# Annex 21

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

**THE MOX PLANT CASE**
**(IRELAND *v.* UNITED KINGDOM)**
**List of cases: No. 10**

PROVISIONAL MEASURES

**ORDER OF 3 DECEMBER 2001**

# 2001

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

**AFFAIRE DE L'USINE MOX**
**(IRLANDE c. ROYAUME-UNI)**
**Rôle des affaires : No. 10**

MESURES CONSERVATOIRES

**ORDONNANCE DU 3 DÉCEMBRE 2001**

Official citation:

*MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 95

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Mode officiel de citation :

*Usine MOX (Irlande c. Royaume-Uni), mesures conservatoires, ordonnance du 3 décembre 2001, TIDM Recueil 2001,* p. 95

3 DECEMBER 2001
ORDER

**THE MOX PLANT CASE**
**(IRELAND *v.* UNITED KINGDOM)**

PROVISIONAL MEASURES

**AFFAIRE DE L'USINE MOX**
**(IRLANDE c. ROYAUME-UNI)**

MESURES CONSERVATOIRES

3 DÉCEMBRE 2001
ORDONNANCE

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

YEAR 2001

3 December 2001

List of cases:
No. 10

**THE MOX PLANT CASE**

(IRELAND *v.* UNITED KINGDOM)

REQUEST FOR PROVISIONAL MEASURES

**ORDER**

*Present*: *President* CHANDRASEKHARA RAO; *Vice-President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, AKL, ANDERSON, VUKAS, WOLFRUM, TREVES, MARSIT, EIRIKSSON, NDIAYE, JESUS, XU; *Judge* ad hoc SZÉKELY; *Registrar* GAUTIER.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 290 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") and articles 21, 25 and 27 of the Statute of the Tribunal (hereinafter "the Statute"),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter "the Rules"),

Having regard to the fact that Ireland and the United Kingdom of Great Britain and Northern Ireland (hereinafter "the United Kingdom") have not accepted the same procedure for the settlement of disputes in accordance with article 287 of the Convention and are therefore deemed to have accepted arbitration in accordance with Annex VII to the Convention,

Having regard to the Notification and Statement of Claim submitted by Ireland to the United Kingdom on 25 October 2001 instituting arbitral proceedings as provided for in Annex VII to the Convention "in the dispute concerning the MOX plant, international movements of radioactive materials, and the protection of the marine environment of the Irish Sea",

Having regard to the Request for provisional measures submitted by Ireland to the United Kingdom on 25 October 2001 pending the constitution of an arbitral tribunal under Annex VII to the Convention,

Having regard to the Request submitted by Ireland to the Tribunal on 9 November 2001 for the prescription of provisional measures by the Tribunal in accordance with article 290, paragraph 5, of the Convention,

*Makes the following Order:*

1. *Whereas* Ireland and the United Kingdom are States Parties to the Convention;

2. *Whereas*, on 9 November 2001, Ireland filed with the Registry of the Tribunal by facsimile a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention "in the dispute concerning the MOX plant, international movements of radioactive materials, and the protection of the marine environment of the Irish Sea" between Ireland and the United Kingdom;

3. *Whereas* a copy of the Request was sent the same day by the Registrar of the Tribunal to the Secretary of State for Foreign and Commonwealth Affairs, Foreign and Commonwealth Office of the United Kingdom, London, and also in care of the Ambassador of the United Kingdom to Germany on 12 November 2001;

4. *Whereas*, on 9 November 2001, the Registrar was notified of the appointment of Mr. David J. O'Hagan, Chief State Solicitor, as Agent for Ireland, and of the appointment of Mr. Michael Wood, CMG, Legal Adviser to the Foreign and Commonwealth Office, as Agent for the United Kingdom;

5. *Whereas* the original of the Request and documents in support were filed on 12 November 2001, certified copies of which were transmitted on the same day to the Agent of the United Kingdom;

6. *Whereas*, on 12 November 2001, the Agent of Ireland proposed corrections to paragraphs 7 and 8 of the Request and the Agent of the United Kingdom informed the Tribunal, in accordance with article 65, paragraph 4, of the Rules, that he had no objections to these corrections being made;

7. *Whereas*, pursuant to article 90, paragraph 2, of the Rules, the President of the Tribunal, by Order dated 13 November 2001, fixed 19 and 20 November 2001 as the dates for the hearing, notice of which was communicated forthwith to the parties;

8. *Whereas* the Tribunal does not include upon the bench a judge of the nationality of Ireland and Ireland has chosen, pursuant to article 17, paragraph 2, of the Statute, Mr. Alberto Székely of Mexican nationality to sit as judge *ad hoc* in this case;

9. *Whereas*, since no objection to the choice of Mr. Székely as judge *ad hoc* was raised by the United Kingdom, and none appeared to the Tribunal itself, Mr. Székely was admitted to participate in the proceedings as judge *ad hoc* after having made the solemn declaration required under article 9 of the Rules at a public sitting of the Tribunal held on 18 November 2001;

10. *Whereas*, pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was notified by the Registrar on 9 November 2001 of the Request, and States Parties to the Convention were notified, in accordance with article 24, paragraph 3, of the Statute, by a note verbale from the Registrar dated 13 November 2001;

11. *Whereas*, on 14 November 2001, the President ascertained the views of the parties regarding the procedure for the hearing in accordance with article 73 of the Rules;

12. *Whereas*, on 15 November 2001, the United Kingdom filed with the Registry by facsimile its Written Response, which was transmitted to the Agent of Ireland on the same day; the original of the Written Response was filed with the Registry on 17 November 2001, a certified copy of which was transmitted by courier to the Agent of Ireland on the same day;

13. *Whereas*, on 16 November 2001, the Agent of the United Kingdom proposed corrections to paragraph 192 of the Written Response and the Agent of Ireland informed the Tribunal, in accordance with article 65,

paragraph 4, of the Rules, that he had no objections to these corrections being made;

14. *Whereas*, on 18 November 2001, the Agent of the United Kingdom proposed corrections to paragraph 190 of the Written Response and, in accordance with article 65, paragraph 4, of the Rules, the Agent of Ireland, while expressing no objections to these corrections being made, reserved his position on the contents of the proposed corrections;

15. *Whereas*, in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 18 November 2001 concerning the written pleadings and the conduct of the case;

16. *Whereas* additional documents were submitted on 17, 19 and 20 November 2001 by Ireland, and on 18 and 20 November 2001 by the United Kingdom, copies of which were transmitted in each case to the other party;

17. *Whereas*, on 19 November 2001, the President held consultations with the Agents of the parties in accordance with article 45 of the Rules;

18. *Whereas*, prior to the opening of the hearing, the parties submitted documents pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal;

19. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Request and the Written Response and the documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings;

20. *Whereas* oral statements were presented at four public sittings held on 19 and 20 November 2001 by the following:

On behalf of Ireland: Mr. David J. O'Hagan, Chief State Solicitor, *as Agent*,
Mr. Michael McDowell SC, Attorney General,
Mr. Eoghan Fitzsimons SC, Member of the Irish Bar,
Mr. Philippe Sands, Member of the Bar of England and Wales; Professor of International Law, University of London, United Kingdom,
Mr. Vaughan Lowe, Member of the Bar of England and Wales; Chichele Professor of Public International Law, University of Oxford, United Kingdom,
*as Counsel and Advocates*,

On behalf of the United Kingdom: Mr. Michael Wood, CMG, Legal Adviser, Foreign and Commonwealth Office, *as Agent*,
Lord Goldsmith QC, Attorney General,
Mr. Richard Plender QC, Member of the Bar of England and Wales,
Mr. Daniel Bethlehem, Member of the Bar of England and Wales; Deputy Director of the Lauterpacht Research Centre for International Law, Cambridge, United Kingdom,
Mr. Samuel Wordsworth, Member of the Bar of England and Wales,
*as Counsel*;

21. *Whereas* in the course of the oral proceedings a number of documents were displayed on video monitors;

22. *Whereas*, on 20 November 2001, a list of points and issues which the Tribunal would like the parties specially to address was communicated to the Agents;

23. *Whereas*, during the hearing on 20 November 2001, the Agent of Ireland requested that Ireland be permitted to submit a written response to the questions referred to in paragraph 22 and the President acceded to that request;

24. *Whereas*, during the hearing on 20 November 2001, the Agent of the United Kingdom responded orally to the questions referred to in paragraph 22;

25. *Whereas* the Agent of Ireland submitted a written response on 21 November 2001 to the questions referred to in paragraph 22 and additional documentation on 22 and 23 November 2001 and the Agent of the United Kingdom submitted comments on the written response of Ireland on 23 November 2001;

26. *Whereas*, in the Notification and Statement of Claim of 25 October 2001, Ireland requested the arbitral tribunal to be constituted under Annex VII (hereinafter "the Annex VII arbitral tribunal") to adjudge and declare:

1) That the United Kingdom has breached its obligations under Articles 192 and 193 and/or Article 194 and/or Article 207 and/or Articles 211 and 213 of UNCLOS in relation to the authorisation of the MOX plant, including by failing to take the necessary measures to prevent, reduce and control pollution of the marine environment of the Irish Sea from (1) intended discharges of

radioactive materials and or wastes from the MOX plant, and/or (2) accidental releases of radioactive materials and/or wastes from the MOX plant and/or international movements associated the MOX plant, and/or (3) releases of radioactive materials and/or wastes from the MOX plant and/or international movements associated the MOX plant with the of resulting from terrorist act;

2) That the United Kingdom has breached its obligations under Articles 192 and 193 and/or Article 194 and/or Article 207 and/or Articles 211 and 213 of UNCLOS in relation to the authorisation of the MOX plant by failing (1) properly or at all to assess the risk of terrorist attack on the MOX plant and international movements of radioactive material associated with the plant, and/or (2) properly or at all to prepare a comprehensive response strategy or plan to prevent, contain and respond to terrorist attack on the MOX plant and international movements of radioactive waste associated with the plant;

3) That the United Kingdom has breached its obligations under Articles 123 and 197 of UNCLOS in relation to the authorisation of the MOX plant, and has failed to cooperate with Ireland in the protection of the marine environment of the Irish Sea *inter alia* by refusing to share information with Ireland and/or refusing to carry out a proper environmental assessment of the impacts on the marine environment of the MOX plant and associated activities and/or proceeding to authorise the operation of the MOX plant whilst proceedings relating to the settlement of a dispute on access to information were still pending;

4) That the United Kingdom has breached its obligations under Article 206 of UNCLOS in relation to the authorisation of the MOX plant, including by

   (a) failing, by its 1993 Environmental Statement, properly and fully to assess the potential effects of the operation of the MOX plant on the marine environment of the Irish Sea; and/or

(b) failing, since the publication of its 1993 Environmental Statement, to assess the potential effects of the operation of the MOX plant on the marine environment by reference to the factual and legal developments which have arisen since 1993, and in particular since 1998; and/or

(c) failing to assess the potential effects on the marine environment of the Irish Sea of international movements of radioactive materials to be transported to and from the MOX plant; and/or

(d) failing to assess the risk of potential effects on the marine environment of the Irish Sea arising from terrorist act or acts on the MOX plant and/or on international movements of radioactive material to and from the MOX plant.

5) That the United Kingdom shall refrain from authorizing or failing to prevent (a) the operation of the MOX plant and/or (b) international movements of radioactive materials into and out of the United Kingdom related to the operation of the MOX plant or any preparatory or other activities associated with the operation of the MOX until such time as (1) there has been carried out a proper assessment of the environmental impact of the operation of the MOX plant as well as related international movements of radioactive materials, and (2) it is demonstrated that the operation of the MOX plant and related international movements of radioactive materials will result in the deliberate discharge of no radioactive materials, including wastes, directly or indirectly into the marine environment of the Irish Sea, and (3) there has been agreed and adopted jointly with Ireland a comprehensive strategy or plan to prevent, contain and respond to terrorist attack on the MOX plant and international movements of radioactive waste associated with the plant;

6) That the United Kingdom pays Ireland's costs of the proceedings;

27. *Whereas* the provisional measures requested by Ireland in the Request to the Tribunal dated 9 November 2001 were as follows:

(1) that the United Kingdom immediately suspend the authorisation of the MOX plant dated 3 October 2001, alternatively take such other measures as are necessary to prevent with immediate effect the operation of the MOX plant;
(2) that the United Kingdom immediately ensure that there are no movements into or out of the waters over which it has sovereignty or exercises sovereign rights of any radioactive substances or materials or wastes which are associated with the operation of, or activities preparatory to the operation of, the MOX plant;
(3) that the United Kingdom ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII tribunal (Ireland hereby agreeing itself to act so as not to aggravate, extend or render more difficult of solution that dispute); and
(4) that the United Kingdom ensure that no action is taken which might prejudice the rights of Ireland in respect of the carrying out of any decision on the merits that the Annex VII tribunal may render (Ireland likewise will take no action of that kind in relation to the United Kingdom);

28. *Whereas* the submissions presented by the United Kingdom in its Written Response read as follows:

> [T]he United Kingdom requests the International Tribunal for the Law of the Sea to:
>
> (1) reject Ireland's application for provisional measures;
> (2) order Ireland to bear the United Kingdom's costs in these proceedings;

29. *Whereas* Ireland, in its final submissions at the public sitting held on 20 November 2001, requested the prescription by the Tribunal of the following provisional measures:

(1) that the United Kingdom immediately suspend the authorisation of the MOX plant dated 3 October, 2001, alternatively take such other measures as are necessary to prevent with immediate effect the operation of the MOX plant;
(2) that the United Kingdom immediately ensure that there are no movements into or out of the waters over which it has sovereignty or exercises sovereign rights of any radioactive substances or materials or wastes which are associated with the operation of, or activities preparatory to the operation of, the MOX plant;
(3) that the United Kingdom ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex VII tribunal (Ireland hereby agreeing itself to act so as not to aggravate, extend or render more difficult of solution that dispute); and
(4) that the United Kingdom ensure that no action is taken which might prejudice the rights of Ireland in respect of the carrying out of any decision on the merits that the Annex VII tribunal may render (Ireland likewise will take no action of that kind in relation to the United Kingdom);

