principle of consent, rather than the principle itself. The comments raise substantial concerns, e.g. about the scope of the word “validly” in paragraph 1 or about the reference to peremptory norms in paragraph 2. But it is not only in those respects that article 29 raises more issues than it resolves. All the other circumstances dealt with in chapter V are defined, either by the articles themselves (force majeure, distress, state of necessity) or elsewhere in the draft articles (countermeasures), or at least by reasonably well-understood and well-developed rules of general international law reflected in the Charter of the United Nations (self-defence). Only consent as a circumstance precluding wrongfulness is left to the uncertainties of phrases such as “validly”. Moreover, as France and the United Kingdom both point out, analogies with other areas of international law (attribution, the law of treaties) provide uncertain guidance as to whether a particular official had authority to “preclude the wrongfulness” of conduct by consenting to it. In the *Savarkar* case,⁴⁵⁰ for example, it was irrelevant that the brigadier who agreed to return the escapee to the British ship had no authority to enter into international agreements on behalf of France. Of course, his conduct would have been attributable to France under chapter II of part one, but again that was not the point. Rather, the question was whether his consent to the return of the escapee was sufficient. On this question article 29 provides no guidance. The commentary goes further, but some of its clarifications are not spelled out in the article itself and, more importantly, it says little or nothing as to the actual or ostensible authority to consent for the purposes of chapter V. It may well be that the question as to who has authority to consent to a departure from a particular rule depends, to some extent at least, on the particular rule. It is one thing to consent to a search of embassy premises, another to the trial of an extraditee on a charge other than that on which the person was extradited and yet another to the establishment of a military base on the territory of a State, or to the conduct of military operations against rebels located on that territory.

238. This suggests that there is a deeper problem with article 29 than one simply of formulation. Is it possible to distinguish between, on the one hand, the issue of consent as an element in the application of a rule (which is accordingly part of the *definition* of the relevant obligation) and, on the other hand, the issue of consent as a basis for precluding the wrongfulness of conduct inconsistent with the obligation? The commentary unequivocally excludes cases of consent given *after* the conduct has occurred, which it

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.*, pp. 131–132.

⁴⁵⁰ See footnote 438 above.

rightly regards as a form of waiver.⁴⁵¹ But if consent must be given in advance, and if it is only validly given in some cases and not in others, and if authority to consent varies with the rule in question, then it may be asked whether the element of consent should not be seen as incorporated in the different primary rules, possibly in different terms for different rules. For example, the rule that a State has the exclusive right to exercise jurisdiction or authority on its territory is subject to the proviso that foreign jurisdiction may be exercised with the consent of the host State, and such cases are very common (e.g. commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, etc.). They do not involve, even *prima facie*, conduct not in conformity with the international obligation, and thus they fall outside the scope of chapter V, and indeed outside the scope of the draft articles as a whole. Sir Gerald Fitzmaurice referred to such cases under the rubric of “Non-performance justified *ab intra* by virtue of a condition of the treaty implied in it by international law”, and he formulated the distinction as follows:

Since the very issue, whether non-performance is justified, is one that assumes the existence of a *prima facie* or apparent obligation under the treaty, conditions expressed in or implied by the language of the treaty itself relate to the existence and scope of the obligation, not to the justification for its non-performance.⁴⁵²

He was of course dealing only with the law of treaties, but the same principle surely applies to the formulation of obligations arising under general international law (e.g. the obligation not to exercise civil jurisdiction on the territory of another State without its consent, or not to overfly its territory without prior authorization). This explains why Sir Gerald did not deal with consent as a separate “circumstance justifying non-performance”. Instead he dealt with it under the rubric of “acceptance of non-performance”, which is best considered as a form of waiver. It does not concern the question whether responsibility has arisen in the first place, but rather the loss of the right to invoke responsibility, which is outside the scope of part one.⁴⁵³

239. The distinction between “intrinsic” and “extrinsic” justifications or excuses raises a further doubt. All the other articles in chapter V relate to circumstances (force majeure, distress, necessity, an armed attack or other unlawful conduct giving a right to respond by way of self-defence or countermeasures) which were present at the time of the wrongful act. The commentary limits article 29 to consent given in advance, yet such consent validly given implies that the conduct is perfectly lawful at the time it occurs. By contrast, where a State acts inconsistently with an obligation and its conduct is excused on grounds such as necessity, force majeure or distress, one is not inclined to say that the conduct is “perfectly lawful”. Rather there is an apparent or *prima facie* breach which is or may be excused. Even in the case of self-defence or countermeasures, where the conduct may be intrinsically lawful in the

⁴⁵¹ *Yearbook ... 1979* (see footnote 438 above), p. 113, para. (16). In this respect it is odd that the commentary (*ibid.*, p. 111, para. (9)) refers to the *Russian Indemnity* case (UNRIIA, vol. XI (Sales No. 61.V.4), p. 421), which was probably a case of waiver and certainly did not involve consent in advance.

⁴⁵² *Yearbook ... 1959* (see footnote 6 above), p. 46.

⁴⁵³ See paragraph 352 below.

circumstances, at least there is a situation which requires some explanation and some justification.⁴⁵⁴

240. Is it possible to envisage cases where an obligation is properly formulated in absolute terms (i.e. without any condition or qualification relating to consent), but nonetheless the consent of the State concerned precludes the wrongfulness of the conduct? If so, article 29 might have a valid, though limited, scope of application. The Special Rapporteur is not aware of any such case.⁴⁵⁵ All the examples given in the commentary relate to rules (non-exercise of foreign jurisdiction on the territory of a State; non-use of force against it; non-intervention in its internal affairs, etc.) which are not absolute prohibitions but which allow that the conduct in question may be validly consented to by the target State. In the absence of identifiable intermediate cases (i.e. cases where consent might validly be given in advance but where it is not part of the definition of the obligation) the position appears to be as follows: either the obligation in question allows that consent may be given in advance to conduct which, in the absence of such consent, would conflict with the obligation, or it does not. In the former case, and consent is validly given, the issue whether wrongfulness is precluded does not arise. In the latter, consent cannot be given at all. Both cases are distinguishable from waiver after a breach has occurred, giving rise to State responsibility.⁴⁵⁶

241. For all these reasons, it seems that to treat consent in advance as a circumstance precluding wrongfulness is to confuse the content of the substantive obligation with the operation of the secondary rules of responsibility, whereas to treat consent given in arrears as such a circumstance is to confuse the origins of responsibility with its implementation (*mise en oeuvre*). In neither case is article 29 properly located in chapter V, and it should be deleted. Instead, an explanation of the role of consent in relation to State responsibility should be inserted in the commentary to chapter V.

242. However, in case this recommendation is not accepted, it is appropriate to say something on the specific issues raised by Governments as to the formulation of article 29:

⁴⁵⁴ A State exercising a right to self-defence is required to notify the Security Council “immediately” (Article 51 of the Charter of the United Nations). The conditions on the proper exercise of countermeasures are currently contained in draft articles 47–50 and also imply a measure of international scrutiny.

⁴⁵⁵ One possibility, which approximates to Sir Gerald Fitzmaurice’s idea of “acceptance of non-performance” might be provided by the following example: assume State A acts with respect to State B in breach of a bilateral obligation, anticipating that State B would consent if asked, and State B, aware of State A’s conduct, does not object. But such cases do not fall within the scope of article 29 as explained in the commentary, and even if they can be envisaged they would not call for separate treatment in chapter V. It seems better to deal with them under the rubric of waiver or perhaps estoppel.

⁴⁵⁶ The distinction between consent *ex ante* and waiver can be seen from the following examples: first, the State organ with authority to waive a breach, once State responsibility which has actually arisen, may be different from the State organ which had authority to consent in advance. Secondly, in the case of an *erga omnes* obligation (e.g. pursuant to Article 2, paragraph 4, of the Charter of the United Nations), it may nonetheless be true that one particular State was competent to consent in advance to conduct which would otherwise have been a breach of the obligation (see the comment by Austria in paragraph 235 above). It does not follow, however, that only that State has a legal interest in the breach after it has occurred.

(a) “*Consent validly given*”. Some of the difficulties raised by this phrase have been outlined above. It is clear that some such qualification is required, since it is not the case that one State can release another from every obligation (e.g. in relation to human rights). But there is no simple or non-circular test for determining in what circumstances or to what extent a dispensation from one State precludes the wrongfulness of the conduct of another.⁴⁵⁷ Moreover, the phrase “validly given” performs not one function but two: it points to the existence of cases in which consent may not be validly given at all, and it also suggests (but without specifying) that certain modalities need to be observed in giving consent and that issues of the authority to consent may arise. Neither aspect could be developed further without going deeply into the content of the primary rules, although some of the procedural prerequisites to a valid consent, spelled out in the commentary, could be included in the text;

(b) *Consent and peremptory norms*. Again, despite the uncertainties as to the scope and content of peremptory norms which have been referred to by some Governments, it is clear that one State cannot by ad hoc consent dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, any more than it could do so in a treaty. It might be argued at least that one State could absolve another from responsibility for such a breach so far as that State was concerned. But, first of all, article 29 is concerned with circumstances precluding wrongfulness, not responsibility. Secondly, there are many cases in which State consent *does* preclude wrongfulness. Thirdly, as to consent given in advance (which is all that article 29 purports to cover), the demands of a peremptory norm are hardly satisfied by maintaining in place the formal obligation while absolving the wrongdoing State from any responsibility for its breach. Agreement to dispense with responsibility for genocide or torture seems just as inconsistent with the peremptory character of the relevant norm as would be consent to dispense with the underlying obligation. But the difficulties go further. Some peremptory norms contain an “intrinsic” consent element. For example, the rule relating to the non-use of force in international relations embodied in Article 2, paragraph 4, of the Charter of the United Nations does not apply in certain cases where one State has consented to the use of force on its territory by another State. But one State cannot by consent *eliminate* the rule relating to the use of force in international relations in its relations with another State.⁴⁵⁸ Thus it may be necessary to distinguish between a consent which applies Article 2, paragraph 4, which may be valid, and a purported consent which displaces or excludes it entirely,

⁴⁵⁷ This is true even of the simplest qualifying phrase “in the relations between those States”, since what constitutes a merely “bilateral” obligation and what goes beyond the purely bilateral depends on the content and purpose of the obligation. Thus one State may be the primary beneficiary of an obligation imposed in the general interest (e.g. as to the neutrality of that State), and it may not be able alone to release another State from compliance with the obligation. For example, in the debate over whether Austrian membership of the EEC was consistent with its neutrality, it was never argued that Austria’s consent to membership precluded wrongfulness. See, for example, Seidl-Hohenveldern, “Österreich und die EWG”; and Kennedy and Specht, “Austrian membership in the European Communities”.

⁴⁵⁸ On the extent to which “invasion pacts” and “intervention by invitation” may be lawful, see, for example, Roth, *Governmental Illegitimacy in International Law*, pp. 185–195.

which, if Article 2, paragraph 4, is peremptory in character, would be invalid;

(c) *Consent of persons other than States*. Draft article 29 envisages only the consent of States and perhaps other international legal persons,⁴⁵⁹ but there are international law rules which take into account the consent, for example, of corporations or private persons. The extent to which investors can waive the rules of diplomatic protection by agreement in advance has long been controversial, but under the 1965 ICSID Convention, consent by an investor to arbitration under the Convention suspends the right of diplomatic protection by the investor’s national State.⁴⁶⁰ In the field of human rights, it is not the case that the individual can waive the rights conferred by international treaties, but the individual’s free consent is relevant to the application of at least some of those rights;⁴⁶¹

(d) *The limits of consent*. As the commentary notes, if wrongfulness is precluded by virtue of the consent of a State, it may only be precluded within the limits of such consent.⁴⁶² But again there may be difficulties in the application of this idea. For example, consent to a visiting force on the territory of a State may be qualified (e.g. by a requirement to pay rental for the use of facilities) but the non-payment of the rental, while it would no doubt be wrongful in itself and might have further legal consequences, would not automatically transform the visiting force into an army of occupation.

(iii) *Conclusions on article 29*

243. No doubt some of these questions can be addressed in the drafting of article 29, while others are a matter of its application in specific cases. But a more detailed examination of the wording of article 29 confirms the conclusion that it is not properly located in chapter V. To summarize, lack of consent is an intrinsic condition for wrongfulness in the case of many obligations (e.g. the obligation not to overfly the territory of another State). In such cases, to regard consent as a circumstance precluding unlawfulness is very odd since consent validly given in advance renders the conduct lawful, and there is nothing to be precluded. One might as well say that refraining from overflight is a circumstance precluding wrongfulness. Such a construction would eliminate the distinction between primary and secondary obligations. Consent given after the event is quite different, and involves the waiver of a responsibility which has already arisen: it should be dealt with under the rubric of loss of the right to invoke responsibility in part two or perhaps part three of the draft articles. For these reasons, article 29 should be deleted, and its deletion carefully explained in the commentary to chapter V, to avoid misunderstandings.

⁴⁵⁹ *Yearbook ... 1979* (see footnote 438 above), pp. 109 and 113, paras. (2) and (15) respectively.

⁴⁶⁰ Art. 27, para. 1.

⁴⁶¹ See, for example, the International Covenant on Civil and Political Rights, arts. 7, second sentence; 8, para. 3 (c) (iv); 14, para. 3 (g); and 23, para. 3.

⁴⁶² *Yearbook ... 1979* (see footnote 438 above), p. 113, para. (17).

(b) *Article 30. Countermeasures in respect of an internationally wrongful act*

244. Article 30 provides as follows:

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.

245. Article 30 needs to be read in the context of the articles in part two, which specify in some detail the extent and consequences of permissible countermeasures. In other words, the content of the phrase “legitimate under international law” in article 30 is now spelled out in some detail elsewhere in the text.

246. The commentary to article 30 emphasizes the exceptional role of countermeasures in rendering “inoperative” an obligation towards a State subjected to countermeasures.⁴⁶³ Countermeasures must be taken in response to unlawful conduct by the target State, either “to inflict punishment or to secure performance”, but subject to the limits laid down by international law.⁴⁶⁴ The ensuing discussion of those limits is not fully consistent with the provisions in part two: for example, the commentary to article 29 seems to envisage that the use of military force might sometimes be lawful as a countermeasure,⁴⁶⁵ which article 50 (a) expressly denies. This emphasizes the need to consider article 30 and chapter III of part two together.

247. According to the commentary, countermeasures are no longer limited to breaches of bilateral obligations, or to responses taken by the State most directly injured. A breach of obligations *erga omnes* “is to be deemed an offence against all the members of the international community and not simply against the State or States directly affected by the breach”.⁴⁶⁶ Such a breach may thus be collectively sanctioned. Whether it involves obligations *erga omnes* or not, “the prior existence of the internationally wrongful act of the State which is the subject of the measure precludes the wrongfulness of the legitimate reaction against it”,⁴⁶⁷ so far as the wrongdoing State is concerned.⁴⁶⁸

(i) *Comments of Governments on article 30*

248. France raises a number of drafting difficulties, and also calls attention to the need to distinguish individual countermeasures from collective enforcement action under the auspices of the United Nations. Article 30 should be limited to the former.⁴⁶⁹ The United Kingdom and the United States suggest that article 30 can stand alone, without what they regard as the questionable

provisions on countermeasures in part two, in the same way that the right of self-defence is referred to without its content being described in detail.⁴⁷⁰ Japan and France, on the other hand, suggest that article 30 be specifically tied to the provisions on countermeasures in part two.⁴⁷¹

249. By contrast, Mexico questions the inclusion of article 30 at all, and in any event calls for better provisions for settlement of disputes in cases involving countermeasures.⁴⁷²

(ii) *The treatment of countermeasures in the draft articles as a whole*

250. A number of Governments have raised issues about the treatment of countermeasures in part two of the draft articles (arts. 47–50), doubting the wisdom of retaining those articles and the practicality of the dispute settlement provisions. Apart from questions of drafting and expression, the doubts come from different directions, both from States which support the principle of countermeasures and from those which oppose it. This divergence of view presents a difficulty so far as article 30 is concerned. On the one hand, it is clear that, in at least some cases, countermeasures do preclude the wrongfulness of conduct taken against a wrongdoing State in order to induce it to cease its wrongful conduct and to provide essential elements of restitution. On this basis there is a strong case for the retention of article 30 in some form in chapter V. On the other hand, the extent to which the requirements for legitimate countermeasures should be spelled out in article 30 must depend on whether the articles on countermeasures in part two are retained. If they are retained, a simple cross-reference to those conditions will be sufficient (as noted by France and Japan). If they are deleted, the position will be different and the case for some further specification of the circumstances for legitimate countermeasures in article 30 will be much stronger. It is true that chapter V does not specify in any detail the conditions for invoking consent, or self-defence. But the failure to do so in relation to consent has already been criticized, while the position of self-defence is different, *inter alia*, because the inherent right to self-defence is expressly preserved in the Charter of the United Nations, and cannot be affected by anything contained in the draft articles.

251. For these reasons the Special Rapporteur proposes that article 30 be retained in square brackets, in recognition that countermeasures may, in some cases, preclude the wrongfulness of (or at least responsibility for) the conduct in question, but that the various issues of principle and of drafting be deferred for consideration in the context of the provisions on countermeasures in part two.

(c) *Article 31. Force majeure and fortuitous event*

252. Article 31 provides as follows:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an

⁴⁶³ *Ibid.*, commentary to article 30, pp. 115–116, para. (2).

⁴⁶⁴ *Ibid.*, p. 116, para. (3).

⁴⁶⁵ *Ibid.*, commentary to article 29, p. 110, para. (5), but see pages 111–112, paras. (10)–(11).

⁴⁶⁶ *Ibid.*, commentary to article 30, p. 119, para. (12).

⁴⁶⁷ *Ibid.*, p. 120, para. (16).

⁴⁶⁸ But not, the commentary stresses, so far as concerns the rights of third States (*ibid.*, pp. 120, paras. (17)–(19), and 122, para. (24), citing the *Cysne* case of 1930 (UNRIIA, vol. II (Sales No. 1949.V.1), p. 1056. See current article 47, paragraph 3.

⁴⁶⁹ *Yearbook ... 1998* (see footnote 7 above), p. 132. Japan agrees (A/CN.4/492) (reproduced in the present volume).

⁴⁷⁰ *Yearbook ... 1998* (see footnote 7 above), p. 132.

⁴⁷¹ *Ibid.* (France); A/CN.4/492 (Japan) (reproduced in the present volume).

⁴⁷² *Yearbook ... 1998* (see footnote 7 above), p. 132.

irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility.

253. The commentary to article 31 begins by noting that force majeure and fortuitous event have in common “the irrelevance of the prior conduct of the State against which” they are invoked.⁴⁷³ They are involuntary both so far as the “active” and the “passive” State is concerned.⁴⁷⁴ Because there is no clear distinction between the two situations, they are included in a single article. Both cover cases of “material impossibility”, and it does not matter whether this impossibility is due to natural or human intervention, or a combination of the two, so long as it is outside the control of the acting State.⁴⁷⁵ In drafting what became article 61 of the 1969 Vienna Convention on supervening impossibility of performance, the Commission had taken the view that force majeure was also a circumstance precluding wrongfulness in relation to treaty performance.⁴⁷⁶ The same view was taken at the United Nations Conference on the Law of Treaties, although the Conference insisted on a narrow formulation of article 61 so far as treaty termination was concerned.⁴⁷⁷

254. In State practice, most of the cases where “impossibility” has been relied on did not involve actual impossibility as distinct from increased difficulty of performance, and the plea of force majeure accordingly failed. But cases of material impossibility have occurred, e.g. where “a State aircraft ... because of damage, loss of control of the aircraft or a storm, is forced into the airspace of another State without the latter’s authorization, either because the pilot’s efforts to prevent this happening have been unsuccessful or because he could not know what was happening”, and in such cases the principle that wrongfulness is precluded has been accepted.⁴⁷⁸

255. Apart from aerial incidents, the principle in article 30 is also recognized in relation to ships in innocent passage by article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone (now article 18, paragraph 2, of the United Nations Convention on the Law of the Sea), as well as in article 7, paragraph 1, of the Convention on Transit Trade of Land-locked States. “In these provisions, *force majeure* is admittedly a constituent element of the ‘primary rules’ laid down therein, but the very fact that it has been incorporated in these rules is clearly an express confirmation, in relation to particular cases, of a general principle of customary international law whereby *force majeure* has the effect of precluding wrongfulness.”⁴⁷⁹ The principle was also accepted by

⁴⁷³ *Yearbook ... 1979* (see footnote 438 above), commentary to article 31, p. 122, para. (2).

⁴⁷⁴ *Ibid.*, p. 123, para. (4).

⁴⁷⁵ *Ibid.*, para. (7).

⁴⁷⁶ *Ibid.*, p. 124, para. (9), citing *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 255.

⁴⁷⁷ *Ibid.*, pp. 124–125, commentary to article 31, para. (10).

⁴⁷⁸ *Ibid.*, p. 125, para. (12), citing cases of accidental intrusion into airspace attributable to weather, and also cases of accidental bombing of neutral territory attributable to navigational errors during the First World War.

⁴⁷⁹ *Ibid.*, commentary to article 31, p. 126, para. (16).

the Permanent Court of Arbitration. In the *Lighthouses* case, a lighthouse owned by a French company had been requisitioned by the Government of Greece in 1915 and was subsequently destroyed by enemy action. The Court denied the French claim for restoration of the lighthouse on grounds of force majeure.⁴⁸⁰ In the *Russian Indemnity* case, the principle was accepted, but the plea of force majeure failed on the facts because the payment of the debt was not materially impossible.⁴⁸¹ Force majeure was acknowledged as a general principle of law (though again the plea was rejected on the facts of the case) by PCIJ in the *Serbian Loans* and *Brazilian Loans* cases.⁴⁸²

256. After a thorough review of practice, case law and doctrine, the commentary concludes by affirming the principle, but it stresses that it only applies where the impossibility was irresistible and was objectively unforeseen, so that the State concerned had “no real possibility of escaping the effects of such a force or event”. Moreover, the State “*must not itself have contributed, intentionally or through negligence, to the occurrence of the situation of material impossibility*”.⁴⁸³

(i) *Comments of Governments on article 31*

257. Austria expresses the view that article 31 blurs objective and subjective elements in a confusing way, and suggests that the notion of “material impossibility” should be developed in preference to “fortuitous event”.⁴⁸⁴ The United Kingdom accepts the principle stated in article 31 but also calls for it to be limited to exceptional cases of material impossibility which are beyond the control of the State concerned.⁴⁸⁵ France suggests that the two phrases “force majeure” and “fortuitous event” relate to the same regime; the article should be revised to eliminate redundancy.⁴⁸⁶ None of these comments questions the need for article 31 in some form.

(ii) *The application of article 31 in recent practice*

258. In the *Rainbow Warrior* arbitration, France relied on force majeure as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical treatment. The Tribunal dealt with the point briefly:

New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering

⁴⁸⁰ *Ibid.*, p. 127, para. (20), citing UNRIAA, vol. XII (Sales No. 63.V.3), pp. 219–220. Many other cases of force majeure were catalogued in a study prepared by the Secretariat (*Yearbook ... 1978*, vol. II (Part One), document A/CN.4/315, “‘Force majeure’ and ‘fortuitous event’ as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine”, pp. 61–227).

⁴⁸¹ *Yearbook ... 1979*, vol. II (Part Two), commentary to article 31, p. 128, para. (22), citing UNRIAA (see footnote 451 above), p. 443.

⁴⁸² *Ibid.*, paras. (23)–(24), citing *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, pp. 33–40; and *Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21*, p. 120.

⁴⁸³ *Ibid.*, p. 132, para. (36).

⁴⁸⁴ See footnote 7 above.

⁴⁸⁵ *Ibid.*

⁴⁸⁶ *Ibid.* In addition it suggests that paragraph (2) is redundant and can be omitted.

performance more difficult or burdensome does not constitute a case of *force majeure*.⁴⁸⁷

Thus the decision adds to the many cited in the commentary and in the Secretariat survey⁴⁸⁸ which accept the principle that wrongfulness is precluded in international law, as well as in many systems of national law, by force majeure, while at the same time attaching stringent conditions to its application.

259. There is of course a distinction between force majeure as a circumstance precluding wrongfulness and impossibility of performance as a ground for termination of a treaty. Force majeure applies both to treaty and to non-treaty obligations, and it applies by operation of law on the happening of a situation of force majeure. Impossibility of performance, like other grounds for the termination of a treaty, has to be formally invoked by a party, and it applies only after it has been duly invoked. In addition, the “degree of difficulty” associated with force majeure as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 of the 1969 Vienna Convention for termination on grounds of supervening impossibility, as ICJ pointed out in the *Gabčíkovo-Nagymaros Project* case:

Article 61, paragraph 1, requires the “permanent disappearance or destruction of an object indispensable for the execution” of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties ... Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.⁴⁸⁹

260. In addition to its application in inter-State cases as a matter of public international law, force majeure has substantial currency in the field of international trade and mixed arbitration, and probably qualifies as a general principle of law.⁴⁹⁰

(a) Chapter V of part III of the United Nations Convention on Contracts for the International Sale of Goods deals with provisions common to the obligations of the seller and of the buyer. Section IV is entitled “Exemptions”, and contains only two provisions, article 79 dealing with unavoidable impediments and article 80 dealing with the *exceptio inadimpleti contractus*. Article 79 does not use the term “force majeure” but it covers the same field. A party is not liable for a failure to perform if he proves that the failure was due to

an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of

⁴⁸⁷ UNRIAA, vol. XX (see footnote 36 above), p. 253.

⁴⁸⁸ See footnote 480 above.

⁴⁸⁹ *I.C.J. Reports 1997* (see footnote 51 above), p. 63, para. 102.