30. *Whereas*, at the public sitting held on 20 November 2001, the United Kingdom presented its final submissions as follows:

The United Kingdom requests the International Tribunal for the Law of the Sea to:

(1) reject Ireland's request for provisional measures;
(2) order Ireland to bear the United Kingdom's costs in these proceedings;

31. *Considering* that, in accordance with article 287 of the Convention, Ireland has, on 25 October 2001, instituted proceedings before the Annex VII arbitral tribunal against the United Kingdom "in the dispute concerning the MOX plant, international movements of radioactive materials, and the protection of the marine environment of the Irish Sea";

32. *Considering* that Ireland on 25 October 2001 notified the United Kingdom of the submission of the dispute to the Annex VII arbitral tribunal and of the Request for provisional measures;

33. *Considering* that, on 9 November 2001, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, and pending the constitution of the Annex VII arbitral tribunal, Ireland submitted to the Tribunal a Request for provisional measures;

34. *Considering* that article 290, paragraph 5, of the Convention provides in the relevant part that:

> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea ... may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires;

35. *Considering* that, before prescribing provisional measures under article 290, paragraph 5, of the Convention, the Tribunal must satisfy itself that *prima facie* the Annex VII arbitral tribunal would have jurisdiction;

36. *Considering* that Ireland maintains that the dispute with the United Kingdom concerns the interpretation and application of certain provisions of the Convention, including, in particular, articles 123, 192 to 194, 197, 206, 207, 211, 212 and 213 thereof;

37. *Considering* that Ireland has invoked as the basis of jurisdiction of the Annex VII arbitral tribunal article 288, paragraph 1, of the Convention which reads as follows:

> A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part;

38. *Considering* that the United Kingdom maintains that Ireland is precluded from having recourse to the Annex VII arbitral tribunal in view of article 282 of the Convention which reads as follows:

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such

dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree;

39. *Considering* that the United Kingdom maintains that the matters of which Ireland complains are governed by regional agreements providing for alternative and binding means of resolving disputes and have actually been submitted to such alternative tribunals, or are about to be submitted;

40. *Considering* that the United Kingdom referred to the fact that Ireland has under article 32 of the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (hereinafter "the OSPAR Convention") submitted a dispute between Ireland and the United Kingdom "concerning access to information under article 9 of the OSPAR Convention in relation to the economic 'justification' of the proposed MOX plant" to an arbitral tribunal (hereinafter "the OSPAR arbitral tribunal");

41. *Considering* that the United Kingdom has further stated that certain aspects of the complaints of Ireland are governed by the Treaty establishing the European Community (hereinafter "the EC Treaty") or the Treaty establishing the European Atomic Energy Community (hereinafter "the Euratom Treaty") and the Directives issued thereunder and that States Parties to those Treaties have agreed to invest the Court of Justice of the European Communities with exclusive jurisdiction to resolve disputes between them concerning alleged failures to comply with such Treaties and Directives;

42. *Considering* that the United Kingdom has also stated that Ireland has made public its intention of initiating separate proceedings in respect of the United Kingdom's alleged breach of obligations arising under the EC Treaty and the Euratom Treaty;

43. *Considering* that the United Kingdom maintains that the main elements of the dispute submitted to the Annex VII arbitral tribunal are governed by the compulsory dispute settlement procedures of the OSPAR Convention or the EC Treaty or the Euratom Treaty;

44. *Considering* that, for the above reasons, the United Kingdom maintains that the Annex VII arbitral tribunal would not have jurisdiction and that, consequently, the Tribunal is not competent to prescribe provisional measures under article 290, paragraph 5, of the Convention;

45. *Considering* that Ireland contends that the dispute concerns the interpretation or application of the Convention and does not concern the

interpretation or application of either the OSPAR Convention or the EC Treaty or the Euratom Treaty;

46. *Considering* that Ireland further states that neither the OSPAR arbitral tribunal nor the Court of Justice of the European Communities would have jurisdiction that extends to all of the matters in the dispute before the Annex VII arbitral tribunal;

47. *Considering* that Ireland further maintains that the rights and duties under the Convention, the OSPAR Convention, the EC Treaty and the Euratom Treaty are cumulative, and, as a State Party to all of them, it may rely on any or all of them as it chooses;

48. *Considering* that, in the view of the Tribunal, article 282 of the Convention is concerned with general, regional or bilateral agreements which provide for the settlement of disputes concerning what the Convention refers to as "the interpretation or application of this Convention";

49. *Considering* that the dispute settlement procedures under the OSPAR Convention, the EC Treaty and the Euratom Treaty deal with disputes concerning the interpretation or application of those agreements, and not with disputes arising under the Convention;

50. *Considering* that, even if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the Convention, the rights and obligations under those agreements have a separate existence from those under the Convention;

51. *Considering* also that the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*;

52. *Considering* that the Tribunal is of the opinion that, since the dispute before the Annex VII arbitral tribunal concerns the interpretation or application of the Convention and no other agreement, only the dispute settlement procedures under the Convention are relevant to that dispute;

53. *Considering* that, for the reasons given above, the Tribunal considers that, for the purpose of determining whether the Annex VII arbitral tribunal would have *prima facie* jurisdiction, article 282 of the Convention is not applicable to the dispute submitted to the Annex VII arbitral tribunal;

54. *Considering* that the United Kingdom contends that the requirements of article 283 of the Convention have not been satisfied since, in its view,

there has been no exchange of views regarding the settlement of the dispute by negotiation or other peaceful means;

55. *Considering* that article 283 of the Convention reads as follows:

> 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
> 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement;

56. *Considering* that the United Kingdom maintains that the correspondence between Ireland and the United Kingdom did not amount to an exchange of views on the dispute said to arise under the Convention;

57. *Considering* that the United Kingdom contends further that its request for an exchange of views under article 283 of the Convention was not accepted by Ireland;

58. *Considering* that Ireland contends that, in its letter written as early as 30 July 1999, it had drawn the attention of the United Kingdom to the dispute under the Convention and that further exchange of correspondence on the matter took place up to the submission of the dispute to the Annex VII arbitral tribunal;

59. *Considering* that Ireland contends further that it has submitted the dispute to the Annex VII arbitral tribunal only after the United Kingdom failed to indicate its willingness to consider the immediate suspension of the authorization of the MOX plant and a halt to related international transports;

60. *Considering* that, in the view of the Tribunal, a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted;

61. *Considering* that, in the view of the Tribunal, the provisions of the Convention invoked by Ireland appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded;

62. *Considering* that, for the above reasons, the Tribunal finds that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute;

63. *Considering* that, in accordance with article 290, paragraph 1, of the Convention, the Tribunal may prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment;

64. *Considering* that, according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the Annex VII arbitral tribunal if the Tribunal considers that the urgency of the situation so requires in the sense that action prejudicial to the rights of either party or causing serious harm to the marine environment is likely to be taken before the constitution of the Annex VII arbitral tribunal;

65. *Considering* that the Tribunal must, therefore, decide whether provisional measures are required pending the constitution of the Annex VII arbitral tribunal;

66. *Considering* that, in accordance with article 290, paragraph 5, of the Convention, the Annex VII arbitral tribunal, once constituted, may modify, revoke or affirm any provisional measures prescribed by the Tribunal;

67. *Considering* that Ireland contends that its rights under certain provisions of the Convention, in particular articles 123, 192 to 194, 197, 206, 207, 211, 212 and 213 thereof, will be irrevocably violated if the MOX plant commences its operations before the United Kingdom fulfils its duties under the Convention;

68. *Considering* that Ireland contends further that once plutonium is introduced into the MOX plant and it commences operations some discharges into the marine environment will occur with irreversible consequences;

69. *Considering* that Ireland contends further that, if the plant becomes operational, the danger of radioactive leaks and emissions, whether arising from the operation of the plant, or resulting from industrial accidents, terrorist attacks, or other causes, would be greatly magnified;

70. *Considering* that Ireland argues that the commissioning of the plant is, in practical terms, itself a near-irreversible step and it is not possible to return to the position that existed before the commissioning of the MOX plant simply by ceasing to feed plutonium into the system;

71. *Considering* that Ireland argues that the precautionary principle places the burden on the United Kingdom to demonstrate that no harm would arise from discharges and other consequences of the operation of the MOX plant, should it proceed, and that this principle might usefully inform

the assessment by the Tribunal of the urgency of the measures it is required to take in respect of the operation of the MOX plant;

72. *Considering* that the United Kingdom contends that it has adduced evidence to establish that the risk of pollution, if any, from the operation of the MOX plant would be infinitesimally small;

73. *Considering* that the United Kingdom maintains that the commissioning of the MOX plant on or around 20 December 2001 will not, even arguably, cause serious harm to the marine environment or irreparable prejudice to the rights of Ireland, in the period prior to the constitution of the Annex VII arbitral tribunal or at all;

74. *Considering* that the United Kingdom contends that neither the commissioning of the MOX plant nor the introduction of plutonium into the system is irreversible, although decommissioning would present the operator of the plant with technical and financial difficulties, if Ireland were to be successful in its claim before the Annex VII arbitral tribunal;

75. *Considering* that the United Kingdom argues that Ireland has failed to supply proof that there will be either irreparable damage to the rights of Ireland or serious harm to the marine environment resulting from the operation of the MOX plant and that, on the facts of this case, the precautionary principle has no application;

76. *Considering* that the United Kingdom states that the manufacture of MOX fuel presents negligible security risks and it has in place very extensive security precautions in terms of the protection of the Sellafield site;

77. *Considering* that the United Kingdom states that it hopes to reach agreement with Ireland on the constitution of the Annex VII arbitral tribunal within a short space of time;

78. *Considering* that, at the public sitting held on 20 November 2001, the United Kingdom has stated that "there will be no additional marine transports of radioactive material either to or from Sellafield as a result of the commissioning of the MOX plant";

79. *Considering* that at the same sitting the United Kingdom stated further that "there will be no export of MOX fuel from the plant until summer 2002" and that "there is to be no import to the THORP plant of spent nuclear fuel pursuant to contracts for conversion to the MOX plant within that period either" and clarified that the word "summer" should be read as "October";

80. *Considering* that the Tribunal places on record the assurances given by the United Kingdom as specified in paragraphs 78 and 79;

81. *Considering* that, in the circumstances of this case, the Tribunal does not find that the urgency of the situation requires the prescription of the provisional measures requested by Ireland, in the short period before the constitution of the Annex VII arbitral tribunal;

82. *Considering*, however, that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention;

83. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

84. *Considering* that, in the view of the Tribunal, prudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate;

85. *Considering* that Ireland and the United Kingdom should each ensure that no action is taken which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal;

86. *Considering* that, pursuant to article 95, paragraph 1, of the Rules, each party is required to submit to the Tribunal a report and information on compliance with any provisional measures prescribed;

87. *Considering* that it may be necessary for the Tribunal to request further information from the parties on the implementation of provisional measures and that it is appropriate that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules;

88. *Considering* that, in the present case, the Tribunal sees no need to depart from the general rule, as set out in article 34 of its Statute, that each party shall bear its own costs;

89. *For these reasons*,

THE TRIBUNAL,

1. Unanimously,

*Prescribes*, pending a decision by the Annex VII arbitral tribunal, the following provisional measure under article 290, paragraph 5, of the Convention:

Ireland and the United Kingdom shall cooperate and shall, for this purpose, enter into consultations forthwith in order to:

(a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant;
(b) monitor risks or the effects of the operation of the MOX plant for the Irish Sea;
(c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.

2. Unanimously,

*Decides* that Ireland and the United Kingdom shall each submit the initial report referred to in article 95, paragraph 1, of the Rules not later than 17 December 2001, and authorizes the President of the Tribunal to request such further reports and information as he may consider appropriate after that date.

3. Unanimously,

*Decides* that each party shall bear its own costs.

Done in English and in French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this third day of December, two thousand and one, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Ireland and the Government of the United Kingdom, respectively.

(*Signed*) P. CHANDRASEKHARA RAO,
President.

(*Signed*) Philippe GAUTIER,
Registrar.

*Judges* CAMINOS, YAMAMOTO, PARK, AKL, MARSIT, EIRIKSSON and JESUS append a joint declaration to the Order of the Tribunal.

*Vice-President* NELSON, *Judges* MENSAH, ANDERSON, WOLFRUM, TREVES, JESUS and *Judge* ad hoc SZÉKELY append separate opinions to the Order of the Tribunal.

# Annex 22

A/CN.4/SER.A/2001/Add.1 (Part 2)

# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

# 2001

*Volume II*
*Part Two*

*Report of the Commission*
*to the General Assembly*
*on the work*
*of its fifty-third session*

UNITED NATIONS
New York and Geneva, 2007

## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook* …, followed by the year (for example, *Yearbook … 2000*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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# Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)

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* Initially distributed as *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10.*

## ABBREVIATIONS

| | |
|---|---|
| ASEAN | Association of South-East Asian Nations |
| ECE | Economic Commission for Europe |
| FAO | Food and Agriculture Organization of the United Nations |
| GATT | General Agreement on Tariffs and Trade |
| IAEA | International Atomic Energy Agency |
| ICJ | International Court of Justice |
| ICRC | International Committee of the Red Cross |
| ICSID | International Centre for Settlement of Investment Disputes |
| ILO | International Labour Organization |
| ITLOS | International Tribunal for the Law of the Sea |
| NAFO | Northwest Atlantic Fisheries Organization |
| OAS | Organization of American States |
| OECD | Organisation for Economic Co-operation and Development |
| PCIJ | Permanent Court of International Justice |
| UNCC | United Nations Compensation Commission |
| UNEP | United Nations Environment Programme |
| UNHCR | Office of the United Nations High Commissioner for Refugees |
| WCO | World Customs Organization |
| WHO | World Health Organization |
| WMO | World Meteorological Organization |
| WTO | World Trade Organization |

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|---|---|
| AJIL | *American Journal of International Law* |
| BYBIL | *British Year Book of International Law* |
| *Collected Courses ...* | *Collected Courses of the Hague Academy of International Law* |
| *Eur. Court H.R.* | *European Court of Human Rights* |
| *I.C.J. Reports* | ICJ, *Reports of Judgments, Advisory Opinions and Orders* |
| ILM | *International Legal Materials* (Washington, D.C.) |
| ILR | *International Law Reports* |
| Iran-U.S. C.T.R. | *Iran-United States Claims Tribunal Reports* |
| Lapradelle-Politis | A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Pedone, 1923) |
| Moore, *Digest* | J. B. Moore, *Digest of International Law* (Washington, D.C.) |
| Moore, *History and Digest* | J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C.) |
| NYIL | *Netherlands Yearbook of International Law* |
| *P.C.I.J., Series A* | PCIJ, *Collection of Judgments* (Nos. 1–24: up to and including 1930) |
| *P.C.I.J., Series A/B* | PCIJ, *Judgments, Orders and Advisory Opinions* (Nos. 40–80: beginning in 1931) |
| *Recueil des cours…* | *Recueil des cours de l'Académie de droit international de la Haye* |
| RGDIP | *Revue générale de droit international public* |
| UNRIAA | United Nations, *Reports of International Arbitral Awards* |

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In the present volume, the "International Tribunal for the Former Yugoslavia" refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and the "International Tribunal for Rwanda" refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

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## NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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* *

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| Covenant of the League of Nations | *The Covenant of the League of Nations with a Commentary Thereon, Miscellaneous No. 3, 1919* (London, HM Stationery Office, 1921), p. 1. |
| Revised General Act for the Pacific Settlement of International Disputes (Lake Success, New York, 28 April 1949) | United Nations, *Treaty Series*, vol. 71, No. 912, p. 101. |
| European Convention for the Peaceful Settlement of Disputes (Strasbourg, 29 April 1957) | *Ibid*., vol. 320, No. 4646, p. 243. |
| **Diplomatic and consular relations** | |
| Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) | United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95. |
| Vienna Convention on Consular Relations (Vienna, 24 April 1963) | *Ibid*., vol. 596, No. 8638, p. 261. |
| **Human rights** | |
| Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948) | United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277. |
| 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. |
| Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 March 1952) | *Ibid*. |
| Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (Strasbourg, 11 May 1994) | Council of Europe, *European Treaty Series*, No. 155. |
| International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965) | United Nations, *Treaty Series*, vol. 660, No. 9464, p. 195. |
| International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) | *Ibid*., vol. 993, No. 14531, p. 3. |
| International Covenant on Civil and Political Rights (New York, 16 December 1966) | *Ibid*., vol. 999, No. 14668, p. 171. |
| American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969) | *Ibid*., vol. 1144, No. 17955, p. 123. |
| Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984) | *Ibid*., vol. 1465, No. 24841, p. 85. |
| **Nationality and stateless persons** | |
| Convention relating to the Status of Refugees (Geneva, 28 July 1951) | United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137. |
| Convention relating to the Status of Stateless Persons (New York, 28 September 1954) | *Ibid*., vol. 360, No. 5158, p. 117. |

| | *Source* |
|---|---|
| Convention on the Reduction of Statelessness (New York, 30 August 1961) | *Ibid*., vol. 989, No. 14458, p. 175. |
| Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (Strasbourg, 6 May 1963) | *Ibid*., vol. 634, No. 9065, p. 221. |
| European Convention on Nationality (Strasbourg, 6 November 1997) | Council of Europe, *European Treaty Series*, No. 166. |
| **Private international law** | |
| Convention on Bills of Exchange and Promissory Notes (The Hague, 23 July 1912) | League of Nations, *International Conference for the Unification of the Law on Bills of Exchange, Promissory Notes and Cheques, Preparatory Documents* (C.234. M.83.1929.II), p. 42. |
| Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) | League of Nations, *Treaty Series*, vol. CXLIII, No. 3313, p. 257. |
| Convention providing a Uniform Law for Cheques (Geneva, 19 March 1931) | *Ibid*., No. 3316, p. 355. |
| Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques (Geneva, 19 March 1931) | *Ibid*., No. 3317, p. 407. |
| European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959) | United Nations, *Treaty Series*, vol. 472, No. 6841, p. 185. |
| Convention concerning the powers of authorities and the law applicable in respect of the protection of infants (The Hague, 5 October 1961) | *Ibid*., vol. 658, No. 9431, p. 143. |
| Convention concerning the International Administration of the Estates of Deceased Persons (The Hague, 2 October 1973) | Hague Conference on Private International Law, *Collection of Conventions (1951-2003)*, p. 169. |
| Convention on the Law Applicable to Matrimonial Property Regimes (The Hague, 14 March 1978) | *Ibid*., p. 227. |
| Convention on the Law Applicable to Succession to the Estates of Deceased Persons (The Hague, 1 August 1989) | *Ibid*., p. 339. |
| **Narcotic drugs and psychotropic substances** | |
| Convention on Psychotropic Substances (Vienna, 21 February 1971) | United Nations, *Treaty Series*, vol. 1019, No. 14956, p. 175. |
| United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988) | *Ibid*., vol. 1582, No. 27627, p. 95. |
| **International trade and development** | |
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| Protocol of Provisional Application of the General Agreement on Tariffs and Trade (Geneva, 30 October 1947) | *Ibid*., p. 308. |
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| | *Source* |
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| 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. 3. |
| Agreement establishing a Food and Fertiliser Technology Centre for the Asian and Pacific Region (Kawana, 11 June 1969) | *Ibid*., vol. 704, No. 10100, p. 17. |
| Food Aid Convention, 1971 (opened for signature at Washington, D.C., from 29 March until 3 May 1971) | *Ibid*., vol. 800, No. 11400, p. 162. |
| Customs Convention on Containers, 1972 (Geneva, 2 December 1972) | *Ibid*., vol. 988, No. 14449, p. 43. |
| Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974), as amended by the Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 11 April 1980) | *Ibid*., vol. 1511, No. 26121, p. 99. |
| United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980) | *Ibid*., vol. 1489, No. 25567, p. 3. |
| **Navigation** | |
| Convention on a Code of Conduct for Liner Conferences (Geneva, 6 April 1974) | United Nations, *Treaty Series*, vol. 1334, No. 22380, p. 15 and vol. 1365, p. 360. |
| International Convention on Arrest of Ships, 1999 (Geneva, 12 March 1999) | A/CONF.188/6. |
| **Penal matters** | |
| European Convention on Extradition (Paris, 13 December 1957) | United Nations, *Treaty Series*, vol. 359, No. 5146, p. 273. |
| European Convention on Information on Foreign Law (London, 7 June 1968) | *Ibid*., vol. 720, No. 10346, p. 147. |
| Additional Protocol to the European Convention on Information on Foreign Law (Strasbourg, 15 March 1978) | *Ibid*., vol. 1160, No. A-10346, p. 529. |
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| European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977) | *Ibid*., vol. 1137, No. 17828, p. 93. |
| International Convention Against the Taking of Hostages (New York, 17 December 1979) | *Ibid*., vol. 1316, No. 21931, p. 205. |
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| International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997) | *Ibid*., vol. 2149, No. 37517, p. 256. |
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|---|---|
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| Geneva Conventions on the Law of the Sea (Geneva, April 1958) | |
| Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958) | United Nations, *Treaty Series*, vol. 516, No. 7477, p. 205. |
| United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) | *Ibid*., vol. 1833, No. 31363, p. 3. |
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| **Law applicable in armed conflict** | |
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| Convention relative to the Laying of Automatic Submarine Contact Mines (Convention VIII) (The Hague, 18 October 1907) | *Ibid*., p. 151. |
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| 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) | *Ibid*., p. 317. |
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| | *Source* |
|---|---|
| Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986) | A/CONF.129/15. |
| **Liability** | |
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| Convention on International Liability for Damage Caused by Space Objects (London, Moscow, Washington, D.C., 29 March 1972) | *Ibid*., vol. 961, No. 13810, p. 187. |
| Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993) | Council of Europe, *European Treaty Series*, No. 150. |
| **Telecommunications** | |
| European Agreement on the Protection of Television Broadcasts (Strasbourg, 22 June 1960) | United Nations, *Treaty Series*, vol. 546, No. 7951, p. 247. |
| Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" (Washington, D.C., 20 August 1971) | *Ibid*., vol. 1220, No. 19677, p. 21. |
| **Environment and natural resources** | |
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| Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow, Washington, D.C., 29 December 1972) | *Ibid*., vol. 1046, No. 15749, p. 120. |
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| Convention for the Prevention of Marine Pollution from Land-based Sources (Paris, 4 June 1974) | *Ibid*., vol. 1546, No. 26842, p. 103. |
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| Convention on the Protection of the Rhine against Pollution from Chlorides (Bonn, 3 December 1976) | *Ibid*., vol. 1404, No. 23469, p. 59. |
| Additional Protocol to the Convention on the Protection of the Rhine against Pollution from Chlorides (Brussels, 25 September 1991) | *Ibid*., vol. 1840, No. A-23469, p. 372. |
| Agreement for the Protection of the Rhine against Chemical Pollution (Bonn, 3 December 1976) | *Ibid*., vol. 1124, No. 17511, p. 375. |

| | *Source* |
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| Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution (Kuwait, 24 April 1978) | *Ibid*., vol. 1140, No. 17898, p. 133. |
| Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (NAFO Convention) (Ottawa, 24 October 1978) | *Ibid*., vol. 1135, No. 17799, p. 369. |
| Convention on Long-Range Transboundary Air Pollution (Geneva, 13 November 1979) | *Ibid*., vol. 1302, No. 21623, p. 217. |
| Regional Convention for the Conservation of the Environment of the Red Sea and Gulf of Aden (Jeddah, 14 February 1982) | UNEP, *Selected Multilateral Treaties in the Field of the Environment* (Cambridge, Grotius, 1991), vol. 2, p. 144. |
| Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985) | United Nations, *Treaty Series*, vol. 1513, No. 26164, p. 293. |
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| Convention on Early Notification of a Nuclear Accident (Vienna, 26 September 1986) | United Nations, *Treaty Series*, vol. 1439, No. 24404, p. 275. |
| Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea, 25 November 1986) | ILM (Washington, D.C.), vol. 26, No. 1 (January 1987), p. 38. |
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| Convention on Biological Diversity (Rio de Janeiro, 5 June 1992) | *Ibid*., vol. 1760, No. 30619, p. 79. |
| Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997) | *Official Records of the General Assembly, Fifty-first session, Supplement No. 49*, vol. III, resolution 51/229, annex. |
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| Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (The Hague, 28 September 1955) | United Nations, *Treaty Series*, vol. 478, No. 6943, p. 371. |
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| Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991) | ILM (Washington, D.C.), vol. 30, No. 6 (November 1991), p. 1461. |
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| Declaration on the Neutrality of Laos (Geneva, 23 July 1962) | *Ibid*., vol. 456, No. 6564, p. 301. |
| European Convention on the Protection of the Archaeological Heritage (London, 6 May 1969) | *Ibid*., vol. 788, No. 11212, p. 227. |
| Convention for the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972) | *Ibid*., vol. 1037, No. 15511, p. 151. |
| Treaty on European Union (Maastricht Treaty) (Maastricht, 7 February 1992) | *Ibid*., vol. 1757, No. 30615, p. 3. |
| Marrakesh Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994) | *Ibid*., vols. 1867-1869, No. 31874. |

| | *Source* |
|---|---|
| Energy Charter Treaty (Lisbon, 17 December 1994) | *Ibid*., vol. 2080, No. 36116, p. 100. |
| Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Amsterdam, 2 October 1997) | *Official Journal of the European Communities*, No. C 340, vol. 40 (10 November 1997), p. 1. |
| Consolidated version of the Treaty on European Union (Amsterdam, 2 October 1997) | *Ibid*., p. 145. |
| Consolidated version of the Treaty establishing the European Community (Amsteram, 2 October 1997) | *Ibid*., p. 173. |

# Chapter I

# ORGANIZATION OF THE SESSION

1. The International Law Commission held the first part of its fifty-third session from 23 April to 1 June 2001 and the second part from 2 July to 10 August 2001 at its seat at the United Nations Office at Geneva.