⁴⁹⁰ Force majeure is not a defence to breach of contract under English common law, because of the presumption that contractual undertakings are warranties. There is a narrower conception of “act of God” which is a defence in tort. However, common-law courts have become very used to the notion of force majeure because of the frequent insertion of force majeure clauses in contract, especially in international trade. See generally McKendrick, *Force Majeure and Frustration of Contract*.

the conclusion of the contract or to have avoided or overcome it or its consequences.⁴⁹¹

(b) In the UNIDROIT Principles of International Commercial Contracts, article 7.1.7 deals with force majeure, which is defined in essentially the same terms as in the United Nations Convention on Contracts for the International Sale of Goods.⁴⁹²

261. For all these reasons, article 31 should be retained in the draft articles. There are, however, certain questions of formulation.

(iii) *Force majeure and the “knowledge” of wrongfulness*

262. One of the curious features of article 31 is the phrase “made it materially impossible ... to know that its conduct was not in conformity with that obligation”.⁴⁹³ This suggests that State responsibility depends on the State “knowing” that its conduct is wrongful, yet in general such knowledge is not required. Ignorance of a State’s legal obligations is no excuse for breaching them, nor is mistake of law.⁴⁹⁴ It is true that there might be an innocent mistake of fact (e.g. as to the location of an aircraft, owing to an undetected fault in navigational equipment), and this might qualify as a circumstance precluding wrongfulness. Article 31 can, however, be formulated without the introduction of overtly subjective elements: it should only apply in cases where an unforeseen external event deprived a State from having knowledge of a fact which was an essential element of its responsibility *in the circumstances*, and without which the conduct in question would not have been wrongful. On this basis the reference in article 31 to knowledge of wrongfulness can be deleted.⁴⁹⁵

(iv) *Exclusion of force majeure: (a) if the State has “contributed” to the force majeure situation*

263. By definition, a situation which has been caused or induced by the invoking State is not one of force majeure; the circumstance must be genuinely involuntary in order to qualify. Thus in *Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi*, the Arbitral Tribunal rejected a plea of force majeure because “the

⁴⁹¹ See Schlechtriem, ed., *Commentary on the UN Convention on the International Sale of Goods (CISG)*, pp. 600–626. For comparative law materials on force majeure, see, for example, Draetta, “Force majeure clauses in international trade practice”; Magliveras, “Force majeure in Community law”; and Van Ommeslaghe, “Les clauses de force majeure et d’imprévision (hardship) dans les contrats internationaux”, p. 15. On force majeure in the case law of the Iran-United States Claims Tribunal, see Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, pp. 306–320. Force majeure has also been recognized as a general principle of law by the Court of Justice of the European Communities: see, for example, case 145/85, *Denkavit België NV v. Belgian State Reports of Cases before the Court 1987–2*, p. 565. See further Stefanou and Xanthaki, *A Legal and Political Interpretation of Article 15 (2) [new Article 288 (2)] of the Treaty of Rome*, pp. 78–80.

⁴⁹² See UNIDROIT, *Principles of International Commercial Contracts* (Rome, Unidroit, 1994), pp. 169–171, for text and commentary.

⁴⁹³ See Austria’s comment on article 31 in paragraph 257 above.

⁴⁹⁴ In some legal systems, a claim of right, held in good faith, may justify or excuse certain conduct, even though the legal basis of the claim is incorrect. There does not appear to be any authority for such a doctrine in international law.

⁴⁹⁵ For the proposed formulation, see paragraph 358 below.

alleged impossibility is not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of that State ...⁴⁹⁶ However article 31 as adopted on first reading goes beyond this and excludes force majeure “if the State in question has contributed to the occurrence of the situation of material impossibility”.⁴⁹⁷ By contrast, under the otherwise more restrictive ground for termination of a treaty in article 61 of the 1969 Vienna Convention, material impossibility cannot be invoked “if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty”. This seems a more appropriate test, since it may well be that a State has unwittingly “contributed” to a force majeure situation by something which, in hindsight, might have been done differently but which did not itself constitute a breach of an international obligation or make the event any less unforeseen. Provided the ensuing situation of force majeure is genuine, there is no reason to exclude it as a circumstance precluding wrongfulness. Accordingly, article 31 should provide that force majeure is only excluded if the State has produced or contributed to producing the situation through its own wrongful conduct.

(v) *Exclusion of force majeure: (b) voluntary assumption of risk*

264. Secondly, force majeure should not excuse non-performance if the State has undertaken to prevent the particular situation arising, or has otherwise assumed that risk, and article 31 should so provide.⁴⁹⁸ It might be argued that for force majeure to be excluded, an express undertaking by the State concerned should be required, but obligations can be formulated and undertaken in a variety of ways, and in the context of chapter V it should be sufficient that the assumption of risk is clear.

(vi) *Conclusions on article 31*

265. For these reasons, article 31 should be retained with the changes indicated above. In addition, as France points out,⁴⁹⁹ it seems sufficient to refer to the circumstance by the internationally well-known and accepted title of “force majeure”, and that term should be included in the article itself as well as constituting its title. The title “*Force majeure* and fortuitous event” derives from the French Civil Code, but by no means all cases of “fortuitous event” (*cas fortuit*) qualify as excuses in international law,⁵⁰⁰ whereas

⁴⁹⁶ *International Law Reports* (Cambridge), vol. 96 (1994), pp. 317; and *Belgian Review of International Law*, vol. XXIII, 1990–1, p. 517.

⁴⁹⁷ The commentary suggests that a narrower basis for exclusion was intended (see paragraph 256 above).

⁴⁹⁸ As the study prepared by the Secretariat (see footnote 480 above) points out (p. 74, para. 31), States may renounce the right to rely on force majeure by agreement. The most common way of doing so would be by an agreement or obligation assuming in advance the risk of the particular force majeure event.

⁴⁹⁹ See paragraph 257 above.

⁵⁰⁰ The study prepared by the Secretariat (see footnote 480 above) reviews the debate among the civil lawyers as to whether and how force majeure and fortuitous event are to be distinguished (pp. 70–71, paras. 17–19), but notes (para. 19) that “[i]n international law practice and doctrine the term *force majeure* is normally used *lato sensu*, namely, covering *force majeure* (*stricto sensu*) as well as ‘fortuitous event’”.

cases of force majeure as defined in article 31 seem adequate to cover the field.⁵⁰¹

(d) *Article 32. Distress*

266. Article 32 provides as follows:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril.

267. The commentary to article 32 notes that it deals with the specific case where an individual person whose acts are attributable to the State is in a situation of extreme peril, either personally or in relation to persons under his or her care.⁵⁰² Unlike situations of force majeure, a person acting under distress is not acting involuntarily, even though the choice is effectively “nullified by the situation of extreme peril”.⁵⁰³ Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterizes situations of necessity under article 33.⁵⁰⁴ The interest concerned is the immediate one of saving people’s lives, irrespective of their nationality.

268. In practice, cases of distress have mostly involved ships or aircraft entering State territory under stress of weather or following mechanical or navigational failure.⁵⁰⁵ But distress should not be limited to ships and aircraft,⁵⁰⁶ especially if it is limited to cases involving a threat to life itself.⁵⁰⁷ Moreover, distress can only preclude wrongfulness where the interests sought to be protected (e.g. the lives of passengers and crew) clearly outweigh the other interests at stake in the circumstances. Thus if the conduct sought to be excused endangers more lives than it may save, it is not covered by the plea of distress.⁵⁰⁸

(i) *Comments of Governments on article 32*

269. France proposes tighter wording to prevent abuse of the defence of “distress”.⁵⁰⁹ Mongolia goes further, doubting the desirability of distress as a circumstance precluding wrongfulness at all.⁵¹⁰ On the other hand, the

⁵⁰¹ For the text of article 31 as proposed, see paragraph 358 below.

⁵⁰² *Yearbook ... 1979*, vol. II (Part Two), commentary to article 32, p. 133, para. (1).

⁵⁰³ *Ibid.*, para. (2).

⁵⁰⁴ *Ibid.*, p. 134, para. (3).

⁵⁰⁵ *Ibid.*, para. (5), reviewing some of the incidents. See also the study prepared by the Secretariat (footnote 480 above), pp. 102–103, paras. 141–142, and p. 125, para. 252. An analogous right for private ships has always been recognized, although it falls outside chapter V since the conduct of private persons is not as such attributable to the State (*ibid.*, pp. 150–151, paras. 328–331); Convention on the Territorial Sea and the Contiguous Zone, art. 14, para. 3, cited in *Yearbook ... 1979*, vol. II (Part Two), commentary to article 32, p. 134, para. (7).

⁵⁰⁶ *Yearbook ... 1979*, vol. II (Part Two), commentary to article 32, p. 135, para. (9).

⁵⁰⁷ *Ibid.*, para. (10).

⁵⁰⁸ *Ibid.*, pp. 135–136, para. (11).

⁵⁰⁹ *Yearbook ... 1998* (see footnote 7 above), p. 134.

⁵¹⁰ *Ibid.*

United Kingdom is critical of the limitation of article 32 to persons in the care of the State concerned, and calls for the draft articles explicitly to recognize emergency humanitarian action.⁵¹¹ Japan too supports a broader formulation, covering threats not only to life but also to other vital interests of persons, including economic interests.⁵¹²

(ii) *International practice as to the plea of distress since 1980*

270. The validity of the plea of distress has continued to be accepted in practice since the adoption of article 32 on first reading. In the conventional context of distress at sea, the exception for distress contained in article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone is repeated in much the same terms in article 18, paragraph 2, of the United Nations Convention on the Law of the Sea.⁵¹³ More significant for present purposes was the discussion of the issue in the *Rainbow Warrior* case, since it involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft.

271. The facts of the case have already been referred to.⁵¹⁴ France sought to justify its conduct in removing the two officers from the island of Hao on the ground of “circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State”.⁵¹⁵ The Tribunal unanimously accepted that this plea was admissible in principle, and by majority that it was applicable to the facts of one of the two cases. As to the principle, the Tribunal required France to show three things:

1. The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.

2. The reestablishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.

3. The existence of a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.⁵¹⁶

In fact the danger to one of the officers (Major Mafart), though perhaps not life-threatening, was real and might have been imminent, and it was not denied by the New Zealand physician who subsequently examined him. By contrast, in the case of the second officer (Captain Prieur), the justifications given (the need for medical examination on grounds of pregnancy and the desire to see a dying father) did not justify emergency action. The lives of the agent and the child were at no stage threatened and there were excellent medical facilities nearby. The Tribunal held that:

[C]learly these circumstances entirely fail to justify France’s responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao

⁵¹¹ Ibid.

⁵¹² A/CN.4/492 (reproduced in the present volume).

⁵¹³ See also articles 39, paragraph 1 (c), 98 and 109 of the United Nations Convention on the Law of the Sea.

⁵¹⁴ See paragraph 258 above.

⁵¹⁵ UNRIAA (see footnote 36 above), pp. 254–255, para. 78.

⁵¹⁶ Ibid., p. 255, para. 79.

(in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations ...⁵¹⁷

272. Given the generally favourable response to article 32 and the acceptance of the principle by the Tribunal in the *Rainbow Warrior* case, it seems that it should be retained. However, certain questions have been raised as to its formulation, which need to be discussed.

(iii) *The formulation of article 32*

273. The first question is whether article 32 ought to be limited to cases where human life is at stake, or whether a serious health risk should suffice. The Tribunal in *Rainbow Warrior* seemed to take the broader view, although the health risk to Major Mafart *might* have been life-threatening. The problem here is where to place any lower limit. In situations of distress involving aircraft there will usually be no difficulty in establishing that there is a threat to life, but other cases present an immense spectrum of human difficulties and griefs. Given the context of chapter V and the likelihood that there will be other solutions available for cases which are not apparently life-threatening, it does not seem necessary to extend the scope of distress in this way. But it does raise a further issue. Clearly, the threat to life must be apparent and have some basis in fact, but is it sufficient that the agent who acted under distress reasonably believed that the danger existed? Or does that agent act at peril, so that if a later and detailed examination shows this was not in truth the case (however it may have appeared at the time), distress will not be available to excuse the breach? In cases of genuine distress there may be neither the time nor the personnel to conduct a proper medical or other examination before acting. In such cases, the agent should be entitled to act on the basis of a reasonable belief as to a situation of distress. For these reasons article 32 should be framed in terms of a reasonable belief in a life-threatening situation.

274. A second question is whether it is desirable to extend article 32 to all cases where threats to life are involved, irrespective of the existence of any special relationship between the State organ or agent and the persons in danger.⁵¹⁸ In the Special Rapporteur’s view, article 32 reflects a narrow but historically recognized case of distress involving, in particular, ships and aircraft. It should not be extended too far beyond that specific context, and certainly not into the general field of humanitarian intervention. That is more a matter of necessity than distress, and it will be returned to in the context of article 33.⁵¹⁹

275. Finally it should be noted that article 32 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening situation. Thus it does not exempt the State or its agent from complying with other requirements (national or international), e.g. the requirement to notify arrival to the relevant authorities, or to give relevant information about the voyage, the passengers or

⁵¹⁷ Ibid., p. 263, para. 99. Sir Kenneth Keith dissented on the finding by the Tribunal relating to Major Mafart: while agreeing on the need for medical tests outside the island of Hao, he argued that the situation was not one of “extreme distress”, taking into account the delay of the French authorities in transferring Major Mafart to Paris (ibid., pp. 277–279).

⁵¹⁸ As proposed by the United Kingdom (see paragraph 269 above).

⁵¹⁹ See paragraphs 288–289 below.

the cargo.⁵²⁰ This follows from the language of article 32, but it should be further stressed in the commentary.

(iv) *Conclusions on article 32*

276. For these reasons article 32 should be retained with substantially the same coverage as at present but with amendments to reflect the suggestions made above. In addition (and by parity of reasoning from the equivalent provision in article 31), distress should only be excluded if the situation of distress results, either alone or in combination with other factors, from a wrongful act of the State invoking it.⁵²¹ Finally, the word “extreme” should be deleted, since it does not add anything to the content of the article.⁵²² It should not be open to a State to argue that, although life was at stake in a situation of unavoidable distress, nonetheless the situation was not sufficiently “extreme”.⁵²³

(e) *Article 33. State of necessity*

277. Article 33 provides as follows:

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) The act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) The act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) If the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) If the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) If the State in question has contributed to the occurrence of the state of necessity.

278. The commentary to article 33 distinguishes necessity from consent, countermeasures and self-defence, which depend on the conduct of the “target” State; in that respect it is similar to force majeure and distress.⁵²⁴ But it differs from the latter two circumstances in that a State under force majeure, or even a State agent in a situation

⁵²⁰ See *Lawrence V. Cashin and Gerald Lewis v. His Majesty the King, Canada Law Reports* (1935), p. 103 (held: even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). Other cases of this period shed light on the defence: see *Kate A. Hoff v. The United Mexican States* (United States-Mexico Claims Commission), *American Journal of International Law*, vol. 23, 1929 p. 860 (vessel (the *Rebecca*) entered port in distress; merchandise seized for customs offence: held, entry reasonably necessary in the circumstances and not a mere matter of convenience; seizure therefore unlawful); *The Ship “May” v. His Majesty the King, Canada Law Reports* (1931), p. 374; *The Ship “Queen City” v. His Majesty the King*, *ibid.*, p. 387; *Rex v. Flahaut, Dominion Law Reports* (1935), vol. 2, p. 685 (test of “real and irresistible distress” applied).

⁵²¹ See paragraph 263 above.

⁵²² As is effectively conceded in *Yearbook ... 1979*, vol. II (Part Two), commentary to article 32, p. 136, para. (12), footnote 695 (“virtually superfluous”).

⁵²³ For the proposed text, see paragraph 358 below.

⁵²⁴ *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, pp. 34–35, paras. (2)–(3).

of distress, has effectively no choice but to act in a certain way, whereas “invoking a state of necessity implies perfect awareness of having deliberately chosen to act in a manner not in conformity with an international obligation”.⁵²⁵

279. In the nineteenth century, justifications of necessity often relied on such so-called “inherent rights” of States as self-preservation, which took priority over the “subjective” rights of other States. The decline of the doctrine of “inherent rights” had correspondingly tended to discredit the idea that necessity might preclude the wrongfulness of conduct.⁵²⁶ But the plea of necessity is supported by “numerous cases” of State practice, and can be justified by reference to the normal sources of international law, without recourse to any particular theory of the State.⁵²⁷ The commentary goes on to cite many cases where the plea of necessity was accepted in principle, or at least not rejected, and where the question of its applicability was treated as a question of fact and application.⁵²⁸

280. The commentary admits that scholarly opinion on the plea of necessity is sharply divided,⁵²⁹ suggesting that a further reason for this was the earlier tendency to abuse the doctrine of necessity to cover cases of aggression, annexation or military occupation—including most famously the German justification for the invasion of Belgium and Luxembourg in 1914.⁵³⁰ Whatever the position in earlier years, “an assault on the very existence of another State or on the integrity of its territory or the independent exer-

⁵²⁵ *Ibid.*, p. 34, para. (3).

⁵²⁶ *Ibid.*, p. 35, para. (4).

⁵²⁷ *Ibid.*, pp. 35–36, paras. (5)–(6).

⁵²⁸ These include: the *Russian Indemnity* case of 1912 (see footnote 451 above), p. 443; the arbitral award in *Forests of Central Rhodopia*, decision of 29 March 1933, UNRIAA, vol. III (Sales No. 1949.V2), p. 1405; the PCIJ decision in the case concerning the *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78* (by implication); *Properties of the Bulgarian minorities in Greece*, 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, p. 209; the case of *Fur seal fisheries off the Russian coast* (1893), text in La Fontaine, *Pasicrisie Internationale, 1794–1900: Histoire Documentaire des Arbitrages Internationaux*, p. 426, and *British and Foreign State Papers, 1893–1894* (London, HM Stationery Office, 1899), vol. LXXXVI, p. 220 (and see the correspondence between the Russian and the British Governments in Moore, *op. cit.*, vol. I, p. 826); the *Company General of the Orinoco* case, 31 July 1905, UNRIAA, vol. X (Sales No. 60.V.4), p. 280; and, more recently, the *Torrey Canyon* incident, as discussed in *The “Torrey Canyon”*, Cmnd. 3246 (London, HM Stationery Office, 1967). It was significant in the latter case that there was no protest at the action of the British Government in bombing the ship so as to set fire to the oil threatening to pollute the coast, and indeed that the incident led to the conclusion of an international convention regulating the matter for the future: International Convention relating to intervention on the high seas in cases of oil pollution casualties; see also article 221 of the United Nations Convention on the Law of the Sea. Other individual opinions allowing necessity in certain circumstances include: the law officer’s opinion of 22 November 1832, in Lord McNair, ed., *International Law Opinions*, p. 231, and the individual opinion of Judge Anzilotti in *Oscar Chinn, Judgment, 1934, P.C.I.J., Series A/B, No. 63*, pp. 112–114.

⁵²⁹ For an instructive review of the earlier literature, see *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, pp. 47–48, para. (29). More recent contributions include: Barboza, “Necessity (revisited) in international law”; Salmon, “Faut-il codifier l’état de nécessité en droit international?”; and Raby, “The state of necessity and the use of force to protect nationals”.

⁵³⁰ *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, p. 43, para. (22).

cise of its sovereignty” is a contravention of a norm of *jus cogens* and cannot possibly be justified by the doctrine of necessity.⁵³¹ But not all conduct infringing the territorial sovereignty of a State need necessarily be considered an act of aggression, or otherwise as a breach of a peremptory norm. The commentary refers to limited measures (e.g. of humanitarian intervention or of protection against the hostile action of armed bands based on foreign territory) which are “restricted to eliminating the perceived danger”.⁵³² The “*Caroline*” case, though frequently referred to as an instance of self-defence, really involved necessity. The British attack had been directed against private parties for whose conduct the United States was not responsible. Both Secretary of State Webster and President Tyler in their respective replies to the British Government had allowed that conduct might be permissible in case of “clear and absolute necessity”,⁵³³ or of “the most urgent and extreme necessity”.⁵³⁴ In the exchange of letters of 1842 which closed the controversy, the two Governments recognized that the “great principle” of inviolability of the territory of another State might be suspended in certain cases of “a strong overpowering necessity”, but that this would apply only “for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity”.⁵³⁵

281. The commentary declines to pronounce on the question whether the invocation of necessity to justify a violation of territorial integrity could be justified under modern international law: this comes down to asking whether the Charter of the United Nations expressly or by implication (e.g. by Article 51) has excluded reliance on necessity as a justification or excuse. But it is not the function of the Commission authoritatively to interpret the Charter provisions on the use of force.⁵³⁶ The commentary notes, however, that in modern cases of humanitarian intervention, the excuse of necessity has hardly ever been relied on.⁵³⁷ In almost every such case, “[t]he concept of state of necessity has been neither mentioned nor taken into consideration, even in cases where the existence of consent or a state of self-defence has been contested, and even if some of the facts alleged might relate more to a state of necessity than to self-defence”.⁵³⁸

282. Finally, the commentary considers the defence of military necessity under the law of war. That doctrine “ap-

pears in the first place as the underlying criterion for a whole series of substantive rules of the law of war and neutrality”, and not in the confined context of necessity as a circumstance precluding wrongfulness.⁵³⁹ As to the question whether military necessity is an excuse for non-compliance with international humanitarian law, the answer is clearly that it cannot be: “even in regard to obligations of humanitarian law which are not obligations of *jus cogens* ... to admit the possibility of not fulfilling the obligations imposing limitations on the method of conducting hostilities whenever a belligerent found it necessary to resort to such means in order to ensure the success of a military operation would be tantamount to accepting a principle which is in absolute contradiction with” the relevant conventions: necessity is thus excluded by the terms of the very obligation itself.⁵⁴⁰ Although no specific conclusion is reached, the commentary by implication denies any separate existence to a doctrine of “military necessity”.

283. The Commission (with one dissentient) concluded that concerns about abuse of necessity are better met by an express provision rather than by silence, and that the idea of necessity is “too deeply rooted in general legal thinking for silence on the subject” to be an appropriate solution.⁵⁴¹ As to the formulation of the principle, the interest concerned has to be essential, but it need not relate only to the “existence” of the State. Indeed the defence of the “existence” of the State (as distinct from the preservation of human life or of the environment) has rarely been considered a justification, since the purpose of the positive law of self-defence is to safeguard that existence. But no a priori definition of an essential interest can be offered. “The extent to which a given interest is ‘essential’ naturally depends on all the circumstances in which the State is placed in different specific situations; the extent must therefore be judged in the light of the particular case into which the interest enters, rather than be predetermined in the abstract.”⁵⁴² In addition, the danger to that interest must be “extremely grave” and “imminent”, and such that a breach of the international obligation is the only method of avoiding the peril.⁵⁴³ Necessity cannot be invoked in cases where an equal interest of the other State was involved,⁵⁴⁴ nor in cases of breach of a peremptory norm,⁵⁴⁵ nor in cases where the invocation of necessity is expressly or impliedly excluded by a treaty.⁵⁴⁶

(i) *Comments of Governments on article 33*

284. Despite the doctrinal controversy it has provoked, rather few Governments have commented on article 33. Denmark (on behalf of the Nordic countries)⁵⁴⁷ and France⁵⁴⁸ accept the principle embodied in article 33. Only the United Kingdom does not, citing the risk of

⁵³¹ Ibid.

⁵³² Ibid., p. 44, para. (23).

⁵³³ *British and Foreign State Papers, 1840–1841* (London, Ridgeway, 1857), vol. 29, p. 1133 (Secretary of State Webster), cited in *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, p. 44, para. (24).

⁵³⁴ Ibid., vol. 30, p. 194 (President Tyler), cited in *Yearbook ... 1980* (see footnote 533 above).

⁵³⁵ Ibid., pp. 196 (Lord Ashburton) and 201 (Secretary of State Webster).

⁵³⁶ *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, pp. 44–45, para. (24).

⁵³⁷ Ibid., p. 45, para. (25). The only example to 1980 was the Belgian rescue operation in the Congo in 1960. No position was taken by the Security Council on the plea (*Official Records of the Security Council, Fifteenth Year, 873rd meeting*, paras. 34–39; 877th meeting, paras. 101, 149 and 150; and 879th meeting, p. 29).

⁵³⁸ *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, p. 45, para. (26).

⁵³⁹ Ibid., para. (27).

⁵⁴⁰ Ibid., p. 46, para. (28).

⁵⁴¹ Ibid., p. 49, para. (31).

⁵⁴² Ibid., para. (32).

⁵⁴³ Ibid., para. (33).

⁵⁴⁴ Ibid., p. 50, para. (35).

⁵⁴⁵ Ibid., para. (37).

⁵⁴⁶ Ibid., pp. 50–51, para. (38).

⁵⁴⁷ *Yearbook ... 1998* (see footnote 7 above), p. 134, but reserving the right to comment in further detail.

⁵⁴⁸ Ibid.

abuse.⁵⁴⁹ But it does accept that environmental emergencies can arise, posing an immediate threat to the territory of a State, in circumstances akin to force majeure or distress, and as noted above, it argues for a wider rule of distress allowing humanitarian action even in relation to persons not entrusted to the care of the State agent concerned.⁵⁵⁰ In an earlier comment, Mongolia noted the difficulty of balancing individual State interests against international obligations and remarked that “[i]f article 33 is to remain in the draft, it must be so formulated that the state of necessity is subject to strict conditions and limitations which prevent all possibility of abuse”.⁵⁵¹

(ii) *Experience in the application of the doctrine of necessity since the adoption of draft article 33*

285. In the *Rainbow Warrior* arbitration, the Tribunal expressed doubt as to the existence of the excuse of necessity, although the point did not need to be developed since France did not rely on that excuse (as distinct from distress and force majeure). The Tribunal referred to the draft articles and said:

Article 33, which allegedly authorizes a State to take unlawful action invoking a state of necessity, refers to situations of grave and imminent danger to the State as such and to its vital interests.