## A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei ADDO (Ghana)

Mr. Husain AL-BAHARNA (Bahrain)

Mr. João Clemente BAENA SOARES (Brazil)

Mr. Ian BROWNLIE (United Kingdom of Great Britain and Northern Ireland)

Mr. Enrique CANDIOTI (Argentina)

Mr. James CRAWFORD (Australia)

Mr. Christopher John Robert DUGARD (South Africa)

Mr. Constantin ECONOMIDES (Greece)

Mr. Nabil ELARABY (Egypt)

Mr. Giorgio GAJA (Italy)

Mr. Zdzislaw GALICKI (Poland)

Mr. Raul Ilustre GOCO (Philippines)

Mr. Gerhard HAFNER (Austria)

Mr. Qizhi HE (China)

Mr. Mauricio HERDOCIA SACASA (Nicaragua)

Mr. Kamil IDRIS (Sudan)

Mr. Jorge ILLUECA (Panama)

Mr. Peter KABATSI (Uganda)

Mr. Maurice KAMTO (Cameroon)

Mr. James Lutabanzibwa KATEKA (United Republic of Tanzania)

Mr. Mochtar KUSUMA-ATMADJA (Indonesia)

Mr. Igor Ivanovich LUKASHUK (Russian Federation)

Mr. Teodor Viorel MELESCANU (Romania)

Mr. Djamchid MOMTAZ (Islamic Republic of Iran)

Mr. Didier OPERTTI BADAN (Uruguay)

Mr. Guillaume PAMBOU-TCHIVOUNDA (Gabon)

Mr. Alain PELLET (France)

Mr. Pemmaraju Sreenivasa RAO (India)

Mr. Víctor RODRÍGUEZ CEDEÑO (Venezuela)

Mr. Robert ROSENSTOCK (United States of America)

Mr. Bernardo SEPÚLVEDA (Mexico)

Mr. Bruno SIMMA (Germany)

Mr. Peter TOMKA (Slovakia)

Mr. Chusei YAMADA (Japan)

## B. Officers and the Enlarged Bureau

3. At its 2665th meeting, on 23 April 2001, the Commission elected the following officers:

*Chairman*: Mr. Peter Kabatsi
*First Vice-Chairman*: Mr. Gerhard Hafner
*Second Vice-Chairman*: Mr. Enrique Candioti
*Chairman of the Drafting Committee*: Mr. Peter Tomka
*Rapporteur*: Mr. Qizhi He

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[1] and the Special Rapporteurs.[2]

5. On the recommendation of the Enlarged Bureau the Commission set up a Planning Group composed of the following members: Mr. Gerhard Hafner (Chairman), Mr. Emmanuel Akwei Addo, Mr. João Clemente Baena Soares, Mr. Ian Brownlie, Mr. Zdzislaw Galicki, Mr. Kamil Idris, Mr. Maurice Kamto, Mr. Mochtar Kusuma-Atmadja, Mr. Alain Pellet, Mr. Robert Rosenstock, Mr. Chusei Yamada and Mr. Qizhi He (*ex officio*).

## C. Drafting Committee

6. At its 2666th, 2669th and 2679th meetings, on 24 April, 27 April and 23 May 2001 respectively, the Com-

[1] Mr João Clemente Baena Soares, Mr. Zdzislaw Galicki, Mr. Alain Pellet, Mr. Pemmaraju Sreenivasa Rao and Mr. Chusei Yamada.

[2] Mr. James Crawford, Mr. Christopher John Robert Dugard, Mr. Alain Pellet, Mr. Pemmaraju Sreenivasa Rao and Mr. Víctor Rodríguez Cedeño.

mission established a Drafting Committee, composed of the following members for the topics indicated:

(*a*) International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities): Mr. Peter Tomka (Chairman), Mr. Pemmaraju Sreenivasa Rao (Special Rapporteur), Mr. João Clemente Baena Soares, Mr. Ian Brownlie, Mr. Giorgio Gaja, Mr. Zdzislaw Galicki, Mr. Gerhard Hafner, Mr. Mauricio Herdocia Sacasa, Mr. James Lutabanzibwa Kateka, Mr. Teodor Viorel Melescanu, Mr. Didier Opertti Badan, Mr. Víctor Rodríguez Cedeño, Mr. Robert Rosenstock, Mr. Chusei Yamada and Mr. Qizhi He (*ex officio*);

(*b*) State responsibility: Mr. Peter Tomka (Chairman), Mr. James Crawford (Special Rapporteur), Mr. Ian Brownlie, Mr. Enrique Candioti, Mr. Christopher John Robert Dugard, Mr. Constantin Economides, Mr. Giorgio Gaja, Mr. Zdzislaw Galicki, Mr. Igor Ivanovich Lukashuk, Mr. Djamchid Momtaz, Mr. Guillaume Pambou-Tchivounda, Mr. Alain Pellet, Mr. Robert Rosenstock, Mr. Bruno Simma, Mr. Chusei Yamada and Mr. Qizhi He (*ex officio*);

(*c*) Reservations to treaties: Mr. Peter Tomka (Chairman), Mr. Alain Pellet (Special Rapporteur), Mr. Husain Al-Baharna, Mr. Enrique Candioti, Mr. Constantin Economides, Mr. Giorgio Gaja, Mr. Gerhard Hafner, Mr. Maurice Kamto, Mr. Teodor Viorel Melescanu, Mr. Víctor Rodríguez Cedeño, Mr. Robert Rosenstock, Mr. Bruno Simma and Mr. Qizhi He (*ex officio*).

7. The Drafting Committee held a total of 34 meetings on the three topics indicated above.

### D. Working groups

8. At its 2673rd, 2688th and 2695th meetings, on 4 May, 12 July and 25 July 2001 respectively, the Commission also established the following working groups composed of the members indicated:

(*a*) State responsibility:

(i) Commentaries: Mr. Teodor Viorel Melescanu (Chairman), Mr. Ian Brownlie, Mr. Enrique Candioti, Mr. James Crawford, Mr. Christopher John Robert Dugard, Mr. Constantin Economides, Mr. Giorgio Gaja, Mr. Djamchid Momtaz, Mr. Guillaume Pambou-Tchivounda, Mr. Bernardo Sepúlveda, Mr. Peter Tomka and Mr. Qizhi He (*ex officio*);

(ii) Outstanding issues: open-ended informal consultations chaired by the Special Rapporteur;

(*b*) Diplomatic protection: open-ended informal consultations chaired by the Special Rapporteur, Mr. Christopher John Robert Dugard;

(*c*) Unilateral acts of States: open-ended working group chaired by the Special Rapporteur, Mr. Víctor Rodríguez Cedeño.

### E. Secretariat

9. Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Mahnoush H. Arsanjani, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Mr. George Korontzis and Mr. Renan Villacis, Legal Officers, and Mr. Arnold Pronto and Ms. Ruth Khalastchi, Associate Legal Officers, served as Assistant Secretaries to the Commission.

### F. Agenda

10. At its 2665th meeting, on 23 April 2001, the Commission adopted an agenda for its fifty-third session consisting of the following items:

1. Organization of work of the session.
2. State responsibility.
3. Diplomatic protection.
4. Unilateral acts of States.
5. Reservations to treaties.
6. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities).
7. Programme, procedures and working methods of the Commission, and its documentation.
8. Cooperation with other bodies.
9. Date and place of the fifty-fourth session.
10. Other business.

# Chapter II

## SUMMARY OF THE WORK OF THE COMMISSION AT ITS FIFTY-THIRD SESSION

11. Concerning the topic "State responsibility", the Commission considered the fourth report of the Special Rapporteur (A/CN.4/517 and Add.1). The Commission also completed the second reading of the topic (see chapter IV). The Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly that it take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution, and that it annex the draft articles to the resolution. The Commission decided further to recommend that the General Assembly consider, at a later stage, and in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles on responsibility of States for internationally wrongful acts with a view to adopting a convention on the topic.

12. With regard to the topic of "International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)", the Commission completed the second reading of the topic (see chapter V). The Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly the elaboration of a convention by the Assembly on the basis of the draft articles on prevention of transboundary harm from hazardous activities.

13. As to the topic "Reservations to treaties", the Commission considered part two of the fifth report[3] of the Special Rapporteur, which had not been considered at the preceding session, and his sixth report (A/CN.4/518 and Add.1–3). The Commission adopted 12 draft guidelines dealing with formulation of reservations and interpretative declarations. The Commission also referred 13 draft guidelines, dealing with form and notification of reservations and interpretative declarations, to the Drafting Committee (see chapter VI).

14. With regard to the topic "Diplomatic protection", the Commission considered chapter III of the first report of the Special Rapporteur,[4] dealing with questions of continuous nationality and transferability of claims which had not been considered the previous year, and his second report (A/CN.4/514), dealing with the issue of the exhaustion of local remedies. The Commission referred draft articles 9, 10 and 11 dealing with the questions of continuous nationality, transferability of claims and the exhaustion of local remedies to the Drafting Committee. The Commission also established open-ended informal consultations to consider the question of continuous nationality and transferability of claims (see chapter VII).

15. As regards the topic "Unilateral acts of States", the Commission examined the fourth report of the Special Rapporteur (A/CN.4/519). The Special Rapporteur proposed draft articles (*a*) and (*b*) on the rules relating to interpretation of unilateral acts. The Commission considered the oral report of the Chairman of the Working Group on the topic, Mr. Víctor Rodríguez Cedeño, and supported the proposal to request additional information from States on State practice relating to unilateral acts (see chapter VIII).

16. The Commission continued traditional exchanges of information with ICJ, the Asian-African Legal Consultative Organization, the Inter-American Juridical Committee and the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe (see chapter IX, sect. C).

17. A training seminar organized by the United Nations Office at Geneva was held with 24 participants of different nationalities. Some members of the Commission gave lectures at the seminar (see chapter IX, sect. E).

18. The Commission decided that its next session should be held at the United Nations Office at Geneva in two parts, from 29 April to 7 June and from 22 July to 16 August 2002.

[3] *Yearbook … 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4.

[4] *Ibid.*, document A/CN.4/506 and Add.1.

# Chapter III

# SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

19. In response to paragraph 14 of General Assembly resolution 55/152 of 12 December 2000, the Commission would like to indicate the following specific issues for each topic on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest in providing effective guidance for the Commission in its further work.

## A. Reservations to treaties

### 1. Conditional interpretative declarations

20. At its forty-ninth session, the Commission decided to include the study of interpretative declarations in its work on the topic of reservations to treaties.[5] At its fifty-first session, it drew a distinction between "simple" interpretative declarations and conditional interpretative declarations, the definition of which is contained in guideline 1.2.1 [1.2.4].[6] In moving ahead in its work, the Commission finds that the latter declarations are subject, *mutatis mutandis*, to the same legal regime as reservations themselves. Should this assimilation be confirmed in regard to the effects of reservations and of conditional interpretative declarations respectively, the Commission is considering the possibility of not including in its draft Guide to Practice guidelines specifically relating to conditional interpretative declarations.

21. The Commission would be particularly interested in receiving comments from States in this connection and would welcome any information on the practice followed by States and international organizations in connection with the formulation and the effects of conditional interpretative declarations.

### 2. Late formulation of reservations

22. In the case of the draft guidelines adopted at the present session (see chapter VI), the Commission would like to receive, in particular, comments from Governments on guideline 2.3.1, entitled "Late formulation of a reservation".[7]

23. This guideline has been worded so that it is understood that this practice, which is a departure from the actual definition of reservations as contained in article 2, paragraph 1 (*d*), of the Vienna Convention on the Law of Treaties (hereinafter "the 1969 Vienna Convention") and reproduced in guideline 1.1,[8] should remain exceptional in view of the practice followed by depositaries and, in particular, by the Secretary-General of the United Nations.[9] Nevertheless, some members of the Commission consider that including this practice in the Guide to Practice could unduly encourage the late formulation of reservations. The Commission would like to receive the views of Governments on this issue.

24. Moreover, still in connection with the same draft guideline, the Commission would like to have the views of States on the advisability of using the term "objection", not within the meaning of article 20 of the 1969 Vienna Convention of a declaration whereby a State objects to the content of a reservation, but to signify opposition to its late formulation.[10]

### 3. Role of the depositary

25. The Special Rapporteur on reservations to treaties devoted a section of his sixth report, entitled "Functions of depositaries", to the role of the depositary in the communication of reservations. He proposed reproducing the provisions of articles 77 and 78 of the 1969 Vienna Convention in the Guide to Practice, by adapting them to the particular case of reservations. The problem nonetheless arises of whether it lies with the depositary to refuse to communicate to the States and international organizations concerned a reservation that is manifestly inadmissible, particularly when it is prohibited by a provision of the treaty.

26. The Commission would like to receive the views of States on this point before adopting a draft guideline in this regard.

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[5] *Yearbook … 1997*, vol. II (Part Two), p. 52, paras. 113–115.

[6] *Yearbook … 1999*, vol. II (Part Two), p.103.

[7] "Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation."

[8] *Yearbook … 1998*, vol. II (Part Two), p. 99.

[9] See note verbale from the Legal Counsel (modification of reservations), 2000 (*Treaty Handbook* (United Nations publication, Sales No. E.02.V.2), annex 2).

[10] Possible alternatives such as "rejection" or "opposition" have been proposed.

### B. Diplomatic protection

27. The Commission would welcome comments on the exceptions that may be made to the rule of continuous nationality, including the conditions under which such exceptions would apply. In particular, comments would be appreciated on those exceptions to the rule concerning situations of involuntary change of nationality arising out of State succession or out of marriage or adoption.

28. The Commission would also welcome comments on the following questions relating to diplomatic protection in the context of legal persons:

(*a*) Do States, in practice, exercise diplomatic protection on behalf of a company when the company is registered/incorporated in the State, irrespective of the nationality of the shareholders? Or, do States, in addition, require that the majority, or a preponderance, of the shareholders of the company have the nationality of the protecting State before diplomatic protection will be exercised?

(*b*) May a State exercise diplomatic protection on behalf of shareholders that have its nationality when the company (registered/incorporated in another State) is injured by an act of the State of registration/incorporation?

### C. Unilateral acts of States

29. The Commission draws attention to a questionnaire prepared by the Special Rapporteur which will be circulated to Governments. The Commission encourages Governments to reply to the questionnaire as soon as possible.

# Chapter IV

# STATE RESPONSIBILITY

## A. Introduction

30. At its first session, in 1949, the Commission selected State responsibility among the topics which it considered suitable for codification. In response to General Assembly resolution 799 (VIII) of 7 December 1953 requesting the Commission to undertake, as soon as it considered it advisable, the codification of the principles of international law concerning State responsibility, the Commission, at its seventh session in 1955, decided to begin the study of State responsibility and appointed F. V. García Amador as Special Rapporteur for the topic. At the next six sessions of the Commission, from 1956 to 1961, the Special Rapporteur presented six successive reports dealing on the whole with the question of responsibility for injuries to the persons or property of aliens.[11]

31. The Commission, at its fourteenth session, in 1962, set up a subcommittee whose task was to prepare a preliminary report containing suggestions concerning the scope and approach of the future study.[12]

32. At its fifteenth session, in 1963, the Commission, having unanimously approved the report of the Subcommittee, appointed Roberto Ago as Special Rapporteur for the topic.

33. The Commission received eight reports from the Special Rapporteur, at its twenty-first to thirty-first sessions, from 1969 to 1979.[13] The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic of "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation of international responsibility.[14]

34. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility".[15]

35. At its thirty-first session, the Commission, in view of the election of Roberto Ago as a judge of ICJ, appointed Willem Riphagen, Special Rapporteur for the topic. The Commission received seven reports from the Special Rapporteur,[16] for Parts Two and Three of the topic, at

[11] The six reports of the Special Rapporteur are reproduced as follows:

First report: *Yearbook ... 1956*, vol. II, p. 173, document A/CN.4/96;

Second report: *Yearbook ... 1957*, vol. II, p. 104, document A/CN.4/106;

Third report: *Yearbook ... 1958*, vol. II, p. 47, document A/CN.4/111;

Fourth report: *Yearbook ... 1959*, vol. II, p. 1, document A/CN.4/119;

Fifth report: *Yearbook ... 1960*, vol. II, p. 41, document A/CN.4/125;

Sixth report: *Yearbook ... 1961*, vol. II, p. 1, document A/CN.4/134 and Add.l.

[12] See *Yearbook ... 1962*, vol. II, p. 189, document A/5209, para. 47.

[13] The eight reports of the Special Rapporteur are reproduced as follows:

First report: *Yearbook ... 1969*, vol. II, p. 125, document A/CN.4/217 and Add.1 and *Yearbook ... 1971*, vol. II (Part One), p. 193, document A/CN.4/217/Add.2;

Second report: *Yearbook ... 1970*, vol. II, p. 177, document A/CN.4/233;

Third report: *Yearbook ... 1971*, vol. II (Part One), p. 199, document A/CN.4/246 and Add.1–3;

Fourth report: *Yearbook ... 1972*, vol. II, p. 71, document A/CN.4/264 and Add.1;

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;

Eighth report: *Yearbook ... 1979*, vol. II (Part One), p. 3, document A/CN.4/318 and Add.1–4 and *Yearbook ... 1980*, vol. II (Part One), p. 13, document A/CN.4/318/Add.5–7.

[14] *Yearbook ... 1975*, vol. II, pp. 55–59, document A/10010/Rev.1, paras. 38–51.

[15] *Yearbook ... 1980*, vol. II (Part Two), chap. III, pp. 26–63.

[16] The seven reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook ... 1980*, vol. II (Part One), p. 107, document A/CN.4/330;

Second report: *Yearbook ... 1981*, vol. II (Part One), p. 79, document A/CN.4/344;

Third report: *Yearbook ... 1982*, vol. II (Part One), p. 22, document A/CN.4/354 and Add.1 and 2;

Fourth report: *Yearbook ... 1983*, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1;

Fifth report: *Yearbook ... 1984*, vol. II (Part One), p. 1, document A/CN.4/380;

Sixth report: *Yearbook ... 1985*, vol. II (Part One), p. 3, document A/CN.4/389;

Seventh report: *Yearbook ... 1986*, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1.

its thirty-second to thirty-eighth sessions, from 1980 to 1986.

36. At its thirty-ninth session, in 1987, the Commission appointed Mr. Gaetano Arangio-Ruiz as Special Rapporteur to succeed Willem Riphagen, whose term of office as a member of the Commission had expired on 31 December 1986. The Commission received eight reports from Mr. Arangio-Ruiz, at its fortieth to forty-eighth sessions, from 1988 to 1996.[17]

37. At its forty-eighth session, in 1996, the Commission completed the first reading of the draft articles of Parts Two and Three on State responsibility and decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles provisionally adopted by the Commission on first reading,[18] through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1998.

38. At its forty-ninth session, in 1997, the Commission established a Working Group on State responsibility to address matters dealing with the second reading of the draft articles.[19] The Commission also appointed Mr. James Crawford as Special Rapporteur.

39. The Commission received three reports from the Special Rapporteur, Mr. James Crawford, at its fiftieth to fifty-second sessions, from 1998 to 2000.[20] The reports dealt with consideration of the draft articles for the purposes of second reading in the light of comments and observations received from Governments[21] and developments in State practice, judicial decisions and literature.

40. At its fifty-second session, the Commission took note of the report of the Drafting Committee on the complete text of the draft articles provisionally adopted by the Drafting Committee on second reading (A/CN.4/L.600).[22] The Commission decided to finalize the second reading of the draft articles at its fifty-third session, in 2001, in view of any further comments submitted by Governments with regard to those draft articles.

### B. Consideration of the topic at the present session

41. At its present session, the Commission had before it the comments and observations received from Governments on the draft articles provisionally adopted by the Drafting Committee at the previous session (A/CN.4/515 and Add.1–3) and the fourth report of the Special Rapporteur, Mr. James Crawford (A/CN.4/517 and Add.1). The report addressed the main issues relating to the draft articles in the light of the comments and observations received from Governments. The Commission considered the report at its 2665th, 2667th, 2668th, 2670th to 2675th and 2677th meetings, held on 23, 25 and 26 April, and 1 to 11 and 18 May 2001. The debate focused primarily on the four main outstanding issues relating to the draft articles, namely: serious breaches of obligations to the international community as a whole (Part Two, chapter III); countermeasures (Part Two *bis*, chapter II); dispute settlement provisions (Part Three); and the form of the draft articles.

42. The Commission decided to refer the draft articles to the Drafting Committee at its 2672nd and 2674th meetings, on 3 and 8 May 2001.

43. The Commission also decided, at its 2673rd meeting, on 4 May 2001, to establish two working groups on the topic: one open-ended working group to deal with the main outstanding issues on the topic, and the other working group to consider the commentaries to the draft articles.[23]

44. On the basis of the recommendation of the open-ended working group on the main outstanding issues, the Commission agreed, as an exception to its long-standing practice on adopting draft articles on second reading, to include a brief summary of the debate on the four issues in the light of the importance of the topic and the complexity of the issues. The recommendations of the open-ended working group on the main outstanding issues are contained in paragraphs 49, 55, 60 and 67 below.

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[17] The eight reports of the Special Rapporteur are reproduced as follows: Preliminary report: *Yearbook ... 1988*, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1;

Second report: *Yearbook ... 1989*, vol. II (Part One), p. 1, document A/CN.4/425 and Add.1;

Third report: *Yearbook ... 1991*, vol. II (Part One), p. 1, document A/CN.4/440 and Add.1;

Fourth report: *Yearbook ... 1992*, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1–3;

Fifth report: *Yearbook ... 1993*, vol. II (Part One), p. 1, document A/CN.4/453 and Add.1–3;

Sixth report: *Yearbook ... 1994*, vol. II (Part One), p. 3, document A/CN.4/461 and Add.1–3;

Seventh report: *Yearbook ... 1995*, vol. II (Part One), p. 3, document A/CN.4/469 and Add.1 and 2;

Eighth report: *Yearbook ... 1996*, vol. II (Part One), p. 1, document A/CN.4/476 and Add.1.

[18] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1996*, vol. II (Part Two), chap. III, sect. D, pp. 58–65. For the text of draft articles 42 (para. 3), 47, 48 and 51 to 53, with commentaries thereto, *ibid.*, pp. 65 et seq.

[19] For the guidelines on the consideration of the draft articles on second reading adopted by the Commission on the recommendation of the Working Group, see *Yearbook ... 1997*, vol. II (Part Two), p. 58, para. 161.

[20] The three reports of the Special Rapporteur are reproduced as follows:

*Yearbook ... 1998*, vol. II (Part One), document A/CN.4/490 and Add.1–7;

*Yearbook ... 1999*, vol. II (Part One), document A/CN.4/498 and Add.1–4;

*Yearbook ... 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4.

[21] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/488 and Add.1–3 and *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/492; see also topical summaries of the discussions in the Sixth Committee of the General Assembly: A/CN.4/483, sect. C; A/CN.4/496, sect. D; and A/CN.4/504, sect. A.

[22] *Yearbook ... 2000*, vol. II (Part Two), chap. IV, annex.

[23] For the composition of the Working Group on the commentaries to the draft articles on State responsibility, see paragraph 8 above.

### 1. Brief summary of the debate on the main outstanding issues

#### (a) *Serious breaches of obligations to the international community as a whole (Part Two, chapter III proposed by the Drafting Committee at the fifty-second session)*[24]

45. There were different views concerning the provisions on serious breaches in chapter III of Part Two and as was discussed in the fourth report of the Special Rapporteur.

46. Some members favoured retaining the chapter. In their view, it provided an essential balance to the text, having regard to the decision not to make reference to the concept of "international crimes of State" in former article 19 and was thus vital to the overall balance of the text. Moreover, it would be a retrograde step to delete the chapter, diminishing the work undertaken by the Commission and suggesting that the Commission was unable to find solutions to difficult and controversial issues.

47. Many of those who favoured retaining the chapter felt, however, that it could be improved by various amendments. In particular, the notion of serious breaches required further clarification; the consequences of serious breaches needed to be defined more precisely and expanded to clarify, among other things, the right of all States to invoke the responsibility of a State arising from a serious breach (the so-called *actio popularis*); further indication of when a serious breach entailed exemplary or expressive damages needed to be given; in particular those damages needed to be identified more clearly so as to distinguish them from punitive damages, which were not available under general international law at present; the obligations of cooperation and non-recognition set forth in article 42, paragraph 2, needed to be clarified and developed; and it should be more clearly provided that these consequences were neither exhaustive nor mutually exclusive.

48. Other members favoured the deletion of the chapter for the following reasons: it dealt with primary rules; there was no basis in existing international law for a qualitative distinction between serious breaches and ordinary breaches, nor was such a distinction desirable as a matter of policy, having regard to the wide spectrum of violations that could occur; some of the elements of the provisions were highly problematic, such as the definition of serious breach, the notion of aggravated damages, the obligations incumbent on all States, and the countermeasures which all States were authorized to take. Instead of a separate chapter, the view was expressed that in order to avoid prejudicing the development of rules on "serious breaches", a "without prejudice" clause should be included in Part Four or elsewhere.

49. On the recommendation of the open-ended working group, the Commission reached the understanding that the chapter would be retained but with the deletion of article 42, paragraph 1, which dealt with damages reflecting the gravity of the breach. As part of the understanding, the previous references to serious breach of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests, which mostly dealt with the question of invocation as expressed by ICJ in the *Barcelona Traction* case,[25] would be replaced with the category of peremptory norms. Use of that category was to be preferred since it concerned the scope of secondary obligations and not their invocation. A further advantage of this approach was that the notion of peremptory norms was well established by now in the 1969 Vienna Convention. The new formulation should not deal with trivial or minor breaches of peremptory norms, but only with serious breaches of peremptory norms. The Drafting Committee was also asked to give further consideration to aspects of consequences of serious breaches in order to simplify these, to avoid excessively vague formulas and to narrow the scope of its application to cases falling properly within the scope of the chapter.

#### (b) *Countermeasures (Part Two* bis, *chapter II proposed by the Drafting Committee at the fifty-second session)*[26]

50. There were also different views concerning the provisions on countermeasures contained in chapter II of Part Two *bis* and as was discussed in the fourth report of the Special Rapporteur.

51. Some members favoured retaining this chapter for the following reasons: countermeasures undeniably existed and were recognized as part of international law, as ICJ had confirmed in the *Gabčíkovo-Nagymaros Project* case;[27] unlike other circumstances precluding wrongfulness, countermeasures played a determining role in the implementation of responsibility since their purpose was to induce the wrongdoing State to comply with its obligation not only of cessation, but also of reparation; the regime of countermeasures set forth in articles 50 to 53 and 55 provided a strict framework for taking countermeasures to avoid abuse, provided clearer limits than the vague, indeterminate rules of customary international law governing countermeasures and represented a fragile balance whose essential structure should be maintained; and it would be illogical and impractical to include these provisions in article 23, given its different purpose and function and the length of the provisions to be added.

52. Some of the members favouring the retention of this chapter suggested various amendments which, in their view, would strike a balance between the right to take countermeasures and the need to curb their misuse. The suggestions included the strengthening of the reference to dispute settlement in article 53; and providing a flexible and expeditious dispute settlement machinery for resolving disputes concerning countermeasures.

53. Other members believed that this chapter should be deleted for the following reasons: the provisions were unnecessary and in significant respects did not reflect the

[24] See footnote 22 above. For the report of the Drafting Committee, see *Yearbook ... 2000*, vol. I, 2662nd meeting.

[25] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 3.

[26] See footnote 22 above. For the report of the Drafting Committee, see *Yearbook ... 2000*, vol. I, 2662nd meeting.

[27] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

state of the law or the logic of the role of countermeasures; the regime of countermeasures under customary law was only partly developed; and the chapter dealt with the modalities of a notion that was not clearly defined. Moreover, the provisions were unsatisfactory in a number of respects: they failed to address the multiple purposes of countermeasures and they laid down procedural conditions that were too strict and were inconsistent with international jurisprudence and arbitral decisions. It was suggested that the deletion of the chapter could be accompanied by a strengthened and more comprehensive version of article 23, as proposed by several Governments.

54. Independently of this general question concerning chapter II, there were different opinions regarding countermeasures by States other than the injured State, as provided for in article 54. Some members supported this provision as useful and necessary for dealing with serious breaches under article 41, as one of the essential consequences of serious breaches, without which States would be powerless to deal with such breaches and as crucial to the balance of the draft. In their view it was at least a legitimate form of progressive development of international law; indeed some aspects at least were supported by State practice. Other members opposed this provision for the following reasons: there was no existing foundation for article 54 as law or its potential progressive development because of the inconsistent practice and the absence of an *opinio juris*; and article 54 was flawed in several respects such as providing a superficial legitimacy for bullying small States, creating a "do-it-yourself" sanctions system which threatened the security system based on the Charter of the United Nations, and adding a new circumstance precluding wrongfulness for "collective" countermeasures which were not connected to "ordinary" countermeasures and might eventually extend to the use of force. It was suggested that article 54 be deleted and replaced by a saving clause.