This distinction between the two grounds justifies the general acceptance of Article 32 and at the same time the controversial character of the proposal in Article 33 on state of necessity.⁵⁵²

286. By contrast, in the case concerning the *Gabčíkovo-Nagymaros Project*, ICJ carefully considered an argument based on article 33, expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the principle itself, it noted that the parties had both relied on article 33 as an appropriate formulation,⁵⁵³ and continued:

The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft ...

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an “essential interest” of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a “grave and imminent peril”; the act being challenged must have been the “only means” of safeguarding that interest; that act must not

have “seriously impair[ed] an essential interest” of the State towards which the obligation existed; and the State which is the author of that act must not have “contributed to the occurrence of the state of necessity”. Those conditions reflect customary international law.⁵⁵⁴

As to the application of the principle, the Court agreed that the Hungarian concerns as to the environment and drinking water related to an “essential interest” for the purposes of article 33, citing certain passages in the commentary.⁵⁵⁵ But it denied that the mere existence of uncertainties as to the environmental effects of the Project could, “alone, establish the objective existence of a “peril” in the sense of a component element of a state of necessity”. The “peril” had to be objectively established and not merely apprehended as possible.⁵⁵⁶ In addition to being “grave”, the peril had to be “imminent” in the sense of “proximate”. But, it added:

That does not exclude, in the view of the Court, that a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.⁵⁵⁷

Crucially, the Court was not convinced that, whatever the uncertainties and risks, the unilateral suspension and subsequent abandonment of the Project by Hungary was the only course open in the circumstances, having regard in particular to the amount of work already done and money expended on it. It noted that many of the concerns related to the operation of the scheme in peak mode, and that it had not yet been agreed whether or to what extent that mode would be adopted.⁵⁵⁸ Having regard to the previous conduct of the parties, the state of the works, the scientific uncertainties and the existence of other possibilities to resolve the problems, the Court concluded that Hungary had failed to prove the existence of a grave and imminent peril sufficient to justify its conduct.⁵⁵⁹ In addition, since Hungary had “helped, by act or omission, to bring” about the situation of alleged necessity, it could not now rely on that situation as a circumstance precluding wrongfulness.⁵⁶⁰ It was accordingly not necessary to consider whether the interests of Czechoslovakia in the continuation of the Project would have been a sufficient countervailing factor in accordance with draft article 33, paragraph 1 (b).⁵⁶¹

287. The plea of necessity was also, apparently, raised in the *Fisheries Jurisdiction* case, in circumstances which bore some resemblance to the *Fur seal fisheries off the Russian coast* case a century earlier.⁵⁶² Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization (NAFO) but had, in the opinion of Canada, proved ineffective for various reasons. By the Coastal Fisheries

⁵⁴⁹ *Ibid.*, pp. 134–135.

⁵⁵⁰ See paragraph 269 above, and for discussion, paragraph 274 above.

⁵⁵¹ *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1–4, p. 76.

⁵⁵² UNRIAA (see footnote 36 above), p. 254. In *Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi* (see footnote 496 above), the Tribunal declined to comment on the appropriateness of codifying the doctrine of necessity, noting that the measures taken by Burundi did not appear to have been the only means of safeguarding an essential interest against a grave and imminent peril.

⁵⁵³ *I.C.J. Reports 1997* (see footnote 51 above), p. 39, para. 50. It should be noted that no issue of obligations *erga omnes* arose in that case, which concerned a bilateral treaty. See paragraph 292 below.

⁵⁵⁴ *Ibid.*, pp. 40–41, paras. 51–52. None of the separate or dissenting judges disagreed with the Court in its endorsement of article 33.

⁵⁵⁵ *Ibid.*, p. 41, para. 53.

⁵⁵⁶ *Ibid.*, p. 42, para. 54.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*, pp. 42–43, para. 55.

⁵⁵⁹ *Ibid.*, pp. 42–45, paras. 55–56.

⁵⁶⁰ *Ibid.*, p. 46, para. 57.

⁵⁶¹ *Ibid.*, para. 58.

⁵⁶² See the ICJ judgment of 4 December 1998, declining jurisdiction (*Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432). For the *Fur seal fisheries off the Russian coast* case, see footnote 528 above.

Protection Act Amendment of 12 May 1994, Canada declared that the straddling stocks of the Grand Banks of Newfoundland were “threatened with extinction”, and asserted that the purpose of the Act and regulations was “to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding”. Pursuant to the Act, Canadian officials subsequently boarded and seized a Spanish fishing ship, the *Estai*, on the high seas, leading to a conflict with the European Union and with Spain. The Government of Spain denied that the arrest could be justified by concerns as to conservation “since it violates the established provisions of the NAFO Convention [Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries] to which Canada is a party”.⁵⁶³ Canada disagreed, asserting that “the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen”.⁵⁶⁴ The European Union, in its protest of 10 March 1995, said, *inter alia*, that:

The arrest of a vessel in international waters by a State other than the State of which the vessel is flying the flag and under whose jurisdiction it falls, is an illegal act under both the NAFO Convention and customary international law and cannot be justified *by any means*.⁵⁶⁵

But the subsequent Memorial of Spain dealt with issues of justification at some length. Without expressly referring to draft article 33, it seems on the whole to have taken the position that the Canadian measures could not be justified because they were in conflict with an international convention to which both Canada and Spain were parties and which directly regulated the conservation of halibut fisheries.⁵⁶⁶ In other words, the plea of necessity was not rejected *a priori*. The Court held that it had no jurisdiction over the case; the claim was, however, neither formally pleaded nor adjudicated on the merits.

(iii) Article 33 and humanitarian intervention

288. One of the issues discussed at some length in the commentary is the relationship between the plea of necessity as a circumstance precluding wrongfulness and the doctrine of humanitarian intervention as a ground for the

⁵⁶³ As cited in the judgment of 4 December 1998 (see footnote 562 above), p. 443, para. 20.

⁵⁶⁴ *Ibid.* See further the Canadian Counter-Memorial (29 February 1996), *I.C.J. Pleadings, Fisheries Jurisdiction (Spain v. Canada)*, paras. 17–45.

⁵⁶⁵ *I.C.J. Reports 1998* (see footnote 562 above), p. 444, para. 20.

⁵⁶⁶ See Memorial of Spain (Jurisdiction of the Court), *I.C.J. Pleadings* (footnote 564 above), p. 38, para. 15. By an Agreed Minute between Canada and the European Union, Canada agreed that it would repeal the regulations applying the Coastal Fisheries Protection Act to Spanish and Portuguese vessels in the NAFO area and release the *Estai*. The parties expressly maintained “their respective positions on the conformity of the amendment of 25 May 1994 to Canada’s Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention” and reserved “their ability to preserve and defend their rights in conformity with international law”. See Canada-European Community, Agreed Minute on the Conservation and Management of Fish Stocks (Brussels, 20 April 1995), *International Legal Materials*, vol. 34 (1995), pp. 1263–1264. See also the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (A/CONF.164/37), which goes beyond the pre-existing law in excluding non-participating “third States” from fishing in areas of the high seas subject to a conservation regime (arts. 8, para. 4, and 17, para. 2), and in allowing certain enforcement measures by States parties as against other States parties (art. 21).

use of force on the territory of another State. There are two difficulties here. First of all, of course, is the continuing controversy over whether and to what extent measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law. This is not a question on which the Commission can take a position in formulating the secondary rules of responsibility, nor does the commentary purport to do so. But there is a second difficulty, in that article 33 expressly excludes from the scope of the plea of necessity violations of peremptory norms of international law, among which the rules relating to the use of force referred to in Articles 2, paragraph 4, and 51 of the Charter certainly rank. Thus it could be argued that article 33, while purporting not to take a position on the exception of humanitarian intervention, in fact does so, since such an exception cannot stand with the exclusion of obligations under peremptory norms. The commentary appears to suggest that this difficulty can be avoided by differentiating between the peremptory status of some aspects of the rules relating to the use of force (e.g. the prohibition of aggression) and the non-peremptory status of other aspects (e.g. the injunction against a use of force even when carried out for limited humanitarian purposes).⁵⁶⁷ By implication, therefore, necessity can excuse the wrongfulness of genuine humanitarian action, even if it involves the use of force, since such action does not, at any rate, violate a peremptory norm.

289. This construction raises complex questions about the “differentiated” character of peremptory norms which go well beyond the scope of the draft articles. For present purposes it seems enough to say that either modern State practice and *opinio juris* license humanitarian action abroad in certain limited circumstances, or they do not. If they do, then such action would appear to be lawful in those circumstances, and cannot be considered as violating the peremptory norm reflected in Article 2, paragraph 4, of the Charter of the United Nations.⁵⁶⁸ If they do not, there is no reason to treat them differently than any other aspect of the rules relating to the use of force. In either case, it seems that the question of humanitarian intervention abroad is not one which is regulated, primarily or at all, by article 33. For these reasons, it is suggested that the exception in article 33 for obligations of a peremptory character should be maintained.

(iv) The issue of scientific uncertainty

290. A major question for article 33 is that of scientific uncertainty, and the associated question of the precautionary principle.⁵⁶⁹ At present, article 33 requires

⁵⁶⁷ *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, pp. 42–45, paras. (21)–(26).

⁵⁶⁸ Similar reasoning would apply to the controversy over whether “anticipatory” self-defence is ever permissible. If it is in specific circumstances, article 33 would appear to be unnecessary. If it is not, then there is no reason why article 33 should be available to preclude responsibility for anticipatory action.

⁵⁶⁹ Generally on the precautionary principle, see Sands, *Principles of International Environmental Law*, pp. 212–213; and Nguyen Quoc Dinh, Daillier and Pellet, *op. cit.*, p. 1255. The principle has frequently been applied by national courts: see, for example, *Vellore Citizens Welfare Forum v. Union of India and Others*, *All India Reporter* (India, Supreme Court, 28 August 1996).

that the conduct in question must be “the only means of safeguarding an essential interest of the State against a grave and imminent peril”. Yet in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be substantial areas of scientific uncertainty, and different views may be taken by different experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances. This has already been considered in the context of distress: it was concluded that in the context of saving life, the agent concerned should be entitled to act on the basis of a reasonable belief as to a situation of distress.⁵⁷⁰ The question is whether similar latitude should be allowed in relation to the plea of necessity.

291. The plea of distress covers cases of action to save individual human lives, whereas the plea of necessity covers a wider range of contingencies. The first point to be noted in relation to the latter is that the concern in question is that of safeguarding against peril, i.e. against an extremely serious risk. By definition the peril will not yet have occurred, and it cannot be required that the invoking State prove that it would *certainly* have occurred otherwise. It is difficult and may be impossible to prove a counterfactual. In the *Gabčikovo-Nagymaros Project* case⁵⁷¹ ICJ noted first that the invoking State could not be the sole judge of the necessity, and secondly that the existence of scientific uncertainty was not enough, of itself, to establish the existence of an imminent peril. This is plainly right, but on the other hand, neither should a measure of scientific uncertainty about the future disqualify a State from invoking necessity, if the peril is established on the basis of the evidence reasonably available at the time (as based, for example, on a proper risk assessment procedure), and the other conditions laid down for necessity are met. This is consistent with principle 15 of the Rio Declaration on Environment and Development,⁵⁷² which provides that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. This principle has received general support, and is reflected, for example, in article 5, paragraph 7, of the 1994 Agreement on the Application of Sanitary and Phytosanitary Measures.⁵⁷³ Article 5, paragraph 7, provides that a WTO member may provisionally adopt sanitary or phytosanitary measures (and restrict imports) “where relevant scientific evidence is insufficient”. In the *Beef Hormones* case the WTO Appellate Body recognized that a WTO member may rely on a risk assessment procedure conducted under article 5, paragraphs 1–2, of the 1994 Agreement notwithstanding that such an assessment indicated a “a state of scientific

uncertainty”.⁵⁷⁴ The question is whether the language of article 33 should be amended expressly to incorporate a precautionary element.⁵⁷⁵ The cases for and against are rather evenly balanced, but given the need to keep the defence of necessity within tight bounds, and the possibility of reflecting that element in the commentary, no change has been made.

(v) *The formulation of article 33*

292. As to the formulation of article 33, three further issues should be mentioned, in ascending order of difficulty:

(a) The term “State of necessity” can be retained in the title to article 33, but to avoid confusion with the other sense of “State” in the text, a reference to “necessity” alone seems sufficient;

(b) Article 33, paragraph 2 (b), contemplates that the plea of necessity may be excluded, expressly or impliedly, by an obligation arising out of a treaty, and this is clearly correct in principle.⁵⁷⁶ But there is no reason why this limiting effect can only be produced by a treaty. The draft articles proceed on the basis that, generally speaking, obligations arising from treaties and from other sources of international law have similar consequences in the realm of responsibility.⁵⁷⁷ For example, if a treaty rule protecting a particular value or interest excludes the plea of necessity, why should a customary rule generated in parallel with that treaty by widespread and convergent practice, and having essentially the same content, not have the same effect? Paragraph 2 (b) should be amended accordingly;

(c) Article 33, paragraph 1 (b), stipulates that, for necessity to be invoked, the conduct of the invoking State must not “seriously impair an essential interest of the State towards which the obligation existed”. This language is not well adapted to the breach of an obligation *erga omnes*. For example, it is not clear what individual interest Ethiopia and Liberia had in the *South West Africa* cases, as distinct from the public interest in compliance with the relevant norm.⁵⁷⁸ But South Africa could not have invoked necessity against those States on the basis that no essential interest of theirs was seriously impaired. The relevant interest for that purpose was that of the people of South West Africa itself. Of course, many obliga-

⁵⁷⁴ WTO, *EC Measures concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, 16 January 1998 (WT/DS26/AB/R–WT/DS48/AB/R), para. 194.

⁵⁷⁵ An alternative version of article 33, expressly reflecting the precautionary principle, might read as follows:

“(a) The act was the only means of safeguarding an essential interest of the State against a grave and imminent peril, the occurrence of which could not reasonably be excluded on the best information available.”

⁵⁷⁶ Thus the provisions of human rights treaties excluding derogations from certain fundamental rights even in time of public emergency impliedly exclude reliance on article 33. But see Oraá, *Human Rights in States of Emergency in International Law*, pp. 220–226, stressing the similarities between the derogation clauses and the plea of necessity.

⁵⁷⁷ See paragraph 26 above for a discussion of this principle in the context of former article 17.

⁵⁷⁸ It was precisely because of the lack of such an individual interest that a narrow majority of the Court held their claim inadmissible (*I.C.J. Reports 1966* (see footnote 83 above), p. 6).

⁵⁷⁰ See paragraph 283 above.

⁵⁷¹ See paragraph 286 above.

⁵⁷² *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

⁵⁷³ See *Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on 15 April 1994* (GATT secretariat publication, Sales No. GATT/1994–7), p. 72.

tions *erga omnes* involve peremptory norms, which are excluded entirely from the scope of article 33. Moreover, in the case of an obligation *erga omnes* (e.g. in the field of human rights or international peace and security), the obligation itself may expressly or impliedly exclude reliance on necessity. Nonetheless, circumstances can be envisaged of a single unforeseen case where the interests at stake in compliance with an *erga omnes* obligation ought not to prevail over a claim of necessity. In such cases the balance to be struck by paragraph 1 (b) is not a balance between the interests of the respondent State and the individual interests of the State or States complaining of a breach. What matters is the extent of the injury to the interests protected by the obligation, and paragraph 1 (b) should be reformulated accordingly.

(vi) *Conclusions on article 33*

293. Overall it seems that concerns as to the possible abuse of necessity are not borne out by experience. There is a parallel here with the *rebus sic stantibus* principle in the law of treaties. This was for a long time treated with considerable reserve, but it was embodied in carefully limited terms in the 1969 Vienna Convention,⁵⁷⁹ and it has not had the destabilizing effect some feared it would have.⁵⁸⁰ It should also be stressed that (unlike *rebus sic stantibus*) the plea of necessity only operates by way of a temporary preclusion of wrongfulness. Overall it seems that the considerations set out in article 33 allow a reasonable balance to be struck between the interests of the States concerned and those of the international community as a whole. ICJ in the *Gabčíkovo-Nagymaros Project* case was able to apply the principle without undue difficulty and it also, as has been seen, made a clear and helpful distinction between its proper role as a precluding factor and the continuity and stability of the underlying treaty relationship.⁵⁸¹ For these reasons, the Special Rapporteur favours the retention of article 33 essentially in its present form, but with the amendments referred to above.⁵⁸²

(f) *Article 34. Self-defence*

294. Article 34 provides as follows:

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

295. The commentary to article 34 stresses that it is concerned with the principle of self-defence only insofar as it is a circumstance precluding wrongfulness covered by chapter V, and that consequently it is not concerned to define the extent of lawful self-defence or to enter into the various controversies which have arisen about self-defence under the Charter of the United Nations. Article 34 is thus presented as “the inevitable inference” from the

⁵⁷⁹ Article 62 is formulated in the negative (“A fundamental change of circumstances . . . may not be invoked as a ground for terminating or withdrawing from the treaty unless . . .”). Article 33 is the only circumstance in chapter V formulated in similar negative terms.

⁵⁸⁰ The parallel is relied on in *Yearbook . . . 1980*, vol. II (Part Two), commentary to article 33, p. 51, para. (40).

⁵⁸¹ See paragraph 226 above.

⁵⁸² For the actual language proposed, see paragraph 358 below.

inherent right of self-defence as referred to in Article 51 of the Charter.⁵⁸³ The commentary notes that self-defence usually involves the use of force, in apparent contrast with lawful countermeasures which may not,⁵⁸⁴ but it declines to be drawn into such questions as “any total identity of content between the rule in Article 51 of the Charter and the customary rule of international law on self-defence”; it is sufficient “to remain faithful to the content and scope of the pertinent rules of the United Nations Charter”.⁵⁸⁵ However, the article as drafted does not refer in terms to Article 51, a matter which gave rise to some disagreement within the Commission at the time of adoption of article 34.⁵⁸⁶

296. The commentary goes on to stress that the preclusive effect of article 34 does not entitle the State acting in self-defence to violate the rights of third States.⁵⁸⁷ In this respect self-defence is subject to the same limitation as countermeasures.

(i) *Comments of Governments on article 34*

297. France believes that the reference to self-defence “in conformity with the Charter of the United Nations” is too narrow, and that the broader limits laid down by international law should be referred to instead.⁵⁸⁸ Apart from this comment, the inclusion of article 34 in chapter V appears uncontroversial.

(ii) *How far does the preclusive effect of article 34 extend?*

298. However, there is a central difficulty with article 34, which was referred to in an earlier observation of Mongolia. Complaining of the formulation of article 34, Mongolia noted that “[a]cts of a State constituting self-defence do not violate any international obligation whatsoever of any State . . . Hence, what is ‘unlawful’ cannot be part of the concept of self-defence”.⁵⁸⁹ This is plainly right so far as concerns the core obligation under Article 2, paragraph 4, of the Charter of the United Nations not to use force in international relations. So far as that obligation is concerned, the exclusion of action in self-defence is part of the definition of the obligation itself. A State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4, and if the only effect of self-defence as a circumstance precluding wrongfulness is so to provide, then it should be deleted, for the same reasons as already given with respect to consent.⁵⁹⁰

299. But in the course of self-defence, a State may violate other obligations towards the aggressor. For example, it may trespass on its territory, interfere in its internal af-

⁵⁸³ *Yearbook . . . 1980*, vol. II (Part Two), commentary to article 34, p. 52, para. (1).

⁵⁸⁴ *Ibid.*, p. 54, para. (6).

⁵⁸⁵ *Ibid.*, p. 59, para. (20).

⁵⁸⁶ *Ibid.*, p. 60, para. (26).

⁵⁸⁷ *Ibid.*, p. 61, para. (28).

⁵⁸⁸ See footnote 7 above.

⁵⁸⁹ *Yearbook . . . 1981*, vol. II (Part One), document A/CN.4/342 and Add.1-4, p. 76, para. 8.

⁵⁹⁰ See paragraphs 238-241 above. Cf. *Legality of the Threat or Use of Nuclear Weapons* (see footnote 211 above), pp. 244, para. 38, and 263, para. 96, emphasizing the lawfulness of a use of force in self-defence.

fairs, disrupt its trade contrary to the provisions of a commercial treaty, etc. Traditional international law dealt with these problems to a great extent by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war.⁵⁹¹ In the Charter period, by contrast, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at “peace” with each other.⁵⁹² Indeed the legality of a formal state of war in the Charter period has been doubted. The 1969 Vienna Convention leaves such issues to one side by providing in article 73 that the Convention does not prejudice “any question that may arise in regard to a treaty ... from the outbreak of hostilities between States”.

300. Thus it seems clear that there are cases where self-defence may preclude the wrongfulness of conduct which would otherwise be in breach of treaty or other obligations of the State concerned, even though no question can possibly arise, for a State acting in self-defence, of action contrary to the basic obligation under Article 2, paragraph 4, of the Charter of the United Nations. But the problem is that self-defence does *not* preclude the wrongfulness of conduct vis-à-vis the aggressor State in all cases or with respect to all obligations. The issue is not of course whether the particular action was or was not necessary or proportionate, since that is part of the definition of self-defence. It is that there are some obligations which cannot be violated even in self-defence. The most obvious examples relate to international humanitarian law and human rights obligations. The Geneva Conventions of 12 August 1949 and the Protocol I thereto of 8 June 1977 apply equally to aggressors and defenders, and the same is true of customary international humanitarian law.⁵⁹³ All the human rights treaties contain derogation provisions for times of public emergency, including actions in self-defence.⁵⁹⁴ It is perfectly clear that self-defence does not preclude the wrongfulness of conduct in breach of obligations in these fields.

301. The problem is accordingly to distinguish between those obligations which prevail even over a possibly justified claim of self-defence and those which do not. Curiously, neither the commentary nor the debates on article 34 shed much light on this question.⁵⁹⁵ However,

⁵⁹¹ See further McNair and Watts, *The Legal Effects of War*.

⁵⁹² In *Oil Platforms* (see footnote 69 above), p. 803, it was not denied that the Treaty of Amity, Economic Relations and Consular Rights of 15 August 1955, which provides the basis of the Islamic Republic of Iran’s claim, remained in force at all relevant times, despite many actions by United States naval forces against the Islamic Republic of Iran, justified as self-defence, during the relevant period. In that case both parties agreed that to the extent that any such operations were justified by self-defence they would be lawful.

⁵⁹³ As the Court said of the rules of international humanitarian law in *Legality of the Threat or Use of Nuclear Weapons* (see footnote 211 above), p. 257, para. 79, they constitute “intransgressible principles of international customary law”. On the relationship between human rights and humanitarian law in time of armed conflict, see page 240, para. 25.

⁵⁹⁴ See Oraá, *op. cit.*, especially chapters 4 and 9.

⁵⁹⁵ This is the more curious in that the precise issue is perceptively analysed in the commentary, and the appropriate conclusion reached, in relation to article 33 (see paragraph 282 above). However, Mr. Riphagen indirectly referred to that issue in the course of the debate on article 34, stating in particular that “the rules of *jus cogens* relating to the

ICJ did do so in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. One issue was whether the use of nuclear weapons must be a breach of environmental obligations because of the massive and long-term damage such weapons caused. The Court said:

[T]he issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.⁵⁹⁶

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.⁵⁹⁶

Although the Court did not approach the issue using the terminology of “circumstances precluding wrongfulness” or by referring to article 34, the issue being considered here is precisely the same. In what circumstances is a State acting in self-defence “totally restrained” by an international obligation? The answer is that it depends on whether the obligation was expressed or intended to apply as a definitive constraint even to States in armed conflict. For international humanitarian law, this clearly is the case; similarly for human rights law, subject to the possibility of derogation in time of emergency which is part and parcel of that law. Another example would be a unilateral commitment by a nuclear-weapon State that it would not engage in a first use of nuclear weapons in any circumstances. For other general obligations, by contrast (e.g. those relating to trade and the environment), the answer may be different, but it depends on the formulation and purpose of the primary rule in question. A treaty concerned precisely with protection of the environment in time of armed conflict⁵⁹⁷ will be intended, subject to its terms, as an “obligation of total restraint” and the plea of self-defence will not preclude wrongfulness. Accordingly, article 34 needs to embody language which distinguishes between the two categories. Adopting the language of the Court, it is suggested that article 34 should be subject to an exception for obligations which are “expressed or intended to be obligations of total restraint even to States engaged in armed conflict or acting in self-defence”. In addition it is useful for the sake of clarity and to confirm a vital principle of the law of armed conflict to give, as an example of such obligations, those in the field of international humanitarian law.

(iii) *The position of third States*

302. The commentary to article 34 emphasizes that the principal effect of the article is to preclude the wrongfulness of conduct of a State acting in self-defence vis-à-vis

protection of human rights in armed conflicts remained valid even in the relationship with an aggressor State” (*Yearbook ... 1980*, vol. I, 1620th meeting, p. 189, para. 5). He added later that “[a]ny act—including genocide or a serious violation of human rights, which were not lawful measures—could be described as self-defence. Consequently, the inclusion of the word ‘lawful’ [in the text of article 34] was essential” (*ibid.*, 1635th meeting, p. 272, para. 59).

⁵⁹⁶ *I.C.J. Reports 1996* (see footnote 211 above), p. 242, para. 30.

⁵⁹⁷ For example, the Convention on the prohibition of military or any other hostile use of environmental modification techniques.

the attacking State,⁵⁹⁸ and this is plainly correct as a general proposition. In the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ observed that:

[A]s in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.⁵⁹⁹

This rather convoluted formulation may have been adopted to indicate that the law of neutrality, while it clearly distinguishes between conduct as against a belligerent and conduct as against a neutral, does not imply that neutral States are unaffected by the existence of a state of war. A State exercising an inherent right of self-defence of a State has certain belligerent rights, even as against neutrals. The extent to which the traditional law of neutrality has survived unchanged in the Charter period is still controversial, but fortunately the Commission does not need to enter into these controversies in this context. The language of article 34 leaves open all issues of the effect of action in self-defence vis-à-vis third States, and no alteration seems required.