55. On the recommendation of the open-ended working group, the Commission reached the understanding that it was undesirable to cram the whole or a substantial part of the articles on countermeasures into article 23, which was devoted only to one aspect of the question. Such an attempt would overburden article 23 and could even make it incomprehensible. As part of the understanding, article 23 would remain in chapter V of Part One. The chapter on countermeasures would remain in Part Three, but article 54, which dealt with countermeasures by States other than the injured State, would be deleted. Instead, there would be a saving clause leaving all positions on this issue unaffected. In addition, article 53, dealing with conditions relating to countermeasures, would be reconsidered and the distinction between countermeasures and provisional countermeasures would be deleted. That article was to be simplified and brought substantially into line with the decisions of the arbitral tribunal in the *Air Service Agreement* case[28] and of ICJ in the *Gabčíkovo-Nagymaros Project* case. Articles 51 and 52 on the obligations not subject to countermeasures and proportionality were also to be reconsidered, as necessary.

[28] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 415.

(c) *Dispute settlement provisions (Part Three)*

56. The draft articles adopted on first reading included a Part Three dealing with dispute settlement.[29] There were different views regarding the dispute settlement provisions of that Part.

57. Some members favoured including general dispute settlement provisions, particularly if the Commission were to recommend the elaboration of a convention, because of the significance and complexity of the topic; the text dealt with many important questions of international law that were not covered by particular treaty rules; moreover the inclusion of provisions for dispute settlement would enhance the capacity of courts and tribunals to develop the law through their decisions. The view was also expressed that a compulsory dispute settlement mechanism was necessary at least in relation to countermeasures, given that these were liable to abuse.

58. Other members considered it unnecessary to include dispute settlement provisions. Provisions for dispute settlement were already sufficiently covered by a growing body of conventional international law, underlying which was the principle expressed in Article 33 of the Charter of the United Nations. In their view, given the close link between the primary obligations and the secondary obligations of State responsibility and the fact that the law of State responsibility was an integral part of the structure of international law as a whole, a special regime for dispute settlement in the framework of State responsibility might result in overlap with existing dispute settlement mechanisms and would lead to the fragmentation and proliferation of such mechanisms. Indeed general provision for compulsory dispute settlement in the field of State responsibility would amount to a reversal of the rule in Article 33 of the Charter, a move not to be expected and hardly realistic even now.

59. Still other members believed that the total absence of a dispute settlement mechanism would be inappropriate and suggested including a general dispute settlement provision similar to Article 33 of the Charter of the United Nations, as proposed by one Government.

60. On the recommendation of the open-ended working group, the Commission reached the understanding that it would not include provisions for a dispute settlement machinery, but would draw attention to the machinery elaborated by the Commission in the draft adopted on first reading[30] as a possible means for settlement of disputes concerning State responsibility; and would leave it to the General Assembly to consider whether and what form of provisions for dispute settlement could be included in the event that the Assembly should decide to elaborate a convention.

[29] For the texts of the articles on dispute settlement, see *Yearbook … 1996*, vol. II (Part Two), pp. 64–65.

[30] See footnote 18 above.

(d) *Form of the draft articles*

61. As to the question of the eventual form of the draft articles to be proposed to the General Assembly, diverging views were expressed as to the advisability of the options available to the Commission under article 23 of its statute. Many members supported the conclusion of a convention, or the holding of a conference to conclude a convention. Others, however, preferred the option of the Assembly taking note of or adopting the report by resolution. A further option was for the Commission to recommend adoption of the draft articles in the form of a declaration, as had been proposed at its fifty-first session in the context of the draft articles on nationality of natural persons in relation to the succession of States.[31]

62. Those members supporting the adoption of an international convention maintained, *inter alia*, that the Commission's task was to state the law, which could only be done through conventions; that the Commission had a tradition of having all of its major drafts adopted as international conventions; and that doing so in the case of the draft articles would ensure their place, together with the 1969 Vienna Convention, as one of the fundamental pillars of public international law. Furthermore, in the light of its significance, the obligations and rights peculiar to the institution of responsibility required a set of rules which could only be envisaged in a definitive binding instrument. Stating customary rules of international law in treaty form would give them additional certainty, reliability and binding force, and would thus consolidate a vital chapter of the law. In addition, not codifying the law of State responsibility in a treaty would create an imbalance in the international legal order whereby primary rules were more comprehensively codified than secondary rules. It was doubtful that non-ratification might lead to "reverse codification". The fact that customary rules were included in a convention did not *per se* mean that they would cease to enjoy such status if the convention were to remain unratified. Indeed, unratified conventions continued to play an important role. It was pointed out that all States participating in a diplomatic conference would be involved in the elaboration of the treaty on an equal footing. The Convention had taken more than a decade to come into force, and was even now ratified by less than half the States in the world; neither of these facts had had any discernible effect on its authority as a statement of the law of treaties. To say that States would necessarily upset the balance of the text implied that they acted against their own interests, when in fact, States, in principle, acted responsibly and were capable of engaging in political negotiations to produce satisfactory results even in the framework of a general codification. Furthermore, codification conferences had tended to make few changes to consensus texts prepared by the Commission.

63. Others, opposing the adoption of a convention, pointed out that: it was difficult to state the basic elements of international law in a convention; unlike, for example, the law of State immunity, the law of State responsibility did not require implementation in national legislation; moreover an unratified convention containing significant elements of customary international law could result in "reverse codification". It would, likewise, not be clear what the effects would be, both for parties and non-parties to the convention. The possibility of reservations or of States adopting a non-cooperative stance posed further dangers. The 1969 Vienna Convention was not an accurate analogy since it dealt largely with matters of form, whereas the topic of State responsibility covered the substance of international law and presupposed a disagreement or dispute between the parties concerned rather than a consensual activity such as treaty-making. Likewise, a convention was not strictly necessary since the draft articles adopted on second reading were bound to be influential, just as the existing text had been widely cited and relied on by ICJ and other tribunals. Furthermore, the holding of a conference of plenipotentiaries would result in a lengthy process, unpredictable in outcome, and could call into question the balance of the text, laboriously achieved over 40 years.

64. Some members supporting a non-treaty form maintained that while, under ideal conditions, a convention might be preferable, it was not realistic given all the difficulties which would inevitably arise. Furthermore, it would not be desirable to give the General Assembly a stark choice between "a convention or nothing". An Assembly resolution or declaration adopted unanimously would be more effective than a convention adopted after many years of preparatory work and ratified by a small number of States. Indeed, if the report of the Commission were adopted by resolution of the Assembly or taken note of, it would be seen as an authoritative study of current rules, State practice and doctrine aimed at providing guidance to States on their rights and responsibilities, thereby contributing to legal stability and predictability in international relations. Adoption in the form of a declaration would effectively place the burden on opposing States to prove that it was not binding. It was observed that such "soft law" instruments did have a decisive impact on international relations and the conduct of States, as evidenced by the jurisprudence of ICJ.

65. Those opposing a non-binding instrument pointed out that such a route would detract from the importance of the question of State responsibility in international law, as well as casting doubts on the value of the text. A General Assembly resolution could not have the same normative value as a treaty. It would deviate from the original intention and objective, which called for a general system of legal rules, and would afford no way of remedying the inadequacies of international customary law. It would also fail to take account of the historical dimension of a project which had been on the Commission's agenda from the beginning. It would be unrealistic to expect the Assembly to adopt the text as a declaration without first substantially amending the draft articles. There was no guarantee that States would not attach interpretative declarations to the instrument. Thus, a declaration entailed the same problems as a convention, but without the advantages.

66. As to the significance of the inclusion of elements of progressive development in the draft, in one view, the eventual form of the draft articles was dependent on their content: if a substantial law-making element was included, the appropriate form would be a multilateral convention,

[31] See *Yearbook ... 1999*, vol. II (Part Two), p. 20, para. 44.

but if the draft articles merely codified existing rules, there would be no need for a convention. Others pointed out that precisely because the text contained elements of progressive development, caution was required and a convention should not be proposed. Practice showed that States were, in general, not in favour of such elements being included in internationally binding instruments. Still others disputed this, and pointed out that various conventions, such as those concerning the law of the sea and consular relations, included aspects of codification and progressive development of international law. Like earlier Commission texts, the draft articles combined elements of both, it was not always possible to determine which category a particular provision belonged to, and in the long run this might not matter if a provision was seen to be sensible and balanced. In addition, substantial elements of international law had been articulated in conventions. For example, the 1969 Vienna Convention includes the fundamental notion of peremptory norms.

67. On the recommendation of the open-ended working group, the Commission reached the understanding that in the first instance, it should recommend to the General Assembly that the Assembly should take note of the draft articles in a resolution and annex the text of the articles to it. This is a procedure similar to the one that was followed by the Assembly with regard to the articles on "Nationality of natural persons in relation to the succession of States" in resolution 55/153 of 12 December 2000. The recommendation would also propose that, given the importance of the topic, in the second and later stage the Assembly should consider the adoption of a convention on this topic. The question of dispute settlement would naturally arise at that second stage (see paragraph 60 above).

#### 2. Change of the title of the topic

68. The Commission was concerned that the title "State responsibility" was not sufficiently clear to distinguish the topic from the responsibility of the State under internal law. It considered different variants for the title, such as "State responsibility under international law", "International responsibility of States" and "International responsibility of States for internationally wrongful acts". One of the advantages of the last formulation was that it made it easier for the text to be translated into the other languages, by clearly distinguishing it from the concept of international "liability" for acts not prohibited by international law. At the end, the Commission settled on the title "Responsibility of States for internationally wrongful acts", without the qualifier "international" before "responsibility" so as to avoid repeating the word "international" twice in the title. Since the draft articles cover only internationally wrongful acts and not any other wrongful acts, it was considered preferable to retain the reference to "international" before "wrongful acts".

#### 3. Adoption of the draft articles and commentaries

69. The Chairman of the Drafting Committee presented his report (A/CN.4/L.602 and Corr.1 and subsequently as A/CN.4/L.602/Rev.1) at the 2681st to 2683rd and 2701st meetings of the Commission, held on 29 to 31 May and 3 August 2001. The Commission considered the report of the Drafting Committee at the same meetings and adopted the entire set of draft articles on responsibility of States for internationally wrongful acts at its 2683rd and 2701st meetings.

70. At its 2702nd to 2709th meetings, held from 6 to 9 August 2001, the Commission adopted the commentaries to the aforementioned draft articles.

71. In accordance with its statute, the Commission submits the draft articles to the General Assembly, together with the recommendation set out below.

### C. Recommendation of the Commission

72. At its 2709th meeting, on 9 August 2001, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly that it take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution, and that it annex the draft articles to the resolution.

73. The Commission decided further to recommend that the General Assembly consider, at a later stage, and in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles on responsibility of States for internationally wrongful acts with a view to concluding a convention on the topic. The Commission was of the view that the question of the settlement of disputes could be dealt with by the above-mentioned international conference, if it considered that a legal mechanism on the settlement of disputes should be provided in connection with the draft articles.

### D. Tribute to the Special Rapporteur, Mr. James Crawford

74. At its 2709th meeting, on 9 August 2001, the Commission, after adopting the text of the draft articles on responsibility of States for internationally wrongful acts, adopted the following resolution by acclamation:

"*The International Law Commission*,

*Having adopted* the draft articles on responsibility of States for internationally wrongful acts,

*Expresses* to the Special Rapporteur, Mr. James Crawford, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft articles on responsibility of States for internationally wrongful acts."

75. The Commission also expressed its deep appreciation to the previous Special Rapporteurs, Messrs Francisco V. García Amador, Roberto Ago, Willem Riphagen and Gaetano Arangio-Ruiz, for their outstanding contribution to the work on the topic.