(iv) *The formulation of article 34*

303. Finally, France and (in an earlier comment) Mongolia question the simple reference in article 34 to self-defence in conformity with the Charter of the United Nations.⁶⁰⁰ However, these suggestions are opposed to each other: France seeks a reference to what it regards as the wider right of self-defence under general international law, whereas Mongolia seeks an express reference to Article 51. In the Special Rapporteur's opinion, it is neither necessary nor desirable to resolve underlying questions about the scope of self-defence in modern international law—even if it were possible to do so in the draft articles, which having regard to Article 103 of the Charter it is not. It is not the function of the draft articles to specify the content of the primary rules, including that referred to in Article 51. Article 34 uses the phrase “a lawful measure of self-defence taken in conformity with the Charter of the United Nations”, and this is a sufficient reference to the modern international law of self-defence, customary and conventional. No change to article 34 is proposed in this respect.

(v) *Conclusions on article 34*

304. For these reasons it is recommended that article 34 be retained, but that a new paragraph be added to distinguish in general terms between those obligations which prevail even as against a State exercising a right of self-defence, and those which do not.⁶⁰¹

⁵⁹⁸ *Yearbook ... 1980*, vol. II (Part Two), commentary to article 34, p. 61, para. (28).

⁵⁹⁹ *I.C.J. Reports 1996* (see footnote 211 above), p. 261, para. 89.

⁶⁰⁰ See paragraph 297 above, and for Mongolia's comment, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/342 and Add.1-4, p. 76, para. 8.

⁶⁰¹ For the proposed formulation of the article, see paragraph 358 below. For its location, see paragraph 357 below.

(g) *Article 35. Reservation as to compensation for damage*

305. Article 35 provides as follows:

Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudice any question that may arise in regard to compensation for damage caused by that act.

Article 35 is the only provision in chapter V which deals with the consequences (substantive or procedural) of invoking circumstances precluding wrongfulness. It is proposed to deal with it in that context, and after considering whether any additional circumstances ought to be provided for.⁶⁰²

4. POSSIBLE JUSTIFICATIONS OR EXCUSES NOT INCLUDED IN CHAPTER V

306. Although the Commission saw six circumstances originally enumerated in chapter V as the main generally applicable ones, it evidently did not regard the list as “absolutely exhaustive”, and noted the possibility of the development of further general or specific excuses for wrongful conduct. In its view, chapter V was “not to be construed as closing the door on that possibility”.⁶⁰³ This raises a number of questions for the Commission on second reading. First, are there other circumstances precluding wrongfulness of a general character which ought to be recognized in chapter V? Secondly, what provision—if any—is necessary to deal with the possibility that new excuses for non-performance might arise in the future? The second question is dealt with in the context of chapter 1 of part two, since it concerns the effect of the draft articles as a whole. The first question is addressed below.

307. Different legal systems, in fact, recognize different ranges of justifications or excuses for non-performance of obligations, and the review undertaken earlier of the evolution of chapter V shows that a number of other candidates for inclusion have been considered at various times.⁶⁰⁴ It is necessary to mention three of them.

(a) *Performance in conflict with a peremptory norm (jus cogens)*

308. Articles 53 and 64 of the 1969 Vienna Convention deal with cases where the provisions of a treaty are themselves in contradiction with an existing or new peremptory norm, in which case the consequence is the invalidity or termination of the treaty. Moreover, those cases are regarded so seriously that the offending provision is inseparable, i.e. the whole treaty is invalid, even if only one of its provisions is impugned.⁶⁰⁵ But there is a third possibility. A treaty, apparently lawful on its face and innocent in its purpose, might fail to be performed in circumstances where its performance would produce, or

⁶⁰² See paragraphs 338-349 below.

⁶⁰³ *Yearbook ... 1980*, vol. II (Part Two), commentary to article 34, p. 61, para. (29).

⁶⁰⁴ See paragraph 217 above.

⁶⁰⁵ 1969 Vienna Convention, art. 44, para. 5. Article 64 states that in the case of a new peremptory norm, “any existing treaty which is in conflict with that norm becomes void and terminates”. Thus the whole treaty terminates if any provision of it is in conflict with a peremptory norm.

substantially assist in, a breach of a peremptory norm. An example might be where a treaty right of passage through a strait or overflight through the airspace of a State was being exercised in order to commit an act of aggression against another State, or where weapons promised to be provided under an arms supply agreement were to be used to commit genocide or crimes against humanity. There is no reason in such cases why the treaty itself should be void or should terminate. It is not intrinsically unlawful, and no new peremptory norm is involved. It is simply that, as a result of extrinsic circumstances, the performance of the treaty would violate, or lead directly to the violation of, a peremptory norm. In such cases the question is whether “non-performance of a treaty stipulation which conflicts with a rule of *jus cogens*—provided that the conflict is properly established—should not be considered a ground [i.e. a justification] for a breach of that treaty”.⁶⁰⁶ At the level of principle, the answer must surely be yes. If a peremptory norm invalidates an inconsistent treaty, how can the obligation to perform the treaty stand against the breach of such a norm? No doubt the link between performance of the treaty obligation and breach of the peremptory norm would have to be clear and direct. But in such cases, the temporary suspension of the obligation to perform surely follows from the peremptory character of the norm that would otherwise be violated.

309. On the other hand, there is a question as to how this result is to be achieved. In many cases it will be sufficient to interpret the relevant treaty rule as not requiring the conduct in question, in the same way as direct conflict between treaties and peremptory norms will usually be avoided by interpretation.⁶⁰⁷ However, the relevant rule may be clear, and so too the conflict with the peremptory norm in the given circumstances.

310. Sir Gerald Fitzmaurice treated this question under the heading “Non-performance justified *ab intra* by virtue of a condition of the treaty implied in it by international law”, and specifically on the basis of an implied condition of “continued compatibility with international law”,⁶⁰⁸ noting that:

A treaty obligation the observance of which is incompatible with a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility ...

The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty.⁶⁰⁹

No similar rule applied to “a rule in the nature of *jus dispositivum*”,⁶¹⁰ since the parties were free to contract out of such a rule, including prospectively.

311. It should be stressed that, in the passage quoted, Sir Gerald Fitzmaurice evidently did not contemplate either

⁶⁰⁶ Rosenne, *op. cit.*, p. 65. The author adds that “it is difficult to foresee this hypothesis in concrete terms” (*ibid.*).

⁶⁰⁷ This discussion focuses on the potential conflict between treaty performance and a peremptory norm. In the case of a rule of customary international law, the possibility of conflict is much less, but it is not excluded.

⁶⁰⁸ *Yearbook ... 1959* (see footnote 6 above), p. 46.

⁶⁰⁹ *Ibid.*

⁶¹⁰ *Ibid.*

the invalidity of the treaty or its termination. His focus was on the question of non-observance, in a situation of what might be referred to as occasional conflict or inconsistency. A treaty which is on its face inconsistent with a peremptory norm no doubt cannot stand, but few treaties are of this character. Cases of “occasional conflict” are much more likely, and it is not clear why these should entail total invalidation.⁶¹¹ Moreover, it should again be noted that under the 1969 Vienna Convention, it is necessary that a State should take action to invoke some ground for invalidity or termination, and this includes action pursuant to articles 53 and 64. A State may be reluctant to see a treaty invalidated or terminated as a whole, yet it may be legitimately concerned as to a specific case of performance of the treaty conflicting with the demands of a peremptory norm.⁶¹² In the event of such a conflict, there is, anyway, no room for election or for an option as between the two conflicting norms.

312. As various comments on the draft articles indicate, a number of Governments continue to harbour concerns about the notion of *jus cogens*.⁶¹³ These relate, it seems, not so much to a lack of support for the substantive values embodied in the relatively few indisputable *jus cogens* norms (the prohibitions against genocide, slavery, crimes against humanity and torture, the prohibition of aggression, and a few others), as to the worry that the notion is radically indeterminate and will destabilize treaty relations. But in nearly 20 years since the 1969 Vienna Convention came into force there has been no case where *jus cogens* has been invoked to invalidate a treaty. During the same period, tribunals, national and international, have affirmed the idea of peremptory norms in various contexts, not limited to the validity of treaties.⁶¹⁴ ICJ, while so far avoiding the use of the term itself, has also endorsed the notion of “intransgressible principles”.⁶¹⁵

313. In the Special Rapporteur’s view, there can be no going back on the clear endorsement of the notion of peremptory norms contained in the 1969 and 1986 Vienna Conventions. According to article 53 common to the two Conventions, a peremptory norm of general international law is one from which no derogation is permitted, except by a later norm of the same status. It follows from this definition that obligations generated by a peremptory norm must prevail over other obligations in case of conflict. The Special Rapporteur thus agrees with Sir Gerald Fitzmaurice and Rosenne that, once the peremptory character of a norm of *jus cogens* is clearly recognized, that norm must prevail over any other international obligation not having the same status. Indeed

⁶¹¹ Any more than the “occasional” inconsistency between a Security Council resolution and the 1971 Montreal Convention invalidated the latter (see paragraphs 9 and 24 above).

⁶¹² See the remarks of Judge ad hoc Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, pp. 439–441. The Court did not address these issues in its Order.

⁶¹³ See paragraph 236 above.

⁶¹⁴ See, for example, the decisions of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Anto Furundzija*, judgement of 10 December 1998, unreported, and of the British House of Lords in *Regina v. Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte (No. 3)*, 24 March 1999, *The Weekly Law Reports 1999*, vol. 2, especially pp. 832–848 (Lord Browne-Wilkinson).

⁶¹⁵ *I.C.J. Reports 1996* (see footnote 211 above), p. 257, para. 79.

in such cases the State concerned would not have the choice whether or not to comply: if there is inconsistency in the circumstances, the peremptory norm must prevail. On the other hand, the invalidation of a treaty which does not in terms conflict with any peremptory norm, but whose observance in a given case might happen to do so, seems both unnecessary and disproportionate. In such cases, the treaty obligation is, properly speaking, inoperative⁶¹⁶ and the peremptory norm prevails. But if the treaty can in future have applications not inconsistent with the peremptory norm, why should it be invalidated by such an occasional conflict? Certainly, an occasional conflict with a non-peremptory norm of customary international law (which may have the same content as a treaty) would not invalidate the customary rule for the future.

314. Is such a conflict to be resolved at the level of the secondary rules, or is it not (like consent⁶¹⁷), more properly considered part of the formulation of the primary obligation? The position is not the same as it is with respect to consent since, as argued above, the consent requirement is intrinsic to the *particular* norm or obligation, whereas the effect of peremptory norms is extrinsic to that norm or obligation and arises as an aspect of the system of international law. Nonetheless in some respects at least the impact or effect of peremptory norms occurs prior to and independently of the secondary rules of responsibility—for example, in the case of article 53 of the 1969 Vienna Convention itself. If a treaty is invalid, no obligation arises to which chapter V can apply. But is this always the situation? The question may be asked in the following way: when the draft articles speak of the obligations of States in accordance with the applicable primary rules, do they nonetheless conceive of those obligations as general in form? Or are they obligations applicable to the specific States concerned in the specific circumstances of each particular case? In short, are the obligations referred to in articles 3 (a) and 16 general in character, or are they highly individualized and specified? The latter conception, rigorously applied, might dissolve part one of the draft articles altogether, referring everything to the auspices of the primary rules. Yet this does not seem a useful result or one consistent with the development of a systematic approach to State responsibility. Thus it seems sensible still to think of the obligations which are the subject of the draft articles as being, or at least as including, obligations of a general character. By the same token, it seems appropriate to reflect the overriding impact of peremptory norms *in casu*—in situations of occasional conflict—as a circumstance precluding wrongfulness under chapter V of part one.⁶¹⁸

315. Accordingly, chapter V should contain a provision to the effect that the wrongfulness of an act of a State not in conformity with an international obligation is precluded if the act is required in the circumstances by a peremptory norm of general international law. It should be stressed that nothing less than direct conflict between the

two obligations, that is to say, an impossibility to comply at the same time with both in the circumstances that have arisen, can be sufficient for this purpose.⁶¹⁹

(b) *The “exceptio inadimplenti non est adimplendum”*

316. The maxim “*exceptio inadimplenti non est adimplendum*” (often referred to as the *exceptio inadimplenti contractus*) stands for the idea that a condition for one party’s compliance with a synallagmatic obligation is the continued compliance of the other party with that obligation. It is connected with a broader principle, that a party ought not to be able to benefit from its own wrong. This was formulated by PCIJ in the *Factory at Chorzów* case in the following way:

It is ... a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.⁶²⁰

The *exceptio* thus operates in the same manner as other circumstances precluding wrongfulness, and it requires consideration here.

(i) *Application of the exceptio in international case law*

317. The application of the *exceptio* was an issue in the *Diversion of Water from the Meuse* case. In that case, the Netherlands complained, inter alia, about Belgium’s taking of water for irrigation and other purposes from a particular lock on the Belgian side, which was said to be unlawful under a bilateral Treaty of 1863. Belgium argued that its use of the lock was not unlawful having regard to the similar use by the Netherlands of a lock on its side. Subsidiarily it argued that, “by constructing certain works contrary to the terms of the Treaty, the Applicant has forfeited the right to invoke the Treaty against the Respondent”.⁶²¹ The Court upheld the principal Belgian contention, inter alia, by comparing the use of the two locks:

Neither of these locks constitutes a feeder, yet both of them discharge their lock-water into the canal, and thus take part in feeding it with water otherwise than through the treaty feeder ... In these circumstances, the Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past.⁶²²

In his separate opinion, Judge Altamira denied that the obligations of the two parties were synallagmatic; accordingly Belgium could not invoke the Netherlands’ own conduct as a circumstance precluding wrongfulness.⁶²³ Judges Anzilotti (dissenting) and Hudson disagreed. Judge Anzilotti, referring to Belgium’s subsidiary submission, said that:

I am convinced that the principle underlying this submission (*inadimplenti non est adimplendum*) is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any

⁶¹⁶ See paragraphs 227–228 above.

⁶¹⁷ See paragraph 243 above.

⁶¹⁸ The “nominalist” approach to obligations, which is rejected here, might have further consequences for chapter V. It would reinforce a very narrow conception of the chapter (covering only circumstances precluding responsibility, not wrongfulness). It would tend to the exclusion of article 34 on self-defence.

⁶¹⁹ For the text of the proposed article, see paragraph 358 below.

⁶²⁰ *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 31.

⁶²¹ *Diversion of Water from the Meuse, P.C.I.J., Series C, No. 81*, p. 209.

⁶²² *Ibid.*, *Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 25.

⁶²³ *Ibid.*, p. 43.

case, it is one of these “general principles of law recognized by civilized nations” which the Court applies in virtue of Article 38 of its Statute.⁶²⁴

Judge Hudson referred both to analogous principles of the English law of equity as well as to civil law sources and said:

It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law ... A very similar principle was received into Roman Law ... The *exceptio non adimpleti contractus* required a claimant to prove that he had performed or offered to perform his obligation ... [E]ven where a code is silent on the point Planiol states the general principle that “in any synallagmatic relationship, neither of the two parties may claim a benefit to which it is entitled unless it offers to perform its own obligation” ...

The general principle is one of which an international tribunal should make a very sparing application. It is certainly not to be thought that a complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State’s appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.⁶²⁵

318. In the *Appeal Relating to the Jurisdiction of the ICAO Council*, ICJ emphasized that a mere allegation by a party to a treaty that another party had committed a material breach of it could not allow the former unilaterally to consider that treaty as terminated or suspended.⁶²⁶ In his separate opinion, Judge de Castro expressly referred to the *exceptio inadimpleti contractus* in the context of India’s contention that “[n]o question of interpretation or application can arise with regard to a treaty which has ceased to exist or which has been suspended”.⁶²⁷ Relying upon the principle laid down in article 60 of the 1969 Vienna Convention, “which follows from the contractual nature of treaties”,⁶²⁸ Judge de Castro said:

It should not be overlooked that the rule opens the possibility of raising the *exceptio inadimpleti non est adimplendum*. The breach of an obligation is not the cause of the invalidity or termination of the treaty. It is a source of responsibility and of new obligations or sanctions. Alongside this, it is the material breach of a treaty which entitles the injured party to invoke it in order to terminate or suspend the operation of the treaty.⁶²⁹

319. In the *Gabčíkovo-Nagymaros Project* case, the question arose in a rather specific and unusual form. As noted above, ICJ held that Hungary was not justified in suspending and terminating work on the project in the period 1989–1991, but equally that Czechoslovakia was not entitled unilaterally to divert the Danube for the purposes of its Variant C. Both parties were accordingly in breach of the 1977 Treaty, but the Court declined to allow

Hungary to rely on Czechoslovakia’s breach (undoubtedly a material breach) as a ground for termination. Relying on the passage from the *Factory at Chorzów* case, cited above (para. 316), the Court said it could not:

overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary’s own prior wrongful conduct ... Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.⁶³⁰

Subsequently the Court noted that “[t]he principle *ex injuria jus non oritur* is sustained by the Court’s finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct”.⁶³¹ However, it should be noted that while Slovakia’s later breach of the Treaty was “caused” by Hungary’s earlier breach (in the sense of it being a *causa sine qua non*), it was not caused by the earlier breach in the sense of the *Factory at Chorzów* dictum. Instead it was, as the Court held, independently unlawful.

(ii) *Comparative law underpinnings of the “exceptio”*

320. As Judges Anzilotti and Hudson indicated in *Diversion of Water from the Meuse*,⁶³² the principle underlying the *exceptio* is widely recognized in national legal systems in respect of reciprocal or synallagmatic obligations, i.e. where it is clear that performance of an obligation by one party is either a precondition or a concurrent condition to the performance of the same or a related obligation by the other party. A cognate situation arises where the breach by one party is consequential upon and directly produced by an earlier breach of the other party (e.g. where a delay in completion of certain work by one party is caused by a delay in delivery of a necessary piece of equipment by the other). Moreover, in national law (just as in the treaty cases cited above), what is at stake appears to be a circumstance precluding wrongfulness in respect of the continued performance of an obligation, rather than its termination. As Treitel notes, after a thorough review of the comparative law experience:

The effect of the *exceptio* in CIVIL LAW must be distinguished from that of termination ... Termination brings to an end each party’s duty to perform, though the circumstances making the remedy available may give the injured party a right to damages; it also gives the injured party a right to the return of his own performance on restoring what he has received under the contract. The *exceptio* does not produce these effects, but only gives rise to what has been called a “waiting position”. It is a “dilatory plea” which does not terminate the contract but merely entitles the injured party *for the time being* to refuse to perform his part ... The injured party may rely on the *exceptio* both in legal proceedings and extra-judicially. Where the circumstances are such as to justify the injured party’s refusal to perform the court is bound to give effect to

⁶³⁰ *I.C.J. Reports 1997* (see footnote 51 above), p. 67, para. 110.

⁶³¹ *Ibid.*, p. 76, para. 133. Among the dissentients on this point, see the declaration of President Schwebel (*ibid.*, p. 85) or the dissenting opinions of Judges Herczegh and Fleischhauer, who both consider as a decisive element the seriousness or lack of proportionality of Czechoslovakia’s breach of its obligations as compared to Hungary’s (*ibid.*, p. 198 (Judge Herczegh), and p. 212 (Judge Fleischhauer), stressing that “[t]he principle that no State may profit from its own violation of a legal obligation does not condone excessive retaliation”). See also the declaration of Judge Rezek (p. 86). But Judge Bedjaoui strongly objects to that view, noting that treaties “cannot be destroyed by violating them. Save by mutual consent, States cannot and may not rid themselves of their treaty obligations so easily” (*ibid.*, p. 138).

⁶³² See footnote 621 above.

⁶²⁴ *Ibid.*, p. 50.

⁶²⁵ *Ibid.*, p. 77, citing, inter alia, Planiol, *Droit civil*, 6th ed. (1912), vol. 2, p. 320.

⁶²⁶ *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 67, para. 38.

⁶²⁷ *Ibid.*, p. 124.

⁶²⁸ *Ibid.*, p. 129.

⁶²⁹ *Ibid.*, p. 128, footnote 1. Judge de Castro adds further that “[i]t is the breach of rights or obligations having their source in the agreement which lies at the root of the *exceptio non adimpleti*” (p. 129), thus pointing out the limits of India’s contention.

the *exceptio*: it has no discretion in the matter even in those systems (such as the French) in which the remedy of termination is subject to the discretion of the court.⁶³³

321. The principle of the *exceptio* is also reflected in international commercial law instruments. For example, article 80 of the United Nations Convention on Contracts for the International Sale of Goods provides simply that:

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

It does not seem to matter for the purposes of article 80 whether the act or omission which caused the non-performance was or was not wrongful. The principle is differently formulated, under the rubric of "withholding performance", in article 7.1.3 of the UNIDROIT Principles of International Commercial Contracts, which provides that "[w]here the parties are to perform simultaneously, either party may withhold performance"⁶³⁴ if the other is not willing and able to perform.

(iii) *Should the principle be recognized in the draft articles?*

322. In his fourth report on the law of treaties, Sir Gerald Fitzmaurice discussed the principle in the framework of "circumstances justifying non-performance". He was not certain whether it was properly classified as a justification "*ab extra* by operation of a general rule of international law", or "*ab intra* by virtue of a condition of the treaty implied in it by international law".⁶³⁵ But he was clear that the principle existed, and indeed he formulated it very broadly:

By virtue of the principle of reciprocity, and except in the case of the class of [multilateral treaties of the "integral" type ... where the force of the obligation is self-existent, absolute and inherent for each party, irrespective and independently of performance by the others], non-performance of a treaty obligation by one party to the treaty will, so long as such non-performance continues, justify an equivalent and corresponding non-performance by the other party or parties.⁶³⁶

His commentary was also clear in regarding this as a general principle, not only applicable to treaty obligations:

[T]here is a general *international law rule of reciprocity* entailing that the failure of one State to perform its international obligations in a particular respect will either *entitle other States to proceed to a corresponding non-performance* in relation to that State, or will at any rate *disentitle that State from objecting to such corresponding non-performance*.⁶³⁷

The commentary goes on to mention the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, where ICJ declined to apply the principle to a treaty providing for the constitution of an arbitral commission; the wrongful refusal of one party to the dispute to appoint its own member was held to prevent the constitution of the commission as a whole, on the ground that:

⁶³³ Treitel, *Remedies for Breach of Contract: A Comparative Account*, pp. 310–311, para. 235; for his review, see pages 245–317 ("defence of refusal to perform").

⁶³⁴ See footnote 492 above.

⁶³⁵ *Yearbook ... 1959* (see footnote 6 above), pp. 44 and 46.

⁶³⁶ *Ibid.*, p. 46.

⁶³⁷ *Ibid.*, p. 70, para. 102.

The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties.⁶³⁸

This is reminiscent of Czechoslovakia's attempt, in the case concerning the *Gabčíkovo-Nagymaros Project*, to fashion, by way of "approximate application", a version of the project favourable to it when faced with Hungary's wrongful refusal to proceed. The Court rejected the argument, holding that Hungary's breach of the 1977 Treaty could not be remedied by creating a project which was not the kind of project contemplated by the Treaty.⁶³⁹

323. The Commission did not debate Sir Gerald Fitzmaurice's fourth report on the law of treaties, nor did his successor, Sir Humphrey Waldock, address the issue. Under his guidance the scope of the 1969 Vienna Convention was narrowed so as to deal with the treaty as an instrument, leaving to one side most questions of the performance of treaty obligations. These were reserved to the topic of State responsibility by article 73 of the Vienna Convention.

324. The issue of the *exceptio* was addressed by Mr. Willem Riphagen in the context of countermeasures. In his fifth report, he proposed as article 8 of part two the following text:

Subject to articles 11 to 13, the injured State is entitled, by way of reciprocity, to suspend the performance of its obligations towards the State which has committed an internationally wrongful act, if such obligations correspond to, or are directly connected with, the obligation breached.⁶⁴⁰

In the debate, some members pointed to "the fine and somewhat formalistic distinction between [draft article 8] and the suspension of the *performance* of treaty obligations".⁶⁴¹ Mr. Gaetano Arangio-Ruiz likewise dealt with the issue as an aspect of countermeasures, noting that:

⁶³⁸ *I.C.J. Reports 1950* (see footnote 34 above), p. 229, cited by Sir Gerald Fitzmaurice, *Yearbook ... 1959* (see footnote 6 above), p. 71.

⁶³⁹ Or, as the Court actually put it:

"[E]ven if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty ...

"It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations ... but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse."

(*I.C.J. Reports 1997* (see footnote 51 above), pp. 53–54, paras. 76 and 78)

On the so-called "principle of approximate application", see *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion*, *I.C.J. Reports 1956*, separate opinion of Sir Hersch Lauterpacht, p. 46, and the discussion by Rosenne, *op. cit.*, pp. 95–101.

⁶⁴⁰ *Yearbook ... 1984*, vol. II (Part One), document A/CN.4/380, p. 3, and for the draft commentary, see *Yearbook ... 1985*, vol. II (Part One), document A/CN.4/389, pp. 10–11. Draft article 11 as proposed by Mr. Riphagen excluded the application of article 8 in cases of obligations arising from multilateral treaties and affecting the collective interests of the States parties. Draft article 12 was a savings clause dealing with *ius cogens*.

⁶⁴¹ *Yearbook ... 1984*, vol. II (Part Two), p. 103, para. 373.