## E. Draft articles on responsibility of States for internationally wrongful acts

### 1. Text of the draft articles

76. The text of the draft articles adopted by the Commission at its fifty-third session is reproduced below.

**RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS**

Part One

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Chapter I

GENERAL PRINCIPLES

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

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

***Article 2. Elements of an internationally wrongful act of a State***

**There is an internationally wrongful act of a State when conduct consisting of an action or omission:**

**(*a*) is attributable to the State under international law; and**

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

***Article 3. Characterization of an act of a State as internationally wrongful***

**The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.**

Chapter II

ATTRIBUTION OF CONDUCT TO A STATE

***Article 4. Conduct of organs of a State***

**1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.**

**2. An organ includes any person or entity which has that status in accordance with the internal law of the State.**

***Article 5. Conduct of persons or entities exercising elements of governmental authority***

**The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.**

***Article 6. Conduct of organs placed at the disposal of a State by another State***

**The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.**

***Article 7. Excess of authority or contravention of instructions***

**The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.**

***Article 8. Conduct directed or controlled by a State***

**The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.**

***Article 9. Conduct carried out in the absence or default of the official authorities***

**The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.**

***Article 10. Conduct of an insurrectional or other movement***

**1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.**

**2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.**

**3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.**

***Article 11. Conduct acknowledged and adopted by a State as its own***

**Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.**

Chapter III

BREACH OF AN INTERNATIONAL OBLIGATION

***Article 12. 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 is not in conformity with what is required of it by that obligation, regardless of its origin or character.**

*Article 13. International obligation in force for a State*

**An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.**

*Article 14. Extension in time of the breach of an international obligation*

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

**2. The breach of an international obligation by an act of a State having a continuing character extends 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 remains not in conformity with that obligation.**

*Article 15. Breach consisting of a composite act*

**1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.**

**2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.**

## CHAPTER IV

## RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

*Article 16. Aid or assistance in the commission of an internationally wrongful act*

**A State which aids or assists another State in the commission of an internationally wrongful act by the latter 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.**

*Article 17. Direction and control exercised over the commission of an internationally wrongful act*

**A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act 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.**

*Article 18. Coercion of another State*

**A State which coerces another State to commit an act is internationally responsible for that act if:**

**(*a*) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and**

**(*b*) the coercing State does so with knowledge of the circumstances of the act.**

*Article 19. Effect of this chapter*

**This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.**

## CHAPTER V

## CIRCUMSTANCES PRECLUDING WRONGFULNESS

*Article 20. Consent*

**Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.**

*Article 21. Self-defence*

**The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.**

*Article 22. Countermeasures in respect of an internationally wrongful act*

**The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.**

*Article 23.* **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*, that is the occurrence of an irresistible force or of an unforeseen 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 situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or**

**(*b*) the State has assumed the risk of that situation occurring.**

*Article 24. 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 has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.**

**2. Paragraph 1 does not apply if:**

**(*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or**

**(*b*) the act in question is likely to create a comparable or greater peril.**

*Article 25. 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 the act:**

**(*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and**

**(*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.**

**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 excludes the possibility of invoking necessity; or**

**(*b*) the State has contributed to the situation of necessity.**

*Article 26. Compliance with peremptory norms*

**Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.**

*Article 27. Consequences of invoking a circumstance precluding wrongfulness*

**The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:**

**(*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;**

**(*b*) the question of compensation for any material loss caused by the act in question.**

## PART TWO

## CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

### CHAPTER I

### GENERAL PRINCIPLES

*Article 28. Legal consequences of an internationally wrongful act*

**The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.**

*Article 29. Continued duty of performance*

**The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.**

*Article 30. Cessation and non-repetition*

**The State responsible for the internationally wrongful act is under an obligation:**

**(*a*) to cease that act, if it is continuing;**

**(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.**

*Article 31. Reparation*

**1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.**

**2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.**

*Article 32. Irrelevance of internal law*

**The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.**

*Article 33. Scope of international obligations set out in this Part*

**1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.**

**2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.**

### CHAPTER II

### REPARATION FOR INJURY

*Article 34. Forms of reparation*

**Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.**

*Article 35. Restitution*

**A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:**

**(*a*) is not materially impossible;**

**(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.**

*Article 36. Compensation*

**1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.**

**2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.**

*Article 37. Satisfaction*

**1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.**

**2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.**

**3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.**

*Article 38. Interest*

**1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.**

**2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.**

*Article 39. Contribution to the injury*

**In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.**

## Chapter III

## SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

*Article 40. Application of this chapter*

**1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.**

**2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.**

*Article 41. Particular consequences of a serious breach of an obligation under this chapter*

**1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.**

**2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.**

**3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.**

# Part Three

# THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

## Chapter I

## INVOCATION OF THE RESPONSIBILITY OF A STATE

*Article 42. Invocation of responsibility by an injured State*

**A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:**

**(*a*) that State individually; or**

**(*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:**

**(i) specially affects that State; or**

**(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.**

*Article 43. Notice of claim by an injured State*

**1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.**

**2. The injured State may specify in particular:**

**(*a*) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;**

**(*b*) what form reparation should take in accordance with the provisions of Part Two.**

*Article 44. Admissibility of claims*

**The responsibility of a State may not be invoked if:**

**(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;**

**(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.**

*Article 45. Loss of the right to invoke responsibility*

**The responsibility of a State may not be invoked if:**

**(*a*) the injured State has validly waived the claim;**

**(*b*) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.**

*Article 46. Plurality of injured States*

**Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.**

*Article 47. Plurality of responsible States*

**1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.**

**2. Paragraph 1:**

**(*a*) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;**

**(*b*) is without prejudice to any right of recourse against the other responsible States.**

*Article 48. Invocation of responsibility by a State other than an injured State*

**1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:**

**(*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or**

**(*b*) the obligation breached is owed to the international community as a whole.**

**2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:**

**(*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and**

**(*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.**

**3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.**

CHAPTER II

COUNTERMEASURES

*Article 49. Object and limits of countermeasures*

**1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.**

**2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.**

**3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.**

*Article 50. Obligations not affected by countermeasures*

**1. Countermeasures shall not affect:**

**(*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;**

**(*b*) obligations for the protection of fundamental human rights;**

**(*c*) obligations of a humanitarian character prohibiting reprisals;**

**(*d*) other obligations under peremptory norms of general international law.**

**2. A State taking countermeasures is not relieved from fulfilling its obligations:**

**(*a*) under any dispute settlement procedure applicable between it and the responsible State;**

**(*b*) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.**

*Article 51. Proportionality*

**Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.**

*Article 52. Conditions relating to resort to countermeasures*

**1. Before taking countermeasures, an injured State shall:**

**(*a*) call upon the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;**

**(*b*) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.**

**2. Notwithstanding paragraph 1 (*b*), the injured State may take such urgent countermeasures as are necessary to preserve its rights.**

**3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:**

**(*a*) the internationally wrongful act has ceased; and**

**(*b*) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.**

**4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.**

*Article 53. Termination of countermeasures*

**Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.**

*Article 54. Measures taken by States other than an injured State*

**This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.**

PART FOUR

GENERAL PROVISIONS

*Article 55.* **Lex specialis**

**These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.**

*Article 56. Questions of State responsibility not regulated by these articles*

**The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.**

*Article 57. Responsibility of an international organization*

**These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.**

*Article 58. Individual responsibility*

**These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.**

*Article 59. Charter of the United Nations*

**These articles are without prejudice to the Charter of the United Nations.**

## 2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

77. The text of the draft articles with commentaries thereto adopted by the Commission at its fifty-third session is reproduced below:

## RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

*General commentary*

(1) These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law.

(2) Roberto Ago, who was responsible for establishing the basic structure and orientation of the project, saw the articles as specifying:

> the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility … [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.[32]

(3) Given the existence of a primary rule establishing an obligation under international law for a State, and assuming that a question has arisen as to whether that State has complied with the obligation, a number of further issues of a general character arise. These include:

(*a*) The role of international law as distinct from the internal law of the State concerned in characterizing conduct as unlawful;

(*b*) Determining in what circumstances conduct is to be attributed to the State as a subject of international law;

(*c*) Specifying when and for what period of time there is or has been a breach of an international obligation by a State;

(*d*) Determining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter;

(*e*) Defining the circumstances in which the wrongfulness of conduct under international law may be precluded;

(*f*) Specifying the content of State responsibility, i.e. the new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done;

(*g*) Determining any procedural or substantive preconditions for one State to invoke the responsibility of another State, and the circumstances in which the right to invoke responsibility may be lost;

(*h*) Laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfilment of the obligations of the responsible State under these articles.

This is the province of the secondary rules of State responsibility.

(4) A number of matters do not fall within the scope of State responsibility as dealt with in the present articles:

(*a*) As already noted, it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, *mutatis mutandis*, for other "sources" of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.

(*b*) The consequences dealt with in the articles are those which flow from the commission of an internationally wrongful act as such.[33] No attempt is made to deal with the consequences of a breach for the continued validity or binding effect of the primary rule (e.g. the right of an injured State to terminate or suspend a treaty for material breach, as reflected in article 60 of the 1969 Vienna Convention). Nor do the articles cover such indirect or additional consequences as may flow from the responses of international organizations to wrongful conduct. In carrying out their functions it may be necessary for international organizations to take a position on whether a State has breached an international obligation. But even where this is so, the consequences will be those determined by or within the framework of the constituent instrument of the organization, and these fall outside the scope of the articles. This is particularly the case with action of the United Nations under the Charter, which is specifically reserved by article 59.

(*c*) The articles deal only with the responsibility for conduct which is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited, and may even be expressly permitted, by international law (e.g. compensation for property duly taken for a public purpose). There may also be cases where a State is obliged to restore the *status quo ante* after some lawful activity has been completed. These requirements of compensation or restoration would involve primary obligations; it would be the failure to pay compensation, or to restore the *status*

[32] *Yearbook ... 1970*, vol. II, p. 306, document A/8010/Rev.l, para. 66 (*c*).

[33] For the purposes of the articles, the term "internationally wrongful act" includes an omission and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See paragraph (1) of the commentary to article 1.

*quo* which would engage the international responsibility of the State concerned. Thus for the purposes of these articles, international responsibility results exclusively from a wrongful act contrary to international law. This is reflected in the title of the articles.

(*d*) The articles are concerned only with the responsibility of States for internationally wrongful conduct, leaving to one side issues of the responsibility of international organizations or of other non-State entities (see articles 57 and 58).

(5) On the other hand, the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole. Being general in character, they are also for the most part residual. In principle, States are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences and thereby to exclude the ordinary rules of responsibility. This is made clear by article 55.

(6) The present articles are divided into four parts. Part One is entitled "The internationally wrongful act of a State". It deals with the requirements for the international responsibility of a State to arise. Part Two, "Content of the international responsibility of a State", deals with the legal consequences for the responsible State of its internationally wrongful act, in particular as they concern cessation and reparation. Part Three is entitled "The implementation of the international responsibility of a State". It identifies the State or States which may react to an internationally wrongful act and specifies the modalities by which this may be done, including, in certain circumstances, by the taking of countermeasures as necessary to ensure cessation of the wrongful act and reparation for its consequences. Part Four contains certain general provisions applicable to the articles as a whole.

## Part One

## THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Part One defines the general conditions necessary for State responsibility to arise. Chapter I lays down three basic principles for responsibility from which the articles as a whole proceed. Chapter II defines the conditions under which conduct is attributable to the State. Chapter III spells out in general terms the conditions under which such conduct amounts to a breach of an international obligation of the State concerned. Chapter IV deals with certain exceptional cases where one State may be responsible for the conduct of another State not in conformity with an international obligation of the latter. Chapter V defines the circumstances precluding the wrongfulness for conduct not in conformity with the international obligations of a State.

### Chapter I

### GENERAL PRINCIPLES

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

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

*Commentary*

(1) Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part One. The term "international responsibility" covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.

(2) PCIJ applied the principle set out in article 1 in a number of cases. For example, in the *Phosphates in Morocco* case, PCIJ affirmed that when a State commits an internationally wrongful act against another State international responsibility is established "immediately as between the two States".[34] ICJ has applied the principle on several occasions, for example in the *Corfu Channel* case,[35] in the *Military and Paramilitary Activities in and against Nicaragua* case,[36] and in the *Gabčíkovo-Nagymaros Project* case.[37] The Court also referred to the principle in its advisory opinions on *Reparation for Injuries*,[38] and on the *Interpretation of Peace Treaties (Second Phase)*,[39] in which it stated that "refusal to fulfil a treaty obligation involves international responsibility".[40] Arbitral tribunals have repeatedly affirmed the principle, for example in the *Claims of Italian Nationals Resident in Peru* cases,[41] in

[34] *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10, at p. 28. See also *S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 15, at p. 30; *Factory at Chorzów, Jurisdiction*, *Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21; and *ibid., Merits*, *Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 29.

[35] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4, at p. 23.

[36] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 142, para. 283, and p. 149, para. 292.

[37] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), at p. 38, para. 47.

[38] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 184.

[39] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 221.

[40] *Ibid.*, p. 228.

[41] Seven of these awards rendered in 1901 reiterated that "a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents" (UNRIAA, vol. XV (Sales No. 66.V.3), pp. 399 (Chiessa claim), 401 (Sessarego claim), 404 (Sanguinetti claim), 407 (Vercelli claim), 408 (Queirolo claim), 409 (Roggero claim), and 411 (Miglia claim)).

the *Dickson Car Wheel Company* case,[42] in the *International Fisheries Company* case,[43] in the *British Claims in the Spanish Zone of Morocco* case[44] and in the *Armstrong Cork Company* case.[45] In the *"Rainbow Warrior"* case,[46] the arbitral tribunal stressed that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility".[47]

(3) That every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized, both before[48] and since[49] article 1 was first formulated by the Commission. It is true that there were early differences of opinion over the definition of the legal relationships arising from an internationally wrongful act. One approach, associated with Anzilotti, described the legal consequences deriving from an internationally wrongful act exclusively in terms of a binding bilateral relationship thereby established between the wrongdoing State and the injured State, in which the obligation of the former State to make reparation is set against the "subjective" right of the latter State to require reparation. Another view, associated with Kelsen, started from the idea that the legal order is a coercive order and saw the authorization accorded to the injured State to apply a coercive sanction against the responsible State as the primary legal consequence flowing directly from the wrongful act.[50] According to this view, general international law empowered the injured State to react to a wrong; the obligation to make reparation was treated as subsidiary, a way by which the responsible State could avoid the application of coercion. A third view, which came to prevail, held that the consequences of an internationally wrongful act cannot be limited either to reparation or to a "sanction".[51] In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances.

(4) Opinions have also differed on the question whether the legal relations arising from the occurrence of an internationally wrongful act were essentially bilateral, i.e. concerned only the relations of the responsible State and the injured State *inter se*. Increasingly it has been recognized that some wrongful acts engage the responsibility of the State concerned towards several or many States or even towards the international community as a whole. A significant step in this direction was taken by ICJ in the *Barcelona Traction* case when it noted that:

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[52]

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations. Among these the Court instanced "the outlawing of acts of aggression, and of genocide, as also … the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[53] In later cases the Court has reaffirmed this idea.[54] The consequences of a broader conception of international responsibility must necessarily be reflected in the articles which, although they include standard bilateral situations of responsibility, are not limited to them.

(5) Thus the term "international responsibility" in article 1 covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law, and whether they are centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of countermeasures.

(6) The fact that under article 1 every internationally wrongful act of a State entails the international responsibility of that State does not mean that other States may not also be held responsible for the conduct in question, or for injury caused as a result. Under chapter II the same

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[42] *Dickson Car Wheel Company (U.S.A.)* v. *United Mexican States*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 669, at p. 678 (1931).