The problem here is to see whether practice justifies making a distinction between such “conventional” measures as treaty suspension and termination and countermeasures in general, not only for merely descriptive purposes but in view of the legal regime to be codified or otherwise adopted by way of progressive development. As well as the question of so-called reciprocity in general, the issues relating to these two “conventional” measures—issues connected with the relationship between the law of treaties and the law of State responsibility—will require further study before any draft articles are formulated.⁶⁴²

The Commission decided not to consider reciprocal measures “as a distinct category of countermeasures” on the ground that they “did not deserve special treatment”.⁶⁴³

(iv) *Relationship of the exceptio to other procedures*

325. As this history suggests, in considering whether to include the *exceptio* in chapter V it is first necessary to ask whether its role is not sufficiently performed by two other procedures. The first of these is countermeasures. Almost by definition, where one State has breached a synallagmatic obligation, the other State’s refusal to perform that obligation will be a legitimate countermeasure, since it is very unlikely to be disproportionate and may well be the most appropriate response of all. On the other hand, the *exceptio* has a much more limited application than countermeasures, is not subject to the same limitations and is a more specific response to a particular breach, lacking the opprobrium often associated with countermeasures. A legal system might reject countermeasures, self-help other than in self-defence and reprisals but still find a role for the *exceptio*. Although the Commission has already rejected the category of reciprocal countermeasures, for reasons which are valid enough in that context, that rejection does not exclude the possibility of adopting some version of the *exceptio* in chapter V of part one—a possibility the Commission has not yet considered.⁶⁴⁴

326. The second alternative procedure is the suspension of a treaty for breach. Under article 60, paragraph 1, of the 1969 Vienna Convention, a material breach of a bilateral treaty by one party entitles the other to terminate the treaty, but also to suspend it in whole or in part. In the case of a multilateral treaty, the *only* possibility for a party aggrieved by a material breach is to suspend the treaty in its relations with the defaulting State, since termination is a matter for all the parties to the treaty.⁶⁴⁵ Overall the Convention gives considerable emphasis to suspension of treaties, no doubt out of a desire to leave open the possibility of a resumption of treaty relations even after a material breach.⁶⁴⁶

⁶⁴² *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/440 and Add.1, p. 14, para. 35.

⁶⁴³ *Yearbook ... 1992*, vol. II (Part Two), p. 23, para. 151.

⁶⁴⁴ *Ibid.* See also *Yearbook ... 1996*, vol. II (Part Two), p. 67, para. (1) of the commentary to article 47, footnote 200.

⁶⁴⁵ See article 60, paragraph 2 (b) and (c). The rather strict provisions of article 44 on separability do not apply to suspension for breach: see article 44, paragraph 2, presumably on the ground that a State which may terminate the whole treaty for breach may suspend less than the whole. This could however lead to unfair results in practice, if a State were to suspend those provisions which imposed obligations on it, while seeking to maintain in force those that gave it rights.

⁶⁴⁶ In the case concerning the *Gabčíkovo-Nagymaros Project*, the Court seems to have taken the view that Hungary suspended the operation of the 1977 Treaty, apart from any express provision of the 1969 Vienna Convention permitting it to do so. It said:

327. There are, however, still differences between reliance on the *exceptio* as a circumstance precluding wrongfulness, and the suspension of a treaty under article 60 of the 1969 Vienna Convention or its customary law equivalent. First, article 60 only applies to “material” breaches, rather narrowly defined, whereas the *exceptio* applies to any breach of treaty. Secondly, article 60 allows the suspension of the whole treaty, or (apparently) any combination of its provisions, whereas the *exceptio* only allows non-performance of the same or a closely related obligation. Thirdly, the *exceptio* may also be more readily applied to cases of obligations of simultaneous performance, given the formal procedure for suspension in article 65.⁶⁴⁷ And finally, article 60 is of course only concerned with the suspension of treaty obligations, whereas there is no reason to think that the *exceptio*, as it is formulated in the *Factory at Chorzów*⁶⁴⁸ dictum, does not apply to all international obligations whatever their origin.

(v) *Forms of the exceptio distinguished*

328. There is thus some, but far from complete, overlap between the *exceptio* and the other doctrines discussed, and this supports the view that—regard being had to the weight of authority behind it and to its general good sense—some version of the *exceptio* ought to be recognized in chapter V. However, it is necessary here to distinguish at least two different forms of the *exceptio*. One, expressed in the *Factory at Chorzów* dictum⁶⁴⁹ and in article 80 of the United Nations Convention on Contracts for the International Sale of Goods,⁶⁵⁰ requires that there be a causal link between the breach of the obligation by State A and its non-performance by State B. The second, broader one is concerned with synallagmatic or interdependent obligations, with each seen as in effect a counterpart of the other: it is as expressed by Judge Hudson in *Diversion of Water from the Meuse*,⁶⁵¹ in article 7.1.3 of the UNIDROIT Principles of International Commercial Contracts⁶⁵² and by Sir Gerald Fitzmaurice in his reports.⁶⁵³ The position taken by the majority in the *Gabčíkovo-Nagymaros Project* case seems to have been different again,⁶⁵⁴ although still a manifestation of the

“The Court cannot accept Hungary’s argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself ...”

(*I.C.J. Reports 1997* (see footnote 51 above), p. 39, para. 48.)

The context suggests that by this it meant that Hungary in substance attempted to suspend the Treaty, despite its own statements that it was acting out of necessity (i.e. on the basis of circumstances precluding wrongfulness). Under article 65 of the 1969 Vienna Convention, suspension (like termination) is a formal act. It is slightly odd to describe a State as suspending a treaty when (a) it has never purported to do so; and (b) it is not entitled to do so as a matter of law.

⁶⁴⁷ On the procedure for invoking circumstances precluding wrongfulness, see paragraph 354 below.

⁶⁴⁸ See footnote 620 above.

⁶⁴⁹ See paragraph 316 above.

⁶⁵⁰ See paragraph 321 above.

⁶⁵¹ See paragraph 317 above.

⁶⁵² See paragraph 321 above.

⁶⁵³ See paragraph 322 above.

⁶⁵⁴ See paragraph 319 above.

general principle of law that a party cannot be allowed to benefit from its own wrongful act.

329. Looking first at the broader, synallagmatic idea of the *exceptio*, it is clear that this could only be admitted in chapter V with many qualifications and limitations. These exceptions would include, in Sir Gerald Fitzmaurice's words, multilateral treaties of the "integral" type (i.e. where performance is not premised on reciprocity).⁶⁵⁵ It could not justify a breach of the rules relating to the use of force or, more generally, a breach of *jus cogens*, and could not stand against any express or clearly implied excluding effect of the primary rule. It could have no application to obligations *erga omnes*, e.g. obligations in the field of human rights, humanitarian law or international criminal law, as was recognized by ICJ in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, where it said that:

Bosnia and Herzegovina was right to point to the *erga omnes* character of the obligations flowing from the Genocide Convention ... and the Parties rightly recognized that in no case could one breach of the Convention serve as an excuse for another.⁶⁵⁶

It seems that the effect of the *exceptio*, even in its broader form, is strictly relative and bilateral: in Mr. Riphagen's words, it would be limited to breaches which "correspond to, or are directly connected with", the prior breach of the other party.⁶⁵⁷

330. A statement of the synallagmatic form of the *exceptio*, limited in this way, nonetheless presents difficulties of application, as can be seen from the United Nations experience with the monitoring of ceasefire agreements. The difficulties were analysed, for example, in a 1956 report of Secretary-General Dag Hammarskjöld, dealing with the extent to which breaches of any of the Middle East armistice agreements of 1949 could be held to justify a retaliatory breach by the other party (acting other than in immediate self-defence).⁶⁵⁸ The report referred to "a chain of actions and reactions ... which, unless broken, is bound to constitute a threat to peace and security", and continued:

[S]ome uncertainty concerning the scope of the obligations of the armistice agreements has, in my view, served to contribute to the unfortunate development ...

As a matter of course, each party considers its compliance with the stipulations of an armistice agreement as conditioned by compliance of the other party to the agreement ...

Obviously, therefore, the question of reciprocity must be given serious consideration and full clarity sought. The point of greatest significance in this context is: to what extent can an infringement of one or several of the other clauses of an armistice agreement by one party

⁶⁵⁵ See paragraph 322 above.

⁶⁵⁶ *I.C.J. Reports 1997* (see footnote 241 above), p. 258, para. 35. See also, and more emphatically, the dissenting opinion of Judge Weeramantry (*ibid.*, pp. 292–294). The Court went on to hold that nonetheless a counterclaim for genocide could be brought under article 80 of the Rules of Court "in so far [as] the two Parties pursue, with their respective claims, the same legal aim, namely the establishment of legal responsibility for violations of the Genocide Convention" (*ibid.*, p. 258, para. 35).

⁶⁵⁷ See paragraph 324 above.

⁶⁵⁸ *Official Records of the Security Council, Eleventh Year, Supplement for April, May and June 1956*, document S/3596, pp. 30–66, cited by Rosenne, *op. cit.*, pp. 111–115.

be considered as entitling the other party to act against the cease-fire clause which is to be found in all the armistice agreements ...

The very logic of the armistice agreements shows that infringements of other articles cannot serve as a justification for an infringement of the cease-fire article. If that were not recognized, it would mean that any one of such infringements might not only nullify the armistice régime, but in fact put in jeopardy the cease-fire itself. For that reason alone, it is clear that compliance with the said article can be conditioned only by similar compliance of the other party.⁶⁵⁹

Thus in a context in which there was no strictly causal nexus between one breach and the other, the Secretary-General's view was that only an infringement of a cease-fire obligation specified in a given article could justify what would otherwise be an infringement of that article. Indeed it may be that under the Charter of the United Nations, any underlying entitlement to use force is terminated on the conclusion of a permanent ceasefire, and that thereafter the only exception to the ceasefire obligation is provided by the right of self-defence.⁶⁶⁰

331. The underlying problem is that a broad view of the *exceptio* may produce escalating non-compliance, negating for practical purposes the continuing effect of the obligation. For these reasons the Special Rapporteur is firmly of the view that the justification for non-compliance with synallagmatic obligations should be resolved (a) by the law relating to the suspension or termination of those obligations (which is sufficient to deal with most problems of treaty obligations); and (b) by the law of countermeasures. The question then becomes whether the narrower form of the *exceptio*, as recognized by the Court in the *Factory at Chorzów* dictum,⁶⁶¹ should be included in chapter V. There is certainly a case for doing so, both as a matter of authority or tradition and as a matter of ordinary common sense. To facilitate debate, the Special Rapporteur proposes that chapter V should include a provision to the effect that the wrongfulness of an act of a State is precluded if it has been prevented from acting in conformity with the obligation in question as a direct result of a prior breach of the same or a related international obligation by another State.⁶⁶²

(c) *The so-called "clean hands" doctrine*

332. Finally, some brief reference should be made to the so-called "clean hands" doctrine, which has sometimes been relied on as a "defence", or at least as a ground of inadmissibility of a claim, in State responsibility cases—mostly, though not always, in the framework of diplomatic protection. For example, in his dissenting opinion in *Military and Paramilitary Activities in and against Nicaragua*, Judge Schwebel relied on the doctrine as a subsidiary basis for dismissing Nicaragua's claim.⁶⁶³ The majority did not refer directly to the point.

⁶⁵⁹ *Ibid.*, pp. 112–113, paras. 12 and 15–18.

⁶⁶⁰ See the discussion by Lobel and Ratner, "Bypassing the Security Council: ambiguous authorizations to use force, cease-fires and the Iraqi inspection regime", pp. 144–152, with references to earlier literature. For the Secretary-General the problem was partly jurisdictional, since his specific authority in the Middle East was to supervise the armistice agreements as such.

⁶⁶¹ See paragraph 316 above.

⁶⁶² For the proposed provision, see paragraph 358 below.

⁶⁶³ *I.C.J. Reports 1986* (see footnote 68 above), pp. 392–394.

333. The doctrine has hardly been referred to in the Commission's previous work on State responsibility. The Special Rapporteur, Mr. F. V. García Amador, dealt with it only in relation to "Fault on the part of the alien", which is now subsumed in part two, article 42, paragraph 2, as a basis for limiting the amount of reparation due.⁶⁶⁴ To the extent that "clean hands" may sometimes be a basis for rejecting a claim of diplomatic protection,⁶⁶⁵ the doctrine appears to operate as a ground of inadmissibility rather than as a circumstance precluding wrongfulness or responsibility, and it can be left to be dealt with under the topic of diplomatic protection.

334. Even within the context of diplomatic protection, the authority supporting the existence of a doctrine of "clean hands", whether as a ground of admissibility or otherwise, is, in Salmon's words, "fairly long-standing and divided".⁶⁶⁶ It deals largely with individuals involved in slave-trading and breach of neutrality, and in particular a series of decisions of the United States-Great Britain Mixed Commission set up under a Convention of 8 February 1853 for the settlement of shipowners' compensation claims. According to Salmon, in the cases where the claim was held inadmissible:

In any event, it appears that these cases are all characterized by the fact that *the breach of international law by the victim was the sole cause of the damage claimed, [and] that the cause-and-effect relationship between the damage and the victim's conduct was pure, involving no wrongful act by the respondent State.*

When, on the contrary, the latter has in turn violated international law in taking repressive action against the applicant, the arbitrators have never declared the claim inadmissible.⁶⁶⁷

335. It is true that legal principles based on the underlying notion of good faith can play a role in international law. These include the principle (which underlines the *exceptio*) that a State may not rely on its own wrongful conduct, and the principle *ex turpi causa non oritur actio*. Such principles may be capable of generating new legal consequences within the field of responsibility, as the former appears to have done in the case concerning the *Gabčíkovo-Nagymaros Project*.⁶⁶⁸ But this does not mean that new and vague maxims such as the "clean hands" doctrine should be recognized in chapter V. According to Fitzmaurice:

[A] State which is guilty of illegal conduct may be deprived of the necessary *locus standi in iudicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short,

⁶⁶⁴ *Yearbook ... 1958*, vol. II, document A/CN.4/111, pp. 53–54, paras. 16–21.

⁶⁶⁵ As was the case in two awards cited by Judge Schwebel, *I.C.J. Reports 1986* (see footnote 68 above), pp. 393–394, para. 270: viz. the *Clark* claim (1865), in Moore, op. cit., vol. III, pp. 2738–2739, and the *Pelletier* claim, *Papers relating to the Foreign Relations of the United States, for the Year 1887* (Washington, Government Printing Office, 1888), p. 607. A similar argument was raised in the *Barcelona Traction* case: see *I.C.J. Pleadings, Barcelona Traction, Light and Power Company, Limited (New Application: 1962)*, Vol. X, p. 11, but was not discussed by the Court itself in either phase of that case.

⁶⁶⁶ Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", p. 249.

⁶⁶⁷ *Ibid.*, p. 259. See also García-Arias, "La doctrine des 'clean hands' en droit international public", p. 18; and Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux".

⁶⁶⁸ See paragraph 319 above.

were provoked by it. In some cases, the principle of legitimate reprisals will remove any aspect of illegality from such counter-action.⁶⁶⁹

But chapter V is not concerned with such procedural questions as *locus standi*, or with the admissibility of claims. And it is significant that even in the above passage it is not suggested that the illegal conduct of an injured State (still less its lack of "clean hands") is a distinct circumstance precluding the wrongfulness of the conduct which caused injury to that State.

336. For these reasons there is in the Special Rapporteur's view no basis for including the clean hands doctrine as a new "circumstance precluding wrongfulness", distinct from the *exceptio* or from countermeasures. On the contrary, the conclusion reached by Rousseau seems still to be valid: "[I]t is not possible to consider the 'clean hands' theory as an institution of general customary law".⁶⁷⁰

5. PROCEDURAL AND OTHER INCIDENTS OF INVOKING CIRCUMSTANCES PRECLUDING WRONGFULNESS

337. The only provision in chapter V which deals with the incidents or consequences of invoking a circumstance precluding wrongfulness is article 35. This contrasts with the rather elaborate provisions in the 1969 Vienna Convention dealing with the consequences of invoking a ground for invalidity, termination or suspension of a treaty. A number of different issues need to be considered, beginning with article 35 itself.

(a) *Compensation for losses in cases where chapter V is invoked*

338. The terms of article 35 have already been set out.⁶⁷¹ As its title suggests, the article is a reservation as to questions of possible compensation for damage in certain cases covered by chapter V. It does not confer any rights to compensation, although in relation to the two cases not mentioned, countermeasures and self-defence, by clear implication it excludes any such rights.

339. The brief commentary to article 35 notes that the issue of a reservation with respect to damage first arose in 1979 in the discussion of article 31 dealing with force majeure. Because such a proviso was relevant to other provisions of chapter V it was set aside and only reconsidered in 1980. Although the possibility of compensation was argued "forcefully" in connection with the state of necessity,⁶⁷² article 35 was eventually included as "a reservation in quite general terms", applicable to all the circumstances in chapter V except self-defence and countermeasures.⁶⁷³ But it was emphasized that the inclusion of article 35 did not "prejudge any of the questions of principle that might arise in regard to the matter, either

⁶⁶⁹ Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law, p. 119, quoted by Judge Schwebel, *I.C.J. Reports 1986* (see footnote 68 above), p. 394, para. 271.

⁶⁷⁰ Rousseau, *Droit international public*, p. 177, para. 170.

⁶⁷¹ See paragraph 305 above.

⁶⁷² *Yearbook ... 1980*, vol. II (Part Two), commentary to article 35, p. 61, para. (3).

⁶⁷³ *Ibid.*, para. (4).

with respect to the obligation to indemnify, which would be considered in the context of part 2 of the present draft”, or the location of the article.⁶⁷⁴ Nor was there any discussion of State practice or doctrine on the point, either in the commentary or in the debate following the Drafting Committee’s proposal for article 35.⁶⁷⁵

(i) *Comments of Governments on article 35*

340. Austria suggests that article 35 be reformulated to avoid undercutting chapter V as a whole. Only where international law independently provides for compensation should that possibility arise.⁶⁷⁶ France goes further, proposing the deletion of article 35 on the ground that it “envisages no-fault liability”.⁶⁷⁷ Germany appears to envisage that compensation should be limited to the case of necessity under article 33.⁶⁷⁸ The United Kingdom welcomes article 35 as applied to cases (such as necessity) where the circumstance precluding wrongfulness operates as an excuse rather than a justification.⁶⁷⁹ Japan too supports the principle, but suggests the use of a different term than “compensation”, which is an aspect of reparation for wrongful acts under part two.⁶⁸⁰

(ii) *Is there room for a principle of compensation for loss when circumstances preclude wrongfulness?*

341. The commentary takes a very reserved position with respect to article 35, which it regards as a mere “without prejudice” clause. In part this may have been in the expectation that the issue would be dealt with in part two, but this did not occur. As Japan points out, however, article 35 is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of part two.⁶⁸¹ Rather it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any actual losses suffered by any State directly affected by that reliance. That is a perfectly proper condition, in principle, for allowing the former State to rely on a circumstance precluding wrongfulness. It has nothing to do with the general issue of whether a State may be “liable” for injuries caused by lawful activities causing harm to other States, which has been the subject of a separate topic. Under the secondary rules of responsibility, which are the proper subject of the present draft articles, a State would normally be required to make full reparation to an injured State for conduct which (in terms of article 16) is not in compliance with its international obligations.⁶⁸² If the draft articles define circumstances in which the putatively injured State is not so entitled, it is perfectly proper that they should do so subject to the proviso that any actual losses suffered by

that State, and for which it is not itself responsible, should be met by the invoking State. Formally this falls within the scope of the secondary rules of responsibility, since it relates to a situation where State responsibility *prima facie* arises in terms of the draft articles, but the draft articles go on expressly to exclude that responsibility.⁶⁸³ As a matter of substance, the case for such a condition is that, without it, the State whose conduct would otherwise be unlawful would be able to shift the burden of the defence of its own interests or concerns onto an innocent third State.

342. This was accepted by Hungary in invoking the plea of necessity in the case concerning the *Gabčíkovo-Nagymaros Project*. It would have been unconscionable for Hungary to have sought to impose on Czechoslovakia the whole cost of the cancellation of a joint project, where the cancellation occurred for reasons which were not (or at least not only) attributable to Czechoslovakia. As ICJ noted:

Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.⁶⁸⁴

Because the plea of necessity was rejected on other grounds, the precise scope of such compensation in the circumstances of the case was not decided.⁶⁸⁵

(iii) *To which of the circumstances in chapter V should article 35 apply?*

343. For these reasons there is no *a priori* reason for excluding article 35 from the draft articles. If its retention implies that at least some of the circumstances in chapter V are circumstances precluding responsibility rather than wrongfulness, then that too is within the province of the secondary rules of responsibility, just as it would be if they were to be conceptualized as circumstances mitigating responsibility.⁶⁸⁶ Thus the question becomes one of determining which of the circumstances dealt with in chapter V give rise, or might give rise, to the possibility of compensation for actual losses incurred, and how article 35 should be formulated.

344. It is clear that article 35 should not apply to self-defence or countermeasures, since those circumstances depend upon and relate to prior wrongful conduct of the “target” State, and there is no basis to compensate it for the consequences of its own wrongful conduct. If consent were to be retained as a circumstance precluding wrongfulness, it too ought to be excluded from the scope of article 35. A State whose consent is the basis for the conduct of another State (e.g. overflight, or its occupation of territory) is of course entitled to make its consent conditional on the payment of a fee, or rental, or compensation for harm incurred: this is a matter for negotiation at the time consent is given. However, for the reasons given above, there is no place for article 29 within the framework of chapter V.⁶⁸⁷

⁶⁷⁴ Ibid.

⁶⁷⁵ But for a case where compensation was awarded even though the wrongfulness of the conduct was precluded, see the *Company General of the Orinoco* case (footnote 528 above), cited in *Yearbook ... 1980*, vol. II (Part Two), commentary to article 33, p. 40, para. (17).

⁶⁷⁶ See footnote 7 above.

⁶⁷⁷ Ibid.

⁶⁷⁸ Ibid.

⁶⁷⁹ Ibid.

⁶⁸⁰ A/CN.4/492 (reproduced in the present volume).

⁶⁸¹ Ibid.

⁶⁸² See paragraph 14 above.

⁶⁸³ See the ICJ dictum in the case concerning the *Gabčíkovo-Nagymaros Project*, quoted in paragraph 228 above.

⁶⁸⁴ *I.C.J. Reports 1997* (see footnote 51 above), p. 39, para. 48.

⁶⁸⁵ There is a separate issue, which is that of accounting for accrued costs and damages (*ibid.*, p. 81, paras. 152–153).

⁶⁸⁶ See paragraph 230 above.

⁶⁸⁷ See paragraph 243 above.

345. That leaves the three circumstances (force majeure, distress, necessity) which are in principle independent of the conduct or will of the putatively injured State. As for force majeure, this is defined as the occurrence of an “irresistible force or an unforeseen external event beyond the control of the State, making it materially impossible in the circumstances to perform the obligation”; moreover, the invoking State must not have contributed to the occurrence of the situation of force majeure by its own wrongful conduct, and it must not have assumed the risk of the force majeure event occurring.⁶⁸⁸ In these circumstances there seems to be no reason to require the invoking State to assume any special obligation of compensation. Circumstances beyond its control have made it materially impossible to perform, and it has not accepted the sole risk of their occurrence.⁶⁸⁹ Conversely—and as noted above—there is a strong case for compensation for actual loss where a State relies on necessity, provided at least that the other State has not itself through its own default or neglect produced the situation of necessity.

346. As to distress, in the Special Rapporteur’s view, this is closer to the plea of necessity than it is to force majeure. Assume a vessel in distress of weather and already damaged which puts into a foreign port in order to save the lives of the crew. Why should the vessel not be required to pay for any injury to port installations (e.g. arising from fuel oil leaking from a ruptured tank)? To require it to do so may facilitate reliance on distress as a basis for saving lives, which must be in the general interest.

347. As to the two additional circumstances proposed to be added to chapter V, it is suggested that neither needs to be mentioned in article 35. Compliance with peremptory norms is of common interest and concern to all States in the international community, and there is no reason why one State should be required to compensate any other for the exigencies of complying with that common responsibility. As to the *exceptio*, like countermeasures this is dependent on the wrongful conduct of the “target” State and there is no case for countermeasures. For these reasons the Special Rapporteur would limit the scope of article 35 to distress and necessity.

(iv) *Issues of formulation: a right or a mere reservation?*

348. The remaining question is whether, as to distress and necessity, article 35 should be formulated as a positive right or as a reservation. There are difficulties with the former, however, since the range of cases varies so much and since practice is scarce. On balance it is proposed to retain the form of a savings clause, but to strengthen the language to some extent to make it clear that an innocent third State is not expected to bear alone any actual losses arising from the invocation of distress or necessity.

(v) *Conclusions on article 35*

349. For these reasons article 35 should be retained in relation to distress and necessity. The invocation of those

circumstances should be “without prejudice ... to the question of financial compensation for any actual harm or loss caused by” the act of the invoking State.⁶⁹⁰

(b) *Temporal effect of invoking circumstances precluding wrongfulness*

350. The commentary to the various draft articles in chapter V makes it clear that they only preclude wrongfulness (and thus responsibility) for as long as the circumstances in question continue to exist and to satisfy the conditions laid down for their invocation. The same principle was affirmed by the Tribunal in the *Rainbow Warrior* case and by ICJ in the case concerning the *Gabčíkovo Nagymaros Project*.⁶⁹¹ Although probably implicit in chapter V as adopted on first reading, it is of such significance that it should be spelled out expressly. Of course it may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation (e.g. a breach of a treaty justifying countermeasures may be “material” in terms of article 60 of the 1969 Vienna Convention and permit termination of the treaty). Conversely, the obligation may be fully reinstated or its operation fully restored in principle, but modalities for resuming performance may need to be settled. These are not matters which the draft articles can or should resolve, but at least it should be provided that the invocation of circumstances precluding wrongfulness is without prejudice to “the cessation of any act not in conformity with the obligation in question, and subsequent compliance with that obligation, if and to the extent that the circumstance precluding wrongfulness no longer exists”.⁶⁹²

(c) *Onus of proof*

351. In principle, State responsibility is not to be presumed, and the onus of establishing such responsibility lies on the State which asserts it.⁶⁹³ However, where conduct in conflict with an international obligation of a State is attributable to that State and it seeks to avoid its responsibility by relying on some circumstance under chapter V, the position changes and the onus lies on that State to justify or excuse its conduct. In addition, it will often be the case that only the invoking State is fully aware of the circumstances of the case. It seems that this result is sufficiently achieved by the existing language of chapter V, and that no further provision is required.

(d) *Loss of the right to invoke responsibility*

352. The suggestion has been made that the draft articles should cover the question of loss of the right to invoke responsibility, by analogy with article 45 of the 1969 Vienna Convention, which deals with “Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty”. A number

⁶⁸⁸ See paragraphs 263–265 above, and for the terms of article 31, paragraph 358 below.

⁶⁸⁹ Where the force majeure results from coercion by a third State, that State may be responsible for the consequences to the putatively injured State (see paragraph 204 above). As between the invoking State and the third State, clearly the latter should bear responsibility.

⁶⁹⁰ See paragraph 358 below.

⁶⁹¹ See paragraph 228 above.

⁶⁹² Draft article 35 (para. 358 below).

⁶⁹³ As Arbitrator Max Huber said in *British Claims in the Spanish Zone of Morocco*, “the international responsibility of the State is not to be presumed” (UNRIAA (footnote 292 above), p. 699).

of earlier codification attempts included elements which are appropriately dealt with under this rubric, in particular the “acceptance of non-performance by the other party or parties”.⁶⁹⁴ On the other hand, this issue only arises if responsibility has already been incurred, i.e. if all the conditions for the international responsibility of a State have been satisfied. It therefore belongs properly to part two of the draft articles and will be discussed in that framework.

(e) *Dispute settlement in relation to circumstances precluding wrongfulness*

353. Because the effect of the circumstances dealt with in chapter V is to preclude a responsibility which would otherwise exist in relation to some other State or States, the question of settlement of disputes naturally arises. This is manifested, for example, by the linkage which already exists in part two between countermeasures and dispute settlement, and also by the linkage that the States participating in the United Nations Conference on the Law of Treaties insisted on creating between invocation of *jus cogens* under articles 53 and 64 of the 1969 Vienna Convention, and dispute settlement.⁶⁹⁵

354. It is true that the issue of dispute settlement arises generally with respect to the draft articles as a whole, and especially part three. But whatever conclusion may be reached with respect to part three, there is a procedural issue for chapter V which arises by analogy with article 65 of the 1969 Vienna Convention. If a State seeks to rely on a circumstance precluding wrongfulness, i.e. in order to excuse what would otherwise be a breach of international law, it should, as a minimum, promptly inform the other State or States of that fact, and of the consequences for its performance of the obligation. It should then be a matter for the States concerned to seek to resolve any questions arising, by the procedures provided for in the Charter of the United Nations and in particular by article 33. The matter will have to be returned to in the context of part three of the draft articles, but a provision to this effect should, for the time being at least, be included in chapter V.⁶⁹⁶

6. CONCLUSIONS AS TO CHAPTER V

355. At the outset of this discussion of chapter V, it was noted that the circumstances dealt with probably fell into several categories, and that at least with respect to certain of them it might be more appropriate to speak of circumstances precluding responsibility than wrongfulness.⁶⁹⁷ At least with respect to force majeure, distress and necessity, an alternative formulation for the purposes of chapter V might be “A State is not responsible for its failure to perform an international obligation if the failure is due to” one of those circumstances. This could contrast with the formulation in the case of self-defence, and possibly countermeasures, where it could be said that the

circumstance precludes wrongfulness (and therefore the very idea of “failure”). The conflicting requirements of a peremptory norm, and the *exceptio* in the narrow formulation proposed, would no doubt fall in the latter category as well. But on balance the Special Rapporteur is not persuaded that a categorical distinction needs to be made as between the circumstances to be covered by chapter V. There is in truth a range of cases, and a clear example of distress or even necessity may be more convincing as a circumstance precluding wrongfulness than a marginal case of self-defence. It seems sufficient to deal with all the circumstances under the existing general rubric of chapter V, making the specific distinctions and qualifications between them that have been proposed.

356. A second question, left open in the discussion of article 16, is that of the relationship between that article and chapter V.⁶⁹⁸ It would be inelegant, and would tend to give too much emphasis to the issue of excuses for non-performance, to make article 16 (and a fortiori articles 1 or 3) expressly subject to chapter V. Articles 1 and 3 are in the nature of a statement of principle, like article 26 of the 1969 Vienna Convention (*pacta sunt servanda*), and in the context of the draft articles as a whole there is no need for them to contain further qualifications. The phrase “under international law”, proposed by France for inclusion in article 16, is a sufficient qualification for the purposes of that article.⁶⁹⁹ France had also proposed that chapter V be brought, in the form of a single article, within chapter III.⁷⁰⁰ It is not desirable to compress chapter V into a single article, but it may be that present chapters III–V could be subsections of a single chapter dealing with breach of an international obligation. The Drafting Committee may wish to consider the possibility.

357. Finally there is the question of the order of the various circumstances included in chapter V. The original order was consent, countermeasures, force majeure, distress, necessity and self-defence (an order which may have owed something to the historical link between self-defence and necessity⁷⁰¹). Under modern international law, however, self-defence has more in common with countermeasures than necessity, and should be grouped with it. So too does the *exceptio inadimpleti contractus*, which likewise constitutes a response to unlawful conduct by the State against which the circumstance is invoked. On balance it seems appropriate to list the circumstances now to be covered in chapter V in two subgroups: first, compliance with a peremptory norm, self-defence, countermeasures and the *exceptio*; followed by force majeure, distress and necessity, and then by the ancillary clauses discussed above.

358. For the reasons given, the Special Rapporteur proposes the following articles in chapter V. The notes appended to each article explain very briefly the changes that are proposed.

⁶⁹⁴ *Yearbook ... 1959* (see footnote 6 above), pp. 44 and 63. See also paragraphs 217 and 239 above.

⁶⁹⁵ See also the dictum of the Arbitral Tribunal in the *Rainbow Warrior* case (para. 271 above).

⁶⁹⁶ For the proposed provision, see paragraph 358 below.

⁶⁹⁷ See paragraphs 223–231 above.

⁶⁹⁸ See paragraph 14 above.

⁶⁹⁹ See paragraphs 8 and 14 above.

⁷⁰⁰ See paragraph 218 above.

⁷⁰¹ See the discussion of the “*Caroline*” case (para. 280 above).

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

*Article 29. Consent**Note*

Former article 29 dealt with consent validly given as a circumstance precluding wrongfulness. In many cases, the consent of a State, given in advance of an act, is sufficient to legalize the act in international law, for example, consent to overflight over territory etc. In other cases consent given after the event may amount to a waiver of responsibility, but will not prevent responsibility from arising at the time of the act. Thus either consent is part of the defining elements of a wrongful act, or it is relevant in terms of the loss of the right to invoke responsibility. In neither case is it a circumstance precluding wrongfulness, and accordingly article 29 has been deleted. See further paragraphs 237–243 above.

Article 29 bis. Compliance with a peremptory norm (jus cogens)

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is required in the circumstances by a peremptory norm of general international law.

Note

1. Just as a peremptory norm of international law invalidates an inconsistent treaty, so it must have the effect of excusing non-compliance with an obligation in those rare—but nonetheless conceivable—circumstances where an international obligation, not itself peremptory in character, is overridden by an obligation which is peremptory. For example, a right of transit or passage across territory could not be invoked if the immediate purpose of exercising the right was unlawfully to attack the territory of a third State. See paragraphs 308–315 above.

2. Peremptory norms of general international law are defined by the 1969 Vienna Convention (art. 53), as norms from which no derogation is permitted other than by subsequent norms of the same status. It is not thought necessary to repeat this definition in article 29 bis.

3. Article 29 bis only applies where the conflict between a peremptory norm and some other obligation is clear and direct in the circumstances that have arisen. The act which is otherwise wrongful must be specifically required by the peremptory norm in the circumstances of the case, so as to leave the State concerned no choice of means and no way of complying with both obligations.

4. The question of dispute settlement in relation to article 29 bis will be considered in the context of part three of the draft articles.

Article 29 ter. Self-defence

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

2. Paragraph 1 does not apply to international obligations which are expressed or intended to be obligations of total restraint even for States engaged in armed conflict or acting in self-defence, and in particular to obligations of a humanitarian character relating to the protection of the human person in time of armed conflict or national emergency.

Note

1. Paragraph 1 is unchanged from that provisionally adopted on first reading.

2. Paragraph 2 has been added to draw a distinction between those obligations which constrain even States acting in self-defence (especially in the field of international humanitarian law) and those which, while they may be relevant considerations in applying the criteria of necessity and proportionality which are part of the law of self-defence, are not obligations of “total restraint”. The language of paragraph 2 adapts that of ICJ in the advisory opinion concerning the *Legality of the*

Threat or Use of Nuclear Weapons,⁷⁰² The additional phrase specifying obligations of a humanitarian character draws on article 60 of the 1969 Vienna Convention and is intended to single out, by way of example, the most important category of these obligations of total restraint (see paragraphs 298–304 above).

3. The location of this article is changed to bring it into relation with articles 29 bis and 30 and to emphasize the importance of the “inherent right” of self-defence in the system of the Charter of the United Nations.

Article 30. Countermeasures in respect of an internationally wrongful act

[The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.]

Note

Legitimate countermeasures preclude the wrongfulness of the conduct in question, vis-à-vis the State whose wrongful conduct has prompted the countermeasures. However, the drafting of article 30 depends on decisions still to be taken on second reading in relation to the inclusion and formulation of the articles in part two which deal in detail with countermeasures. Article 30 is retained in square brackets pending consideration of the issue of countermeasures as a whole.

Article 30 bis. Non-compliance caused by prior non-compliance by another State

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the State has been prevented from acting in conformity with the obligation as a direct result of a prior breach of the same or a related international obligation by another State.

Note

1. Article 30 bis reflects the principle expressed in the maxim *exceptio inadimplenti non est adimplendum* (or in the case of treaty obligations, *exceptio inadimplenti contractus*). It bears a certain relationship with countermeasures, in the sense that the later act (otherwise wrongful) of State A is conditioned upon and responds to the prior wrongful act of State B. But in the case of the *exceptio*, the link between the two acts is immediate and direct. As expressed by PCIJ in the *Factory at Chorzów* case, the principle only applies where one State has, by its unlawful act, actually prevented the other from complying with its side of the bargain, i.e. from complying with the same or a related obligation. In other words, the link is a direct causal link, and certainly not a question of one breach provoking another by way of reprisal or retaliation. For example, where State A by failure to complete its share of joint works causes State B itself to fall behind the agreed schedule, State A cannot complain of the latter delay, for it would then in effect be seeking to rely on its own wrongful act (see paragraphs 316–331 above).

2. Because of this direct causal link between the two acts, it is not necessary to include the various restrictions on legitimate countermeasures which apply under part two of the draft articles as adopted on first reading. The principle is a very narrow one, with its own built-in limitations. In particular it only applies if the prior breach is established, if it is causally linked to the later act and if the breaches concern the same or related obligations. For this purpose an obligation may be related either textually (as part of the same instrument) or because it deals with the same subject matter or the same particular situation (see paragraph 328 above).

3. Consideration was given to including in article 30 bis the slightly wider situation of synallagmatic obligations, i.e. obligations (usually contained in a treaty) of such a character that continued compliance with the obligation by one State is conditioned upon similar compliance by the other State. In such a case there is no direct causal link between non-performance by State A and non-performance by State B. It remains possible for State B to comply, but to do so would contradict the expectations underlying the agreement. An example would be

⁷⁰² *I.C.J. Reports 1996* (see footnote 211 above), p. 242, para. 30.

a ceasefire agreement, or an agreement for exchange of prisoners or mutual destruction of weapons. However, it is thought that this situation is adequately dealt with by a combination of other rules: treaty interpretation, the application of countermeasures and the possibility of suspension or even termination of the treaty for breach (see paragraphs 329–331 above).

Article 31. Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure. For the purposes of this article, force majeure is the occurrence of an irresistible force or an unforeseen external event beyond the control of the State making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) The occurrence of force majeure results, either alone or in combination with other factors, from the wrongful conduct of the State invoking it; or

(b) The State has by the obligation assumed the risk of that occurrence.

Note

1. Article 31 was originally entitled “Force majeure and fortuitous event”, but by no means all cases of fortuitous event qualify as excuses, whereas force majeure as defined does sufficiently cover the field. The title to article 31 has been correspondingly simplified, without loss of content in the article itself.

2. As originally drafted, paragraph 1 also covered cases of force majeure which made it impossible for the State “to know that its conduct was not in conformity with” the obligation. This added a confusing subjective element and appeared to contradict the principle that ignorance of wrongfulness (i.e. ignorance of law) is not an excuse. The words were intended to cover cases such as an unforeseen failure of navigational equipment causing an aircraft to intrude on the airspace of another State. The words “in the circumstances” are intended to cover this situation without the need to refer to knowledge of wrongfulness (see paragraph 262 above).

3. As adopted on first reading, paragraph 2 provided that the plea of force majeure “shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility”. But force majeure is narrowly defined in paragraph 1, and this additional limitation seems to go too far in limiting invocation of force majeure. Under the parallel ground for termination of a treaty in article 61, paragraph 2, of the 1969 Vienna Convention, material impossibility can be invoked “if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty”. By analogy with this provision, article 31, paragraph 2 (a), excludes the plea of force majeure in cases where the State has produced or contributed to producing the situation through its own wrongful conduct (see paragraph 263 above).

4. In addition, it is conceivable that by the obligation in question the State may have assumed the risk of a particular occurrence of force majeure. Paragraph 2 (b) excludes the plea of force majeure in such cases (see paragraph 264 above).

Article 32. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question reasonably believed that there was no other way,

in a situation of distress, of saving that person’s own life or the lives of other persons entrusted to his or her care.

2. Paragraph 1 does not apply if:

(a) The situation of distress results, either alone or in combination with other factors, from the wrongful conduct of the State invoking it; or

(b) The conduct in question was likely to create a comparable or greater peril.

Note

1. This article is substantially as proposed on first reading. Certain changes have however been made. First, the State agent whose action is in question must have reasonably believed, on the information available or which should have been available, that life was at risk. The previous standard was entirely objective, but in cases of genuine distress there will usually not be time for the medical or other investigations which would justify applying an objective standard.

2. Secondly, in parallel with the proposed article 31, paragraph 2 (a), a new version of article 32, paragraph 2 (a), is proposed, and for substantially the same reasons. It will often be the case that the State invoking distress has “contributed” even if indirectly to the situation, but it seems that it should only be precluded from relying on distress if that State has contributed to the situation of distress by conduct which is actually wrongful.

3. Thirdly, the requirement that the distress be “extreme” has been deleted. It is not clear what it adds, over and above the other requirements of article 32 (see paragraphs 273–276 above).

Article 33. State of necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless:

(a) The act is the only means of safeguarding an essential interest of that State against a grave and imminent peril; and

(b) The act does not seriously impair:

(i) An essential interest of the State towards which the obligation existed; or

(ii) If the obligation was established for the protection of some common or general interest, that interest.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question arises from a preemptory norm of general international law; or

(b) The international obligation in question explicitly or implicitly excludes the possibility of invoking necessity; or

(c) The State invoking necessity has materially contributed to the situation of necessity occurring.

Note

1. Article 33 corresponds to the text adopted on first reading, with certain drafting amendments. For the most part these are minor in character. For example, like other articles in chapter V, article 33 should be expressed in the present tense, and there is no need to refer to the “state of necessity” in the text, the term “necessity” sufficing.

2. Three changes should be noted. First, paragraph 1 (b) has been reformulated to make it clear that the balance to be struck in cases where the obligation is established in the general interest (e.g. as an obligation *erga omnes*) is that very interest. Secondly, paragraph 2 (b) is no longer confined to treaty obligations. Thirdly, paragraph 2 (c) uses the phrase “materially contributed”, since in the nature of things the invoking State is likely to have contributed in some sense to the situation, and the ques-

tion is whether that contribution is sufficiently material to disentitle it to invoke necessity at all (see paragraphs 292–293 above).

Article 34. Self-defence

Note

See current article 29 *ter*.

Article 34 bis. Procedure for invoking a circumstance precluding wrongfulness

1. A State invoking a circumstance precluding wrongfulness under this chapter should, as soon as possible after it has notice of the circumstance, inform the other State or States concerned in writing of it and of its consequences for the performance of the obligation.

[2. If a dispute arises as to the existence of the circumstance or its consequences for the performance of the obligation, the parties should seek to resolve that dispute:

(a) In a case involving article 29 bis, by the procedures available under the Charter of the United Nations;

(b) In any other case, in accordance with part three.]

Note

Chapter V as adopted on first reading made no provision for the procedure for invoking circumstances precluding wrongfulness, or for settlement of disputes. The latter issue will be discussed in relation to part three of the draft articles, and paragraph 3 of article 34 *bis* is included *pro memoria*, pending further discussion of issues of dispute settlement. However, if a State wishes to invoke a circumstance precluding wrongfulness, it is reasonable that it should inform the other State or States concerned of that fact and of the reasons for it, and paragraph 1 so provides (see paragraphs 353–355 above).

Article 35. Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness under this chapter is without prejudice:

(a) To the cessation of any act not in conformity with the obligation in question, and subsequent compliance with that obligation, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) In the case of articles 32 and 33, to the question of financial compensation for any actual harm or loss caused by that act.

Note

1. Article 35 as adopted on first reading contained a reservation as to compensation for damage arising from four of the circumstances precluding wrongfulness, *viz.* under articles 29 (consent), 31 (force majeure), 32 (distress) and 33 (state of necessity). Article 29 is recommended for deletion (and listing it in article 35 was questionable in any event). In the case of force majeure, the invoking State is acting subject to external forces making it materially impossible to perform the obligation, and it has not assumed the sole risk of non-performance. But in the case of articles 32–33, there is at least a measure of choice on the part of the invoking State, whereas the State or States which would otherwise be entitled to complain of the act in question as a breach of an obligation owed to them have not contributed to, let alone caused, the situation of distress or necessity, and it is not clear why they should be required to suffer actual harm or loss in the interests of the State invoking those circumstances. Accordingly article 35 has been retained in relation to distress and necessity. Without entering into detail on questions of compensation, its language has been modified slightly to make it less neutral and anodyne, as well as to avoid technical difficulties with the terms “damage” and “compensation” (see paragraphs 341–349 above).

2. In addition, article 35 (a) has been added to make it clear that chapter V has a merely preclusive effect. When and to the extent that a circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming

it is still in force) will again have to be complied with, and the State whose earlier non-compliance was excused must act accordingly (see paragraph 350 above).

3. In consequence of the broader scope of article 35, its title has been changed.

D. Countermeasures as provided for in part one, chapter V and part two, chapter III

359. Article 30, which is contained in chapter V of part one, deals with acts which are a “legitimate” countermeasure under international law in response to wrongful conduct on the part of other States. It provides that the wrongfulness of such acts by way of countermeasure is precluded, and thus no responsibility arises with respect to them.⁷⁰³ In the draft articles as adopted on first reading this was emphasized by article 35, which preserved the possibility of compensation for actual harm arising from conduct covered by certain other articles in part five, but not for harm caused by countermeasures or self-defence.⁷⁰⁴

360. In its subsequent work on part two of the draft articles, the Commission went on to deal in some detail with countermeasures, following detailed reports on that subject by Mr. Arangio-Ruiz.⁷⁰⁵ The relevant provisions, which were adopted only after substantial debate and in some cases on the basis of votes taken in plenary,⁷⁰⁶ are contained in chapter III of part two. They comprise articles 47–50. These articles also need to be read in the context of part three dealing with settlement of disputes.

The definition of countermeasures

361. According to article 47, paragraph 1, countermeasures are taken when “an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act”. Their purpose is to induce the latter State (hereafter referred to as the target State) to comply with its obligations of cessation and reparation, and they may be taken for as long as those obligations have not been complied with and the countermeasures remain “necessary in the light of its response to the demands of the injured State” (art. 47, para. 1). Thus countermeasures are seen as essentially remedial rather than punitive in their purpose, but on the other hand there is no specific limit on the obligations which may be disregarded by way of countermeasure. In particular, the notion of “reciprocal countermeasure”, earlier developed by Mr. Riphagen, Special Rapporteur, was not adopted.⁷⁰⁷

362. Article 30 has already made it clear that countermeasures only preclude wrongfulness in the relations be-

⁷⁰³ See paragraph 244 above.

⁷⁰⁴ See paragraph 305 above.

⁷⁰⁵ *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/440 and Add.1, p. 1; and *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1–4, p. 1.

⁷⁰⁶ See *Yearbook ... 1993*, vol. II (Part Two), p. 11, para. 16; *Yearbook ... 1994*, vol. II (Part Two), p. 136, para. 228; and *Yearbook ... 1995*, vol. II (Part Two), p. 61, para. 339.

⁷⁰⁷ See paragraph 324 above.

tween an injured State and the State which has committed the internationally wrongful act. The implications so far as third States are concerned are spelled out in article 47, paragraph 3, which provides that countermeasures against State A cannot justify “a breach of an obligation towards a third State”. On the other hand indirect or consequential effects of countermeasures on a third State, or on third parties generally, which do not involve an independent breach of any obligation are not covered by this proviso.

363. Articles 48–50 impose a range of restrictions and qualifications on the taking of countermeasures, in the interests of avoiding their abuse and of limiting them to the purposes specified in article 47. These are both substantive and procedural. In the debate on countermeasures on first reading, the procedural issues were in fact the more controversial.

Substantive limitations on countermeasures

364. The first substantive limitation, which is well established as a matter of general international law, is that of proportionality. It is formulated in the negative in article 49: countermeasures “shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State”. The use of the term “and” indicates that both the seriousness of the breach and the extent to which it affects the injured State are relevant for this purpose.

365. A number of additional substantive limitations are spelled out in article 50, which is entitled “Prohibited countermeasures”. Some of these are self-evident. Countermeasures may not involve “the threat or use of force as prohibited by the Charter of the United Nations” (art. 50 (a)), or “[a]ny other conduct in contravention of a peremptory norm of general international law” (art. 50 (e)). Nor may they involve “[a]ny conduct which derogates from basic human rights” (art. 50 (d)). Thus belligerent reprisals involving the use of force are excluded. A further specific prohibition relates to “conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents” (art. 50 (c)). But there is no specific exclusion of conduct involving a breach of international humanitarian law norms.

366. In addition, article 50 (b) prohibits “[e]xtreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act”. The use of the term “extreme” here implies that even ordinary countermeasures may be coercive, and indeed, since they are designed to induce the target State to comply with its international obligations, it may be that they are coercive by definition.

367. The draft articles do not deal with the possibility that countermeasures may be expressly or implicitly excluded by the obligation in question. There was no need to do so with respect to non-derogable human rights, since they are already covered by the broader language of article 50 (d). But obligations which fall within the ICJ description of “obligations of total restraint” might also be thought expressly or impliedly to exclude countermeas-

ures.⁷⁰⁸ It is true that the category of “obligations of total restraint” was expressed to deal with limitations on action in self-defence, but the same idea would seem to apply a fortiori to action taken by way of countermeasures.

Procedural conditions on the taking of countermeasures

368. The procedural consequences of taking countermeasures are spelled out in article 48. In the form finally adopted, article 48 distinguishes between “interim measures of protection”, which may be taken by the injured State immediately upon the commission of an internationally wrongful act by the target State, and full-scale countermeasures, which can only be taken after negotiations to resolve the dispute, as required by article 54, have taken place and have not succeeded. The distinction was introduced late in the debate on countermeasures, after the Commission had voted by a narrow majority to require negotiation as a necessary prerequisite to the taking of countermeasures.⁷⁰⁹ “Interim measures of protection” are defined as measures “which are necessary to preserve its rights and which otherwise comply with the requirements of this chapter” (art. 48). This language is not very clear, since under article 47 all countermeasures, to be lawful, have to be necessary to ensure that the injured State’s rights to cessation and reparation under articles 41–46 are respected, and to that extent all countermeasures are, by definition, measures which are “necessary to preserve [the] rights” of the injured State. Although it is not stated in so many words, “interim measures” seem to be measures which are necessary to protect the right of the injured State to take countermeasures if negotiations fail. The intention was evidently to allow immediate measures to be taken in relation to items which might otherwise be removed from the territory of the injured State and be no longer available as a subject of countermeasures. Examples include the freezing of assets or bank accounts or the detention of a ship or aircraft. The use of the phrase “interim measures of protection” has obvious overtones of judicial measures, such as those referred to in article 41, paragraph 1, of the ICJ Statute or article 290 of the United Nations Convention on the Law of the Sea. But while there may be some analogy between the two situations, it is not a close one. Article 48 is concerned with unilateral measures taken by a State at its own risk in response to wrongful conduct, measures which would themselves otherwise be internationally wrongful. Provisional measures ordered or indicated by an international court or tribunal are by definition not unilateral, and would hardly authorize conduct not otherwise in conformity with the international obligations of the State party taking them. “Interim measures of protection” as envisaged in article 48, paragraph 1, are closer to a form of unilateral *saisie conservatoire* such as that which may be available to the holder of a lien under national law.

369. Assuming that negotiations have taken place and have not succeeded in resolving the dispute, article 48 contemplates that countermeasures may then be taken, to the full extent allowed by the other articles of chapter III. Thereafter measures of dispute settlement may be pursued

⁷⁰⁸ See paragraph 301 above.

⁷⁰⁹ See *Yearbook ... 1996*, vol. I, 2456th meeting, p. 171, para. 57.

concurrently with those countermeasures, rather than as a necessary prerequisite. But it goes on to provide that the taking of countermeasures entails an obligation of dispute settlement as set out in part three, if no other “binding dispute settlement procedure” is in force between the injured State and the target State in relation to the dispute (art. 48, para. 2). In order to see how this system is to work, it is necessary to outline the provisions of part three, which is entitled “Settlement of disputes”.

370. Part three provides for a three-stage process. The first involves conciliation by a Conciliation Commission (arts. 56–57 and annex I). If neither party submits the dispute to conciliation, or there is no agreed settlement within six months of the report of the Commission, the parties may agree to refer the dispute to arbitration (arts. 58–59 and annex II). A challenge to the validity of the arbitral award may be instituted by either party: such challenges go to ICJ, unless the parties have within three months agreed on some other forum (art. 60). Thus according to part three, arbitration is normally dependent on the consent of the parties, but if they agree, their consent carries with it the compulsory jurisdiction of ICJ with respect to any dispute over the validity of the resulting award.

371. However special provision is made for countermeasures in article 58, paragraph 2:

In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

This is the only provision for compulsory settlement of disputes in the draft articles, and it arises only when one State party has taken countermeasures against another. Evidently it sidesteps the procedure of the Conciliation Commission. Paragraph 2 does not precisely define “the dispute” which is to be submitted to arbitration. It seems clear that it includes the underlying dispute over the (alleged) internationally wrongful act, i.e. the dispute which has led to the taking of countermeasures. But does it also include any consequential dispute (a dispute which is highly likely to arise in practice), for example over whether the countermeasures taken are lawful in terms of the requirements of chapter III? In other words does “the dispute” include such questions as whether the countermeasures are proportionate, whether they are prohibited by article 50, whether there was a genuine attempt at prior negotiation, and if not, whether the countermeasures qualify as “interim measures” within article 48, paragraph 1? Either view might be defended textually. In favour of the narrower view (i.e. the view that “the dispute” is limited to the underlying dispute arising from the internationally wrongful act) is the point that the obligation of dispute settlement arises as soon as countermeasures have been taken, yet the question of the lawfulness of the countermeasures might depend upon subsequent facts e.g. facts relevant to the disproportionate effects of the countermeasure on the injured State. In favour of the wider view is the point that the dispute is only referred to arbitration at a time when the countermeasures have actually been taken: moreover it would be unfair and unbalanced to require the target State to submit to arbitration the issue of the wrongfulness of its own conduct, without being able to test the wrongfulness of the conduct taken by the injured State in

response. Probably the wider view is the better one. But there are limits, in any event, on the scope of the obligation to arbitrate. For example, it does not seem to extend to counterclaims which the target State may have against the injured State in respect of the underlying dispute.

372. Article 48 goes on to regulate the extent to which countermeasures may be maintained in force pending arbitration. Under article 48, paragraph 3, countermeasures must be suspended “when and to the extent that” the target State is cooperating in the arbitral process. But the obligation to suspend countermeasures terminates if the target State fails to comply with a request or order made by the tribunal, e.g. an order or request for provisional measures, and it apparently does not revive (see article 48, paragraph 4). These provisions only apply if the internationally wrongful act of the target State has ceased, i.e. they do not apply to continuing wrongful acts which the target State has not withdrawn. The distinction between continuing and completed wrongful acts has been dealt with above, and endorsed in principle.⁷¹⁰ In practice, what is a continuing wrongful act depends to some extent on the way in which the injured State formulates its demands, so that the requirement of suspension of countermeasures under article 48, paragraph 3, may not apply in many cases.

Countermeasures in relation to “international crimes” as defined in article 19

373. Chapter IV of part two, which is entitled “International crimes”, spells out the specific consequences of international crimes of States, as defined in article 19 adopted on first reading. The paucity of those consequences, as contrasted with the gravity of the concept of crime so defined, has already been analysed.⁷¹¹ Chapter IV modifies two of the limitations on reparation contained in chapter II,⁷¹² and to that modest extent it creates a specific regime of reparation in relation to “State crimes”. But it makes no such modifications in relation to chapter III, so that there are, according to the draft articles, no special aggravating consequences of State crime in the field of countermeasures. It is true that under the definition of “injured State” in article 40 all States are defined as injured by a crime, and that therefore all States have the individual right to seek reparation for, and to take countermeasures in response to, a crime. The draft articles, however, contain no provision dealing with the possible consequences of many States taking countermeasures in response to a wrongful act described as a “crime”, except perhaps for article 53 (d) which provides that States should “cooperate with other States in the application of measures designed to eliminate the consequences of the crime”. It appears that proportionality under article 48 is judged on a bilateral basis, as between the injured State and the target State, so that there is no mechanism for assessing the overall proportionality of conduct taken by way of collective countermeasures. This is however a broader consequence of the width of the definition of “injured

⁷¹⁰ See paragraphs 93–113 above.

⁷¹¹ See *Yearbook ... 1998* (footnote 2 above), p. 11, para. 51, and p. 22, paras. 84–86.

⁷¹² See *Yearbook ... 1996*, vol. II (Part Two), p. 64, article 52, referring to the limitations contained in articles 43 (c)–(d) and 45, para. 3.

State”, and of the fact that all injured States are treated by article 40 in the same way, whether the internationally wrongful act specifically concerns them or whether they are reacting, as it were in the public interest, to a grave breach of international law or of human rights.

374. In 1998 the Commission decided to set aside the notion of State crime for the time being, and to explore “whether the systematic development in the draft articles of key notions such as obligations (*erga omnes*), peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19”.⁷¹³

1. REFLECTIONS ON THE TREATMENT OF COUNTERMEASURES IN PART TWO

375. It is proposed in this section to review a number of the general issues raised by the treatment of countermeasures in part two. There are two principal questions to be decided at this stage: (a) whether to retain the treatment of countermeasures, and (b) how to deal with the explicit linkage between countermeasures and dispute settlement, given that the status of part three, and the form of the draft articles themselves, are unresolved. There is a further and consequential question, left open in the discussion of chapter V of part one, viz. the precise formulation of article 30.

(a) *Comments of Governments*

376. The comments of Governments on countermeasures have been both general and specific in character. Whatever their purpose and content, they clearly show that States consider countermeasures as a key issue in the context of the draft articles on State responsibility.

377. At the general level a number of Governments stress that the treatment of countermeasures in part two, with its emphasis on settlement of disputes, implies that the draft articles would necessarily take the form of a convention. Thus Germany notes that “[t]he Commission will have to bear in mind that the format of the project will have an impact on part three on dispute settlement and, by extension, on part two on countermeasures as well”.⁷¹⁴

378. Governments have also expressed their concerns as to the relationship between the settlement of disputes and the regime of countermeasures. Article 58, paragraph 2, is particularly criticized in that respect: whereas a few Governments are in favour of its retention,⁷¹⁵ many others have pointed out that it “could incite a State to take countermeasures to force another State to accept recourse to arbitration”.⁷¹⁶ Such a provision would then contradict the need to limit recourse to countermeasures. Indeed it

could create “a certain imbalance between the right of the wrongdoing State to take the case to arbitration, whereas the injured State does not have this right when the original dispute as to the responsibility of the wrongdoing State arises”.⁷¹⁷ Several Governments call, if not for its deletion,⁷¹⁸ at least for careful reconsideration.

379. It is not the function of the present report to make proposals for each of the articles on countermeasures in part two, but it is useful to summarize the tenor of the specific comments made so far,⁷¹⁹ especially since these concern not only the formulation of the articles but their place in the draft as a whole.

380. A first distinction is to be drawn between Governments which favour the general approach taken by the Commission and those which have expressed doubts about it. Among the former, Germany considers the relevant provisions in the draft as “generally striking a careful balance between the rights and interests of injured States and those States finding themselves at the receiving end of such countermeasures”.⁷²⁰ Among the latter, critics and concerns proceed from different, indeed sometimes opposite, perspectives. The United States, for example, “believes that the draft articles contain unsupported restrictions”⁷²¹ on the use of countermeasures and, consequently, that the Commission should “delete or substantially revise the prohibitions”⁷²² on them. By contrast, Argentina calls for a careful reconsideration of the topic by the Commission, so as to “reverse the presumption of the lawfulness of countermeasures by providing that, while States do not have a right to take them, in certain cases, under circumstances of exceptional gravity, their use is not unlawful”.⁷²³ Other States are of the opinion that the issues raised by countermeasures would be “more appropriately addressed in a specialist forum”⁷²⁴ or should be dealt with by the Commission within the context of a separate study, and they therefore support the entire deletion of articles 47–50.⁷²⁵ But Italy, among others, strongly opposes that view and considers it “of the utmost importance that the countermeasures regime (for example, conditions relating to resort to countermeasures, and prohibited countermeasures) should be codified”.⁷²⁶

381. Whatever their position as to the proper treatment of countermeasures in the draft articles, Governments

⁷¹⁷ *Ibid.*, p. 173. Denmark on behalf of the Nordic countries. See also United States of America (*ibid.*, pp. 172–173) and Japan (A/CN.4/492, reproduced in the present volume).

⁷¹⁸ As suggested by Mexico (*Yearbook ... 1998* (see footnote 7 above), p. 173).

⁷¹⁹ As for comments on specific articles, those relating to article 30 have already been mentioned (paras. 248–249 above).

⁷²⁰ *Yearbook ... 1998* (see footnote 7 above), p. 152. See also Czech Republic (*ibid.*), Mongolia (*ibid.*, p. 151) and Japan (A/CN.4/492, reproduced in the present volume).

⁷²¹ *Yearbook ... 1998* (see footnote 7 above), p. 100.

⁷²² *Ibid.*, p. 154.

⁷²³ *Ibid.*, pp. 151–152. See in that respect the comment made by the Czech Republic (*ibid.*, p. 152).

⁷²⁴ *Ibid.*, p. 153, as stated by Singapore.

⁷²⁵ *Ibid.* This option is proposed by France (p. 152) and the United Kingdom (p. 154), the latter being satisfied, however, with the present drafting of article 30.

⁷²⁶ *Ibid.*, p. 153. See also Ireland (*ibid.*).

⁷¹³ *Yearbook ... 1998*, vol. II (Part Two), p. 77, para. 331.

⁷¹⁴ *Yearbook ... 1998* (see footnote 7 above), p. 97. See also comments made by Italy (*ibid.*) and Singapore (referring to the WTO procedures, *ibid.*, p. 140).

⁷¹⁵ *Ibid.*, p. 170 (Switzerland and Germany). For Argentina, “[c]ountermeasures and compulsory arbitration should be regarded as two sides of the same coin” (*ibid.*, p. 173).

⁷¹⁶ *Ibid.*, p. 173, in the words used by France. See also comments made by Mexico and the United Kingdom (*ibid.*, pp. 173–174).

have also expressed opinions about specific issues related to them. These include:

(a) The difficulty of distinguishing in practice between countermeasures and interim measures of protection referred to in article 48, paragraph 1;⁷²⁷

(b) The key issue of whether the measures taken should be related or have some nexus to the right infringed;⁷²⁸

(c) The eventuality of “collective measures”⁷²⁹ and of countermeasures in case of breach of multilateral or *erga omnes* obligations;⁷³⁰

(d) The potential effects of the distinction between crimes and delicts upon the regime of countermeasures,⁷³¹ and, more generally, the question whether countermeasures should be conceived as having a punitive function;⁷³²

(e) The position of third States;⁷³³

(f) The impact of countermeasures on the economic situation of the target State⁷³⁴ and on human rights;⁷³⁵

(g) The influence of countermeasures in aggravating inequalities between States, since resort to countermeasures “favours the powerful countries”.⁷³⁶

(b) *Developments in the law and practice relating to countermeasures*

382. The law and literature on countermeasures are thoroughly reviewed in the third and fourth reports of Mr. Arangio-Ruiz,⁷³⁷ and it is not necessary to revisit them at this stage. Since the Commission completed the first reading of the draft articles, however, ICJ has considered the question for the first time, and its handling of it is of particular interest.

383. In the case concerning the *Gabčíkovo-Nagymaros Project*, ICJ had to decide upon the legality of Variant C, the unilateral diversion of the Danube through the

⁷²⁷ *Ibid.*, pp. 156–157. This is especially a matter of concern for Ireland, Germany, the United Kingdom and the United States (*ibid.*) and Japan (A/CN.4/492, reproduced in the present volume). *Contra*, see the comment by Argentina (*Yearbook ... 1998* (footnote 7 above), p. 173).

⁷²⁸ As Singapore puts it (*Yearbook ... 1998* (footnote 7 above), p. 153).

⁷²⁹ Japan (A/CN.4/492, reproduced in the present volume).

⁷³⁰ See *Yearbook ... 1998* (footnote 7 above), comments by the United Kingdom, p. 154.

⁷³¹ *Ibid.*, for example, Mongolia (p. 153). See also Greece (A/CN.4/492, reproduced in the present volume).

⁷³² *Yearbook ... 1998* (see footnote 7 above). See the differing views expressed by Denmark on behalf of the Nordic countries (p. 152), Ireland (*ibid.*, p. 153), on the one hand, and France (*ibid.*, p. 152) on the other.

⁷³³ *Ibid.*, Denmark on behalf of the Nordic countries (p. 152) and Singapore (p. 154).

⁷³⁴ *Ibid.*, pp. 161–162, Ireland, Switzerland, United Kingdom, United States; Singapore (p. 154); and Japan (A/CN.4/492, reproduced in the present volume).

⁷³⁵ *Yearbook ... 1998* (see footnote 7 above), Ireland, United Kingdom, United States (pp. 161–163) and Japan (A/CN.4/492, reproduced in the present volume).

⁷³⁶ *Yearbook ... 1998* (see footnote 7 above), p. 152, Denmark on behalf of the Nordic countries, Argentina (*ibid.*, p. 151) and Singapore (*ibid.*, p. 154).

⁷³⁷ See footnote 705 above.

Gabčíkovo power plant.⁷³⁸ Czechoslovakia had taken that action following Hungary’s refusal to proceed with the works assigned to it under the 1977 Treaty, relying on several arguments but not explicitly on the argument that the implementation of Variant C was a countermeasure. In its argument before the Court, Slovakia similarly “did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful”, but it did express the view that “Variant C could be presented as a justified countermeasure to Hungary’s illegal acts”.⁷³⁹ The Court, having held that Hungary’s refusal to continue the works could not be justified, but that Variant C was itself an internationally wrongful act, went on to consider whether Variant C could be justified as a countermeasure. In the first place it referred to two conditions for justified countermeasures which were satisfied in the circumstances:

In order to be justifiable, a countermeasure must meet certain conditions ...

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary’s suspension and abandonment of works and that it was directed against that State; and it is equally clear, in the Court’s view, that Hungary’s actions were internationally wrongful.

Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. It is clear from the facts of the case ... that Czechoslovakia requested Hungary to resume the performance of its treaty obligations on many occasions.⁷⁴⁰

However, the Court held that Czechoslovakia’s actions failed to fulfil a third criterion, that of proportionality, and they were accordingly unlawful.

In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

...

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube—with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz—failed to respect the proportionality which is required by international law.

...

The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate. It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its

⁷³⁸ For the facts in further detail, see paragraphs 103–104 above.

⁷³⁹ *I.C.J. Reports 1997* (see footnote 51 above), p. 55, para. 82.

⁷⁴⁰ *Ibid.*, pp. 55–56, paras. 83–84. In support of its statement of the law of countermeasures, the Court referred generally to its judgment in *Military and Paramilitary Activities in and against Nicaragua* (see footnote 68 above), p. 127, para. 249; the decision of 9 December 1978 in the case concerning the *Air Service Agreement of 27 March 1946 between the United States of America and France*, UNRIIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 443 et seq.; and to the Commission’s draft articles 47–50.

obligations under international law, and that the measure must therefore be reversible.⁷⁴¹

384. Thus ICJ, in a bilateral context in which no issue of prohibited countermeasures in article 50 was at stake, endorsed four distinct elements of the law of countermeasures: (a) the countermeasure must be taken in response to an unlawful act; (b) it must be preceded by a demand for compliance by the injured State;⁷⁴² (c) the countermeasure must be proportionate, in the sense of “commensurate with the injury suffered, taking account of the rights in question”; and (d) the countermeasure must have as its purpose “to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible”. In particular, the Court accepted the conception of countermeasures underlying article 47, as well as the requirement of proportionality (while adding useful clarifications in relation to the latter, and adopting a stricter approach than the language of article 49 might suggest). It took a slightly different approach to the question of prior notification, dealt with in article 48, which will deserve careful consideration as an alternative to the existing formulation. Overall its position was a balanced one. On the one hand, it did not doubt that countermeasures may justify otherwise unlawful conduct, to the extent of making such conduct “lawful” (as distinct from “legitimate”, the term used in article 30 but avoided in the judgment), and it conceived of countermeasures as falling properly within the scope of the State responsibility. On the other hand, it formulated relatively strict, cumulative requirements for lawful countermeasures and applied them rigorously to the facts of the case, drawing *inter alia* on the Commission’s earlier work.

(c) *Particular issues raised by articles 47–50*

385. The review of articles 47–50 undertaken so far suggests that a number of issues are left unresolved by the draft articles, especially on matters of procedure. But these should not be allowed to obscure the value of these articles as a first attempt to formulate the international law rules governing the practice of countermeasures. That practice is rather widespread, is directly related to issues of State responsibility, and has given rise to concerns as to its possible abuse. In formulating articles 30 and 47–50, the Commission succeeded in producing a measure of agreement on key questions, as to which earlier practice and decisions were uncertain or equivocal. In particular the following points appear to be generally accepted:

(a) Countermeasures can only be justified in response to conduct which is internationally wrongful in law and in fact. The belief of the “injured” State in the wrongfulness is not a sufficient basis. Thus “an injured State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and

⁷⁴¹ *I.C.J. Reports 1997* (see footnote 51 above), pp. 56–57, paras. 85 and 87. The Court referred to the importance of the equality of the parties in control of the waters of an international watercourse, and noted also that Hungary’s consent to the diversion of water from the Danube had been within the framework of a joint project and not a unilateral diversion.

⁷⁴² The Court did not mention any requirement of prior negotiations, although in that case there had been extensive negotiations.

may incur responsibility for an unlawful act in the event of an incorrect assessment”,⁷⁴³

(b) Countermeasures are not limited to “reciprocal” measures in relation to the same or a related obligation. This enables a clearer distinction to be drawn between countermeasures and the application of the *exceptio in-adimpleti contractus*;⁷⁴⁴

(c) The principle of proportionality is a key limiting constraint on the taking of countermeasures. ICJ has given further guidance on its application by reference to the notion of “commensurability” and the requirement that the effects of a countermeasure should as far as possible be reversible in their effects;⁷⁴⁵

(d) The purpose of countermeasures is to induce the target State to cease its unlawful conduct and to provide appropriate reparation.

The comments of Governments, summarized above, raise a number of particular points about the formulation of articles 47–50. For the most part these can be reflected in specific changes to the text or the commentary: this will be a matter for the Commission at its fifty-second session, in 2000, assuming that it is decided to retain the detailed provisions on countermeasures in articles 47–50. Two general matters have however given rise to widespread concern and should be dealt with at this preliminary stage.

(i) *Dispute settlement and the form of the draft articles*

386. A key question in the formulation of the provisions on countermeasures relates to the explicit link drawn between the taking of countermeasures and compulsory arbitration. The existing provisions are drafted on the assumption that the draft articles will be adopted as a convention rather than, for example, as a declaration annexed to a resolution of the General Assembly. As many Governments have noted, this is a controversial assumption, and in any event the Commission has not yet decided on the form in which the draft articles should be recommended to the General Assembly. It does not seem desirable to propose texts dealing with any specific issue, such as countermeasures, if those texts assume that only one possible solution is open as to the form of the draft articles.

387. There are, moreover, specific difficulties with the current linkage between countermeasures and dispute settlement, which make those linkages problematic, whatever position may be taken on the general issue of the form of the draft articles. These concern both “interim measures” and the general regime of countermeasures.

388. The last-minute inclusion of the notion of “interim measures” in article 48, and the difficulties with the terminology, have already been mentioned. The language of “interim measures” is potentially misleading, but it is also

⁷⁴³ *Yearbook ... 1996*, vol. II (Part Two), commentary to article 47 p. 67, para. (1). The earlier dictum to the contrary in the case concerning the *Air Service Agreement of 27 March 1946* (see footnote 740 above), thus does not reflect international law.

⁷⁴⁴ See paragraphs 324–325 above. The Commission has decided to defer consideration of the formulation of the *exceptio*, pending conclusions on the content and formulation of the articles on countermeasures.

⁷⁴⁵ See paragraph 383 above.

unhelpful, since it fails to provide any criterion for distinguishing between “interim” and other forms of countermeasure. All countermeasures are intended to induce the target State to cease the wrongful conduct and to provide reparation, and thus to protect the rights of the injured State in that regard. All countermeasures are instrumental and thus their effects should be, as far as possible, reversible as ICJ held in the *Gabčíkovo-Nagymaros Project* case.⁷⁴⁶ In that important sense all countermeasures are “interim” measures, which envisage the normalization of relations through the resolution of the underlying dispute.⁷⁴⁷ Thus the second sentence of article 48 uses a misleading term to indicate a so far undefined concept, and it clearly needs to be revisited. A simple solution would be to follow the Court’s requirement that before taking countermeasures, the injured State must at least have called on the wrongdoing State to comply with the relevant primary rule or to offer reparation.

389. Turning to the general regime of countermeasures, the position here is at least as problematic. In one sense to make a connection between the taking of countermeasures and resort to arbitration may be seen as progressive, as a step towards moderating the old system of “reprisals”, and as contributing towards the peaceful settlement of international disputes. It recalls the connection made, exceptionally, in the 1969 Vienna Convention between compulsory third-party settlement and the invocation of a peremptory norm (*jus cogens*) as a ground for the invalidity of a treaty.⁷⁴⁸ That procedure, which has never been invoked, can be defended as maintaining the stability of treaty relations.⁷⁴⁹ By contrast the linkage of countermeasures with compulsory arbitration has serious disadvantages and could be a cause of instability. The essential difficulty is that only the target State is entitled to commence compulsory arbitration after countermeasures have been taken, and this places the two disputants in a position of inequality that it is difficult to defend by any principle. Why should the State which has allegedly committed an internationally wrongful act be entitled to require the injured State to arbitrate the dispute, but the injured State not have the same right? An injured State seeking third-party settlement of a dispute thus has an incentive to take countermeasures (even, perhaps, excessive or disproportionate countermeasures) in order to induce the target State to commence arbitration. It should be the policy of international law to discourage resort to countermeasures, but in this respect the draft articles may tend to encourage them. The draft articles deliberately do not require third-party judicial settlement of disputes concerning State responsibility, but since countermeasures can be taken, in principle, in relation to any breach of an international obligation, the effect of article 58, paragraph 2, is arguably to introduce such a system by the back door, and

in an unequal way. There are also technical difficulties with triggering an obligation to arbitrate by reference to the taking of countermeasures: for example, a State which declines to characterize its conduct as a countermeasure may thereby escape that obligation,⁷⁵⁰ and there are difficulties with respect to issues such as counterclaims, which are not provided for in the existing text.⁷⁵¹ For all these reasons, the Special Rapporteur is firmly of the view that the linkage between the taking of countermeasures and compulsory arbitration should not be retained.

(ii) *The balance between “injured” and “target” States*

390. A second point of widespread concern relates to the de facto inequality which countermeasures imply, since almost by definition the most powerful States will have the greatest scope and capacity to take countermeasures. It was precisely that consideration which led the Commission on first reading to introduce a special regime of compulsory arbitration in cases where countermeasures have been taken. But the States which have expressed this concern generally do not support the view that countermeasures should be deleted from the draft articles. In particular, in the Special Rapporteur’s view article 30 cannot be deleted without “decodifying” international law. But once the principle of article 30 is accepted, it is desirable that appropriate limits be set on resort to countermeasures, and in particular that their relationship to cessation and restitution be established. This is a proper task of the draft articles: for the Commission now to decline to carry it through would only tend to accentuate the inequality inherent in the capacity to take countermeasures.

2. GENERAL CONCLUSIONS

(a) *Options for the Commission*

391. To summarize, the Commission would seem to have the following options in dealing with countermeasures:

(a) Option 1 is to retain article 30 in essentially its present form, but to delete the treatment of countermeasures in part two;

(b) Option 2 is not to deal with countermeasures in part two, but to incorporate substantial elements of the legal regime of countermeasures into article 30;

(c) Option 3 is to engage in a substantial treatment of countermeasures in part two, along the lines of the present text, including the linkage with dispute settlement (but without prejudice to other issues which have been raised as to specific articles);

⁷⁴⁶ Ibid.

⁷⁴⁷ See further Crawford, “Counter-measures as interim measures”.

⁷⁴⁸ See articles 53, 64 and 66 of the 1969 Vienna Convention. In that case the linkage with dispute settlement was made not by the Commission but by the United Nations Conference on Diplomatic Intercourse and Immunities.

⁷⁴⁹ There is an element of paradox in providing, on the one hand, that the parties to a treaty cannot, on pain of invalidity, opt out of certain peremptory norms of interest to the international community as a whole, and on the other hand restricting challenges to invalid treaties to the parties thereto.

⁷⁵⁰ An analogous problem arose in the International Tribunal for the Law of the Sea in the case of the *M/V “Saiga” (Saint Vincent and the Grenadines v. Guinea)*, dispute concerning the prompt release of the *M/V “Saiga”* and its crew, judgment of 4 December 1997, para. 72, where the Tribunal held that “given the choice between a legal classification that implies a violation of international law and one that avoids such implication it must opt for the latter”. On this point the Tribunal divided 12–9.

⁷⁵¹ See paragraph 393 below. In many State responsibility cases in which countermeasures have been taken, issues of potential counterclaims will arise.

(d) Option 4 is to deal with countermeasures in part two, dealing with the various criticisms that have been made of articles 47–50, but avoiding any specific linkage with dispute settlement.

392. The Special Rapporteur prefers the fourth of these options. The subject of countermeasures in response to an internationally wrongful act is properly regarded as within the field of State responsibility, and it has always been envisaged that it would be included in part two of the draft articles. The link established in article 47 between countermeasures, cessation of the wrongful conduct and reparation is helpful, and overall the provisions on countermeasures seem to have had a beneficial effect in consolidating the law, as the Court showed in the *Gabčíkovo-Nagymaros Project* case.⁷⁵² There is widespread concern among States and commentators as to the potential for abuse of countermeasures. But there is also a general recognition that the institution of countermeasures exists in international law, a recognition reflected in the Commission's decision in principle to retain article 30 within chapter V. In the Special Rapporteur's view, it would be inappropriate to recognize that countermeasures are a circumstance precluding wrongfulness within the law of State responsibility—i.e. that they may constitute an excuse or justification for wrongful conduct—and not at the same time to spell out at least the main legal limitations upon the taking of countermeasures.⁷⁵³ It is true that there are difficulties with articles 47–50, in particular the linkage with dispute settlement and the failure to deal with problems arising from “collective” countermeasures in situations where there are many “injured States”. But these difficulties can be resolved in the framework of the consideration of part two, and in the case of “collective” responses to breaches of obligation *erga omnes* they will have to be addressed in any event, in the context of article 40 and the incidence of obligations *erga omnes*.

⁷⁵² See footnote 51 above.

⁷⁵³ As noted above (para. 295), the analogy between self-defence and countermeasures does not require the adoption of the same approach to both in the framework of chapter V of part one. The law of self-defence is relatively well developed and is incorporated in Article 51 of the Charter of the United Nations. Nor has the law of self-defence ever been treated as an aspect of the law of State responsibility, as distinct from a point of reference. In all these respects the position of countermeasures is different.

393. There is admittedly a slight awkwardness in referring to countermeasures first of all in the somewhat “incidental” context of article 30, before going on to deal with them in further detail in part two, and this might be a reason for preferring option 2 above.⁷⁵⁴ But the difficulty seems essentially presentational, and the main focus of countermeasures should be on their instrumental purpose in relation to cessation and reparation, rather than their incidental effect as circumstances precluding wrongfulness. This is perhaps the principal advance made in articles 47–50: countermeasures are seen in relation to the obligations of cessation and reparation set out in part two, and not simply as a diffuse and relatively indiscriminate form of sanction, reprisal or penalty. In these circumstances it is difficult to avoid referring to the secondary obligations arising from an internationally wrongful act, as set out in part two. Overall this consideration is insufficient to tilt the balance in favour of option 2 as set out in paragraph 391 above.

(b) *The formulation of article 30*

394. If this recommendation is accepted, it becomes possible to recommend the precise terms of article 30, a matter postponed for reasons already explained.⁷⁵⁵ The Special Rapporteur agrees with the suggestions made by some Governments that article 30 should cross-refer to the treatment of countermeasures in part two, and that it should distinguish between countermeasures and the “measures” taken by or under the auspices of international organizations under their own constituent instruments.⁷⁵⁶ On that basis he proposes the following text for article 30:

“The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if and to the extent that the act constitutes a lawful countermeasure as provided for in articles [xx]–[xx].”

⁷⁵⁴ References to later articles of a law-making text, while they may be awkward, are certainly not unknown: see, for example, the 1969 Vienna Convention (arts. 17, para. 1, 27, 44, paras. 1, 4 and 5, 45 and 48, para. 3).

⁷⁵⁵ See paragraph 250 above.

⁷⁵⁶ For these comments, see paragraphs 248–249 and 376–381 above.

ANNEX

INTERFERENCE WITH CONTRACTUAL RIGHTS: A BRIEF REVIEW OF THE COMPARATIVE LAW EXPERIENCE

1. In assessing whether article 27 of the draft articles should apply to cases where one State induces another to breach a treaty with a third State, reference is sometimes made to general principles of law, e.g. to the effect that it is a wrong to interfere with the legal right of another, including a contractual right.¹ In order to test this argument at its source, it is useful to undertake a brief comparative review.² As will be seen, English, French, German and United States law all recognize that knowingly and intentionally inducing a breach of contract is a civil wrong, but there are important differences between them. By contrast, no such liability seems to be recognized under Islamic law.

English law³

2. The English law of inducing breach of contract is based on a general principle, formulated by Lord Macnaghten in *Quinn v. Leathem* in the following terms:

[I]t is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.⁴

The tort is described variously as inducing or procuring breach of contract, actionable interference with contractual rights or “the principle in *Lumley v. Gye*”. It has been applied to contracts of all kinds. Since its inception it has been seen as an aspect of the more general tort of direct invasion of legal rights. In other words, it has been held wrongful intentionally and without justification to bring

¹ See, for example, Lauterpacht, “Contracts to break a contract”, p. 374.

² The Special Rapporteur would like to thank Mr. Roger O’Keefe of Magdalene College, Cambridge, for his assistance in preparing this annex, and Messrs Heinz Kötz, Basil Markesinis and Tony Weir for their useful comments on it.

³ The matter is governed by the common law in England, not by statute: the law appears to be substantially similar in other common-law jurisdictions. For the position in the United States, see paragraphs 4–5 below.

⁴ *The Law Reports*, House of Lords (1901), p. 510. The tort was first recognized in *Lumley v. Gye* (1853), *The All England Law Reports Reprint 1843–1860*, p. 216. Leading modern authorities are *J. T. Stratford & Sons Ltd v. Lindley and Another*, House of Lords, *Law Reports 1965*, p. 269; *Merkur Island Corpn. v. Laughton*, *ibid.*, *Law Reports 1983*, p. 570; *Associated British Ports v. TGWU*, *ibid.*, *The Weekly Law Reports 1989*, vol. 1, p. 939; *Ticehurst and Thompson v. British Telecommunications plc*, Court of Appeal [1992] ICR 383; *Middlebrook Mushrooms Ltd v. TGWU*, *ibid.* [1993] ICR 612; and *Law Debenture Trust Corporation v. Ural Caspian Oil Corporation Ltd*, *ibid.*, *The Weekly Law Reports 1994*, vol. 3, p. 1221.

about the violation of a legal right, in this case, the legal right of one party vis-à-vis the other to have a contract performed.⁵

3. For an act of inducement to be actionable, three elements are necessary. First, the procurer must know of the existence of the contract and intend to interfere with its performance.⁶ However, knowledge of the contract’s precise terms is unnecessary.⁷ Secondly, the procurer must not have had any sufficient justification for so acting.⁸ In this respect, the courts may have regard “to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and ... the object of the person in procuring the breach”.⁹ To justify an inducement, it is not enough to show that the defendant was acting in good faith in the pursuit of a legitimate interest; there has to be something in the nature of a moral duty,¹⁰ or a distinct legal right to act.¹¹ Thirdly, the contract must actually have been broken, causing actual damage to the plaintiff.¹²

⁵ See *Lumley v. Gye* (footnote 4 above), pp. 216 and 232 (Erle); *Allen v. Flood*, House of Lords, *The Law Reports* (1898), p. 96 (Lord Watson); *Quinn v. Leathem* (para. 2 above); *Associated British Ports v. TGWU* (footnote 4 above), pp. 939, 959 (Butler-Sloss) and 964 (Stuart-Smith); *F. v. Wirral Metropolitan Council*, *The Weekly Law Reports 1991*, vol. 2, p. 1132 (Ralph Gibson and Stuart-Smith).

⁶ See *Merkur Island Corpn. v. Laughton* (footnote 4 above), p. 608 (Lord Diplock); and *Middlebrook Mushrooms Ltd v. TGWU* (footnote 760 above) (Neill).

⁷ *J. T. Stratford & Sons Ltd v. Lindley and Another* (see footnote 4 above); *Merkur Island Corpn. v. Laughton* (see footnote 4 above), p. 609 (Lord Diplock).

⁸ According to *Clerk & Lindsell on Torts*, 17th ed. (London, Sweet & Maxwell, 1995), p. 1218, “it is impossible to lay down any general rule about the nature of this defence”. See, for example, *Glamorgan Coal Co. Ltd. v. South Wales Miners’ Federation* [1903] 2 K.B. 545, 573–574 (Romer), 577 (Striling); *Smithies v. National Association of Operative Plasterers*, House of Lords, *The Law Reports* (1909), p. 310; and *Edwin Hill v. First National Finance Corporation plc*, *The Weekly Law Reports 1989*, vol. 1, p. 225 (Court of Appeal).

⁹ *Glamorgan Coal Co. Ltd.* (see footnote 8 above), p. 574 (Romer), adopted in *Greig v. Insole*, *The Weekly Law Reports 1978*, vol. 1, p. 340 (Slade), and quoted in *British Industrial Plastics v. Ferguson*, *All England Law Reports 1938*, vol. 4, p. 510 (Slessor).

¹⁰ *Ibid.*

¹¹ For example, *Edwin Hill v. First National Finance Corporation plc* (footnote 8 above). Some other common-law jurisdictions take a more liberal approach to justification.

¹² *Jones Brothers (Hunstanton) Ltd. v. Stevens*, *The Law Reports 1955*, vol. I (Queen’s Bench), p. 275.

United States law¹³

4. *The Restatement of the Law, Second, Torts* (1979) deals with “Intentional interference with performance of contract by third person”: paragraph 766 provides that:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

The term “improperly” is used by the drafters of paragraph 766 to connote “unjustified”. The latter term, which is used most frequently by the courts, was thought to imply too strongly that the factors involved were all matters of defence. “Factors in determining whether interference is improper” are spelled out in paragraph 767. They include:

- (a) The nature of the actor’s conduct;
- (b) The actor’s motive;
- (c) The interests of the other with which the actor’s conduct interferes;
- (d) The interests sought to be advanced by the actor;
- (e) The social interests in protecting the freedom of action of the actor and the contractual interests of the other;
- (f) The proximity or remoteness of the actor’s conduct to the interference; and
- (g) The relations between the parties.

5. Comment *c* to paragraph 766 traces the development of United States law back to the same English source, *Lumley v. Gye*.¹⁴ The tort has been applied in the United States to all types of contract, except contracts to marry.¹⁵ As under English law, there must be knowledge of the contract on the part of the defendant (comment *i*) and an intention to interfere with the performance of the contract (comment *j*).

German law¹⁶

6. Inducing breach of contract (*Verleitung zum Vertragsbruch*) constitutes a delict under § 826 BGB (Civil Code), which establishes a general form of tortious responsibility for intentional infliction of harm

¹³ The case law is usefully summarized in Keeton, ed., *Prosser and Keeton on the Law of Torts*, p. 978, para. 129, concurring with the *Restatement of the Law, Second, Torts* (para. 4 above). Note that, contrary to the position in other states of the United States as well as in France, Louisiana has not recognized the tort.

¹⁴ See footnote 4 above.

¹⁵ See comment *d*. Under English law, the tort applies to contracts of all kinds: *Clerk & Lindsell on Torts* (footnote 8 above), p. 1178. Note, however, that a father was traditionally justified in interfering to prevent a child marrying a person of immoral character: *Glamorgan Coal*, p. 577 (Stirling) and *South Wales Miners’ Federation v. Glamorgan Coal Company*, House of Lords, *The Law Reports 1905*, p. 249 (Lord James); *Crofter Hand Woven Harris Tweed Co. v. Veitch*, *ibid.* 1942, pp. 442–443 (Viscount Simon).

¹⁶ See Markesinis, *The German Law of Obligations*, p. 898; and Zweigert and Kötz, *op. cit.*, pp. 622–623.

contra bonos mores (“sittenwidrig”).¹⁷ But the German law “tak[es] a restrictive view [and] does not regard interference with someone else’s contractual rights as tortious conduct in and of itself”.¹⁸ Mere knowledge of or “cooperation” in the breach of a contract with a third party will not suffice.¹⁹ The Bundesgerichtshof (BGH) has stated:

Contractual claims are not amongst the rights whose infringement in itself gives rise to claims in tort. Nor does the moral order oblige an independent third party in a case of conflict to subordinate its own interests to those of the contracting parties . . . Thus, there is no claim under § 826 BGB for damages against a third party simply on the ground of his cooperation in the violation [of a contract] . . . The allegation of conduct *contra bonos mores* is well-founded only in cases of serious offences to feelings of decency, where the course of conduct of a third party is incompatible with the basic requirements of a proper view of the law (*Grundbedürfnissen loyaler Rechtsgesinnung*).²⁰

It is well established in the case law of the BGH that a third party’s interference with a contractual relationship is tortious “only when the third party shows a special degree of wanton or reckless behaviour (*Rücksichtslosigkeit*) towards the contracting party who is prejudiced by the breach of contract that occurs”.²¹ This would be the case, for example, where a third party is in “collusion with the debtor under the contract in order specifically to frustrate the claims of the creditor concerned”,²² or where a third party promises to indemnify the debtor against claims by the creditor.²³ Moreover the breach induced must be central to the performance of the contract as a whole, not a breach of some collateral or incidental provision.

French law²⁴

7. Anyone who knowingly assists another to breach a contractual obligation owed by that other commits a delict under articles 1382 and 1383 of the *Code civil* as regards the victim of the breach.²⁵ It would appear that responsibility for interference with another’s contractual obligations (*la responsabilité du tiers complice* or, in some specific senses, *concurrence déloyale*) is not dependent upon the defendant’s having actually incited or induced the breach in question. Knowledge of the existence of the

¹⁷ See RG JW 1913, 866; RGZ 78, 14, 17; RG JW 1913, 326; BGH NJW 1981, 2184, as cited by Markesinis, *op. cit.*, p. 898. See also cases cited in Palandt, *Bürgerliches Gesetzbuch*, para. 826; and Ulmer, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, para. 826.

¹⁸ Gerven and others, eds., *Torts: Scope of Protection*, p. 279.

¹⁹ See BGH NJW 1969, 1293 ff., cited by Markesinis, *op. cit.*, p. 898; and BGH NJW 1994, 128, excerpted in Gerven and others, eds., *op. cit.*, pp. 277–279 (translation by N. Sims).

²⁰ BGH NJW 1994 (see footnote 19 above), p. 278.

²¹ *Ibid.*, p. 279.

²² *Ibid.*, p. 278.

²³ See BGH NJW 1981, 2184, as cited by Youngs, *English, French and German Comparative Law*, p. 282, footnote 422.

²⁴ For a useful overview, see Palmer, “A comparative study (from a common law perspective) of the French action for wrongful interference with contract”.

²⁵ See Dalloz, *Recueil périodique et critique de jurisprudence*, 1908, Civ 27 May 1908, p. 459; Com 29 May 1967, *Bull civ* III, No. 209; Com 11 October 1971, *Recueil Dalloz Sirey*, 1972 (Paris), p. 120; Civ 2nd 13 April 1972, *ibid.*, p. 440; Civ 3rd 10 May 1972, *Bull civ* III, No. 300; Civ 3rd 8 July 1975, *ibid.*, No. 249; Com 13 March 1979, *Recueil Dalloz Sirey*, 1980, pp. 1–3, note by Serra; Com 23 April 1985, *Bull civ* IV, No. 124; Com 5 February 1991, *ibid.*, No. 51; Com 4 May 1993, *ibid.*, No. 164.

contractual obligation is sufficient to ground responsibility, as was made clear by the Cour de cassation in *Dlle Pedelmas et autres v. Époux Morin et autre*.²⁶ The standard statement of the law is that:

Anyone who knowingly assists another to breach a contractual obligation owed by that other commits a delict as regards the victim of the breach.²⁷

In the words of Savatier's classic text, "case law ... on the one hand, affirms the delictual character of the responsibility of the collusive third party and on the other hand, limits itself, in principle, to declaring [that party] at fault because of his knowledge of the contract, without any other wrong being required".²⁸

8. More explicitly, Serra states in his note on *Dlle Pedelmas et autres v. Époux Morin et autre*:

It is enough for the third party to have acted with full knowledge of the facts, being aware of the existence of the commitment ... with the breach of which he is associated. It is not at all necessary for the third party to have incited the debtor to breach his obligation for him to be considered to have played a determining role in the failure to execute the agreement.²⁹

Viney agrees:

Knowledge of the contract and the conscious performance of acts which impede its execution are sufficient to establish the responsibility of the third party.³⁰

9. These principles were applied to surprising effect in a series of cases, in which it was held that a selective distribution network established under contract by several producers *inter se* can give rise to delictual responsibility, under article 1382 of the *Code civil*, on the part of a "rogue" distributor who obtains and sells their products.³¹ In *S.A.R.L. Geparo Im En Export BV v. S.N.C. Les Parfums Cacharel et Cie*,³² the Cour de cassation stated that:

In view of article 1382 of the *Civil Code* ... a non-authorized intermediary of a lawful selective distribution network commits a civil wrong in attempting to obtain from an authorized distributor, in breach of the contract binding him to the network, the sale of products marketed through this mode of distribution ...³³

Similarly, in *Soc. Allonnes Distribution Centre Leclerc et autre v. Soc. Estée Lauder*, the Cour de cassation declared:

In view of article 1382 of the *Civil Code* ... the selective distribution network can be used as evidence against the companies Allonnes and

²⁶ Com 13 March 1979 (see footnote 25 above), p. 1.

²⁷ *Ibid.*

²⁸ Savatier, *Traité de la responsabilité civile en droit français*, p. 187, para. 144.

²⁹ Com 13 March 1979 (see footnote 25 above), p. 2. See also *Lehmann v. Société des comédiens français*, 2 June 1930, *La Gazette du Palais*, No. 2 (1930), p. 119; and *Maréchal v. Époux Loustau*, Com 4 May 1993 (see footnote 25 above).

³⁰ Viney, *Traité de droit civil: Introduction à la responsabilité*, p. 382, para. 207–2.

³¹ See Com 16 February 1988, *Bull civ IV*, No. 76; Com 13 December 1988, *ibid.*, Nos. 343–344; Com 31 January 1989, *ibid.*, No. 45; Com 21 March 1989, *ibid.*, No. 98; Com 10 May 1989, *Recueil Dalloz Sirey*, 1989, p. 427, especially 3rd, 4th and 5th specific cases.

³² Com 21 March 1989, *Recueil Dalloz Sirey*, 1989 (see footnote 31 above), 4th specific case.

³³ *Ibid.*, p. 428.

Direct Distribution, and ... they have committed a delict by importing and selling without being authorized distributors ...³⁴

The novelty of these cases has been noted, but they appear to meet with approval.³⁵

10. Obviously, for responsibility to arise, the contract breached must itself be a lawful one. Beyond that, however, there appears to be no express provision on the question of justification for interference with contractual relations. In this respect, it is important to recall that responsibility for interference with contractual relations is seen as a manifestation of the "general duty not to harm others":³⁶

Any harm caused by one member of society to another in a case where the former could have foreseen and avoided such harm engenders a presumption of civil wrong and responsibility.³⁷

But, as suggested by the use of the word "presumption", "the harm caused may ... be justified by the exercise of a right"—a right which, in a "simple" and slightly crude term, Savatier places among "the rights allowing one to harm others".³⁸ According to Savatier:

Most of the time, the rights allowing one to harm others are sufficiently based on fairness. They stem ... from the requirements of life in society. Such rights include, for example, the right to freedom of expression ... [or] the right to compete ... These are rights to harm others in *fairness*. Moreover, they are closely correlated with the principles that protect individual freedom: freedom of thought [and] of speech, ... freedom of commerce and of work ...³⁹

He divides these general justifications into five categories, of which only two need to be mentioned here. The first is what might be called the right to compete:

The right to cause certain harm arises from the inevitable parallelism of legitimate human activities: these are competition rights. Whatever the source (competitive examination, bidding, similarity between occupations, etc.), what the candidate obtains (an award, a job, a market, a clientele) is acquired only at the expense of others. Although harmful to the latter, his activity is legitimate.⁴⁰

Whatever the general validity of this principle, the Cour de cassation in the landmark case of *Dœuillet et Cie v. Raudnitz*⁴¹ placed firm limits on the right to compete as it relates to interference with valid contractual obligations, at least in the specific case of contracts of employment. Similar limits have subsequently been applied in principle, if not always on the particular facts, to several other types of commercial contract.

11. Savatier's second justification equates with self-defence and/or necessity:

Like parallel activities, legitimate conflicting activities cause inevitable harm. These are the *rights of self-defence*. Thus, there may be a defence either of a legitimate *group* (national, occupational, social or

³⁴ Com 10 May 1989 (see footnote 31 above), 5th specific case, pp. 428–429.

³⁵ *Ibid.*, note by Bénabent, pp. 430–431.

³⁶ Savatier, *op. cit.*, chap. III, p. 47.

³⁷ *Ibid.*, para. 35.

³⁸ *Ibid.*, p. 48, para. 36.

³⁹ *Ibid.*, pp. 48–49.

⁴⁰ *Ibid.*, pp. 49–50, para. 37 (a).

⁴¹ Civ 27 May 1908 (see footnote 25 above).

religious), or of an *individual*. Self-defence, legal proceedings or necessity are examples of this.⁴²

In the case of the perfume importer/distributor outside the selective distribution network, the Cour de cassation held on the facts that in the absence of proof establishing the irregularity of the acquisition of the goods, the defendant did not breach article 1382 of the *Code civil*. By “irregularity of the acquisition”⁴³ of the goods, the Cour de cassation apparently means their acquisition from a party to the selective distribution agreement in breach of that party’s contractual obligation. Similar findings were reached in several of the other cases. In summary, then, the mere act of circumventing the selective distribution agreement (that is, without the involvement of any of the parties to the agreement) does not constitute a violation of article 1382. This is a simple *pacta tertiis* situation. But to do so with the involvement of one of the parties to the agreement constitutes a violation of article 1382, assuming the legality of the agreement is established.

Islamic law

12. Islamic law embodies no general category of rules of delictual responsibility. Any principles of civil liability must be gleaned from the Koran, Sunna and the opinions of learned jurists. Even then, tortious liability (*jinayah*; sometimes *‘uqubat*) does not constitute a coherent legal category but is divided into specific nominate torts such as usurpation (*ghasab*), conversion (*itlaf*), trover (*tasarruf-i beja*), detinue (*habs*) and trespass (*mudakhalat-i beja*).⁴⁴

13. Notwithstanding this, the term *jinayah* has been defined in general terms by a prominent jurist as “an act of transgression which results into a damage or an injury to a person, his property or honour ... [or] a violation of a right recognised *a priori* by law and which casts a civil liability on the defendant”.⁴⁵ It is not clear whether this definition is simply descriptive of the accepted nominate torts or is also prescriptive; there also appears to be some debate as to the meaning of “a right recognised *a priori* by law”.⁴⁶ As a result, in the absence of any evidence specifically on that point, it is impossible to state whether Islamic law recognizes delictual responsibility for interference with contractual relations.

⁴² Savatier, *op. cit.*, p. 50, para. 37 (*b*). See also pages 73–83, paras. 60–64 (*ibid.*).

⁴³ Com 10 May 1989 (see footnote 31 above).

⁴⁴ See, for example, Masoodi, “Civil liability in English and Islamic laws: a comparative view”, pp. 34–37.

⁴⁵ *Ibid.*, p. 36, citing Ibn Rushd.

⁴⁶ *Ibid.*, p. 39.

14. Two things, however, limit the possibility of tortious liability under Islamic law for interference with contractual relations. First, the basis of civil liability under *jinayah* is exclusively intention: a defendant who did not intend to inflict a loss on the plaintiff will not be liable.⁴⁷ Secondly, in terms of justification, at least one influential school of Muslim jurists affirms “the principle that ‘a wrong caused in the course of exercise of a legal right precludes the defendant of his civil liability’—summed up by an Arabic proposition *al-jawaz al-shar ‘iyuna fi al-dhaman*”.⁴⁸ Limitation by reference to the public interest (*al-maslaha al-mursalah*) has been suggested by others.⁴⁹ Thus even if Islamic law, or systems based upon it, were to recognize the principle of tortious liability for inducing breach of contract, such liability would be very limited.

Conclusions

15. This brief review shows that, while the four European systems reviewed recognize that knowingly and intentionally inducing a breach of contract is a civil wrong, they approach the matter in different ways, and these differences are accentuated if one brings into account a wider range of comparison, such as, for example, Islamic law or Russian law. Thus while it may be that some of these systems produce similar results in practice,⁵⁰ that is by no means universally so. Moreover, a number of additional points can be made. First, even among the Western European systems reviewed, there are important differences in approach. French law is the most open in principle to such liability (but subject to limitations in practice such as a strict burden of proof); German law least so, since it requires something over and above knowing assistance or inducement, amounting to improper conduct. English and United States law take an intermediate position; there is liability in principle for deliberate and knowing inducement, but this is subject to the defence of justification and the proof of actual damage arising from the breach. Secondly, the rules in question operate within the framework of a developed system of regulation of the types of lawful contracts (e.g. in the field of competition law). Thus the statement of a general principle that any knowing interference with the performance of any contract constitutes a delict or a tort is an oversimplification of a more complex situation. Thirdly, in all the systems reviewed, the relevant rules would be classified as “primary” rather than “secondary”, in the sense of the draft articles, if that classification were relevant to them.

⁴⁷ *Ibid.*, p. 49.

⁴⁸ *Ibid.*, p. 43.

⁴⁹ *Ibid.*, pp. 44 and 47.

⁵⁰ See Zweigert and Kötz, *op. cit.*, pp. 622–623.