[43] *International Fisheries Company (U.S.A.)* v. *United Mexican States*, *ibid.*, p. 691, at p. 701 (1931).

[44] According to the arbitrator, Max Huber, it is an indisputable principle that "responsibility is the necessary corollary of rights. All international rights entail international responsibility", UNRIAA, vol. II (Sales No. 1949.V.1), p. 615, at p. 641 (1925).

[45] According to the Italian-United States Conciliation Commission, no State may "escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law", UNRIAA, vol. XIV (Sales No. 65.V.4), p. 159, at p. 163 (1953).

[46] 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, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990).

[47] *Ibid.*, p. 251, para. 75.

[48] See, e.g., D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955) vol. I, p. 385; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 499; G. I. Tunkin, *Teoria mezhdunarodnogo prava* (Moscow, Mezhdunarodnye otnoshenia, 1970), p. 470, trans. W. E. Butler, *Theory of International Law* (London, George Allen and Unwin, 1974), p. 415; and E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sørensen, ed. (London, Macmillan, 1968), p. 533.

[49] See, e.g., I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press, 1998), p. 435; B. Conforti, *Diritto internazionale*, 4th ed. (Milan, Editoriale Scientifica, 1995), p. 332; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 6th ed. (Paris, Librairie générale de droit et de jurisprudence, 1999), p. 742; P.-M. Dupuy, *Droit international public*, 4th ed. (Paris, Dalloz, 1998), p. 414; and R. Wolfrum, "Internationally wrongful acts", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, North-Holland, 1995), vol. II, p. 1398.

[50] See H. Kelsen, *Principles of International Law*, 2nd ed., R. W. Tucker, ed. (New York, Holt, Rinehart and Winston, 1966), p. 22.

[51] See, e.g., R. Ago, "Le délit international", *Recueil des cours..., 1939–II* (Paris, Sirey, 1947), vol. 68, p. 415, at pp. 430–440; and L. Oppenheim, *International Law: A Treatise*, vol. I, *Peace*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green and Co., 1955), pp. 352–354.

[52] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[53] *Ibid.*, para. 34.

[54] See *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 258, para. 83; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595, at pp. 615–616, paras. 31–32.

conduct may be attributable to several States at the same time. Under chapter IV, one State may be responsible for the internationally wrongful act of another, for example if the act was carried out under its direction and control. Nonetheless the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.

(7) The articles deal only with the responsibility of States. Of course, as ICJ affirmed in the *Reparation for Injuries* case, the United Nations "is a subject of international law and capable of possessing international rights and duties … it has capacity to maintain its rights by bringing international claims".[55] The Court has also drawn attention to the responsibility of the United Nations for the conduct of its organs or agents.[56] It may be that the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality. Nonetheless, special considerations apply to the responsibility of other international legal persons, and these are not covered in the articles.[57]

(8) As to terminology, the French term *fait internationalement illicite* is preferable to *délit* or other similar expressions which may have a special meaning in internal law. For the same reason, it is best to avoid, in English, such terms as "tort", "delict" or "delinquency", or in Spanish the term *delito*. The French term *fait internationalement illicite* is better than *acte internationalement illicite*, since wrongfulness often results from omissions which are hardly indicated by the term *acte*. Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reasons, the term *hecho internacionalmente ilícito* is adopted in the Spanish text. In the English text, it is necessary to maintain the expression "internationally wrongful act", since the French *fait* has no exact equivalent; nonetheless, the term "act" is intended to encompass omissions, and this is made clear in article 2.

### *Article 2. Elements of an internationally wrongful act of a State*

**There is an internationally wrongful act of a State when conduct consisting of an action or omission:**

**(*a*) is attributable to the State under international law; and**

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

*Commentary*

(1) Article 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, i.e. the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.

(2) These two elements were specified, for example, by PCIJ in the *Phosphates in Morocco* case. The Court explicitly linked the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty right[s] of another State".[58] ICJ has also referred to the two elements on several occasions. In the *United States Diplomatic and Consular Staff in Tehran* case, it pointed out that, in order to establish the responsibility of the Islamic Republic of Iran:

> [f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.[59]

Similarly in the *Dickson Car Wheel Company* case, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is "that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard".[60]

(3) The element of attribution has sometimes been described as "subjective" and the element of breach as "objective", but the articles avoid such terminology.[61] Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be "subjective". For example, article II of the Convention on the Prevention and Punishment of the Crime of Genocide states that: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such …" In other cases, the standard for breach of an obligation may be "objective", in the sense that the advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is "objective" or "subjective" in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different

[55] *Reparation for Injuries* (see footnote 38 above), p. 179.

[56] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at pp. 88–89, para. 66.

[57] For the position of international organizations, see article 57 and commentary.

[58] See footnote 34 above.

[59] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 29, para. 56. Cf. page 41, para. 90. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), pp. 117–118, para. 226; and *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 54, para. 78.

[60] See footnote 42 above.

[61] Cf. *Yearbook ... 1973*, vol. II, p. 179, document A/9010/Rev.1, paragraph (1) of the commentary to article 3.

possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

(4) Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two. Moreover, it may be difficult to isolate an "omission" from the surrounding circumstances which are relevant to the determination of responsibility. For example, in the *Corfu Channel* case, ICJ held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.[62] In the *United States Diplomatic and Consular Staff in Tehran* case, the Court concluded that the responsibility of the Islamic Republic of Iran was entailed by the "inaction" of its authorities which "failed to take appropriate steps", in circumstances where such steps were evidently called for.[63] In other cases it may be the combination of an action and an omission which is the basis for responsibility.[64]

(5) For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An "act of the State" must involve some action or omission by a human being or group: "States can act only by and through their agents and representatives."[65] The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an "act of the State" for the purposes of State responsibility.

(6) In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.

(7) The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations. In its judgment on jurisdiction in the *Factory at Chorzów* case, PCIJ used the words "breach of an engagement".[66] It employed the same expression in its subsequent judgment on the merits.[67] ICJ referred explicitly to these words in the *Reparation for Injuries* case.[68] The arbitral tribunal in the *"Rainbow Warrior"* affair referred to "any violation by a State of any obligation".[69] In practice, terms such as "non-execution of international obligations", "acts incompatible with international obligations", "violation of an international obligation" or "breach of an engagement" are also used.[70] All these formulations have essentially the same meaning. The phrase preferred in the articles is "breach of an international obligation" corresponding as it does to the language of Article 36, paragraph 2 (*c*), of the ICJ Statute.

(8) In international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others. PCIJ spoke of an act "contrary to the treaty right[s] of another State" in its judgment in the *Phosphates in Morocco* case.[71] That case concerned a limited multilateral treaty which dealt with the mutual rights and duties of the parties, but some have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole). But different incidents may attach to a right which is held in common by all other subjects of international law, as compared with a specific right of a given State or States. Different States may be beneficiaries of an obligation in different ways, or may have different interests in respect of its performance. Multilateral obligations may thus differ from bilateral ones, in view of the diversity of legal rules and institutions and the wide variety of interests sought to be protected by them. But whether any obligation has been breached still raises the two basic questions identified in article 2, and this is so whatever the character or provenance of the obligation breached. It is a separate question who may invoke the responsibility arising from the breach of an obligation: this question is dealt with in Part Three.[72]

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[62] *Corfu Channel, Merits* (see footnote 35 above), pp. 22–23.

[63] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 31–32, paras. 63 and 67. See also *Velásquez Rodríguez* v. *Honduras* case, Inter-American Court of Human Rights, Series C, No. 4, para. 170 (1988): "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions"; and *Affaire relative à l'acquisition de la nationalité polonaise*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 401, at p. 425 (1924).

[64] For example, under article 4 of the Convention relative to the Laying of Automatic Submarine Contact Mines (Hague Convention VIII of 18 October 1907), a neutral Power which lays mines off its coasts but omits to give the required notice to other States parties would be responsible accordingly.

[65] *German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6*, p. 22.

[66] *Factory at Chorzów, Jurisdiction* (see footnote 34 above).

[67] *Factory at Chorzów, Merits* (*ibid.*).

[68] *Reparation for Injuries* (see footnote 38 above), p. 184.

[69] *"Rainbow Warrior"* (see footnote 46 above), p. 251, para. 75.

[70] At the Conference for the Codification of International Law, held at The Hague in 1930, the term "any failure ... to carry out the international obligations of the State" was adopted (see *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3, article 1).

[71] See footnote 34 above.

[72] See also article 33, paragraph 2, and commentary.

(9) Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, "damage" to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.[73]

(10) A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by "fault" one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.

(11) Article 2 introduces and places in the necessary legal context the questions dealt with in subsequent chapters of Part One. Subparagraph (*a*)—which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act—corresponds to chapter II, while chapter IV deals with the specific cases where one State is responsible for the internationally wrongful act of another State. Subparagraph (*b*)—which states that such conduct must constitute a breach of an international obligation—corresponds to the general principles stated in chapter III, while chapter V deals with cases where the wrongfulness of conduct, which would otherwise be a breach of an obligation, is precluded.

(12) In subparagraph (*a*), the term "attribution" is used to denote the operation of attaching a given action or omission to a State. In international practice and judicial decisions, the term "imputation" is also used.[74] But the term "attribution" avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is "really" that of someone else.

(13) In subparagraph (*b*), reference is made to the breach of an international obligation rather than a rule or a norm of international law. What matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State. The term "obligation" is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities. The reference to an "obligation" is limited to an obligation under international law, a matter further clarified in article 3.

### *Article 3. Characterization of an act of a State as internationally wrongful*

**The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.**

*Commentary*

(1) Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law—even if, under that law, the State was actually bound to act in that way.

(2) As to the first of these elements, perhaps the clearest judicial decision is that of PCIJ in the *Treatment of Polish Nationals* case.[75] The Court denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the Constitution of the Free City of Danzig, on the ground that:

> according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted ... [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force ... The application of the Danzig Constitution may ... result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law ... However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City.[76]

(3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled. Interna-

[73] For examples of analysis of different obligations, see *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above), pp. 30–33, paras. 62–68; *"Rainbow Warrior"* (footnote 46 above), pp. 266–267, paras. 107–110; and WTO, Report of the Panel, United States–Sections 301–310 of the Trade Act of 1974 (WT/DS152/R), 22 December 1999, paras. 7.41 et seq.

[74] See, e.g., *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above), p. 29, paras. 56 and 58; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 51, para. 86.

[75] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 4.

[76] *Ibid.*, pp. 24–25. See also *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 24.

tional judicial decisions leave no doubt on that subject. In particular, PCIJ expressly recognized the principle in its first judgment, in the *S.S. "Wimbledon"* case. The Court rejected the argument of the German Government that the passage of the ship through the Kiel Canal would have constituted a violation of the German neutrality orders, observing that:

a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace. ... under Article 380 of the Treaty of Versailles, it was [Germany's] definite duty to allow [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article.[77]

The principle was reaffirmed many times:

it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty;[78]

... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations;[79]

... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.[80]

A different facet of the same principle was also affirmed in the advisory opinions on *Exchange of Greek and Turkish Populations*[81] and *Jurisdiction of the Courts of Danzig*.[82]

(4) ICJ has often referred to and applied the principle.[83] For example, in the *Reparation for Injuries* case, it noted that "[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible … the Member cannot contend that this obligation is governed by municipal law".[84] In the *ELSI* case, a Chamber of the Court emphasized this rule, stating that:

Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.[85]

Conversely, as the Chamber explained:

the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness … Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.[86]

The principle has also been applied by numerous arbitral tribunals.[87]

(5) The principle was expressly endorsed in the work undertaken under the auspices of the League of Nations on the codification of State responsibility,[88] as well as in the work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. The Commission's draft Declaration on Rights and Duties of States, article 13, provided that:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.[89]

(6) Similarly this principle was endorsed in the 1969 Vienna Convention, article 27 of which provides that:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.[90]

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[77] *S.S. "Wimbledon"* (see footnote 34 above), pp. 29–30.

[78] *Greco-Bulgarian "Communities"*, *Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 32.

[79] *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 12; and *ibid., Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 167.

[80] *Treatment of Polish Nationals* (see footnote 75 above), p. 24.

[81] *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 20.

[82] *Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, P.C.I.J., Series B, No. 15*, pp. 26–27. See also the observations of Lord Finlay in *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 26.

[83] See *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116, at p. 132; *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111, at p. 123; *Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1958*, p. 55, at p. 67; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12, at pp. 34–35, para. 57.

[84] *Reparation for Injuries* (see footnote 38 above), at p. 180.

[85] *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15, at p. 51, para. 73.

[86] *Ibid.*, p. 74, para. 124.

[87] See, e.g., the Geneva Arbitration (the *"Alabama"* case), in Moore, *History and Digest*, vol. IV, p. 4144, at pp. 4156 and 4157 (1872); *Norwegian Shipowners' Claims (Norway* v. *United States of America)*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 307, at p. 331 (1922); *Aguilar-Amory and Royal Bank of Canada Claims* (*Tinoco* case) *(Great Britain* v. *Costa Rica), ibid.*, p. 369, at p. 386 (1923); *Shufeldt Claim*, *ibid.*, vol. II (Sales No. 1949.V.1), p. 1079, at p. 1098 ("it is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject") (1930); *Wollemborg Case*, *ibid.*, vol. XIV (Sales No. 65.V.4), p. 283, at p. 289 (1956); and *Flegenheimer*, *ibid.*, p. 327, at p. 360 (1958).

[88] In point I of the request for information on State responsibility sent to States by the Preparatory Committee for the 1930 Hague Conference it was stated:

"In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law."

In their replies, States agreed expressly or implicitly with this principle (see League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (document C.75.M.69.1929.V), p. 16). During the debate at the 1930 Hague Conference, States expressed general approval of the idea embodied in point I and the Third Committee of the Conference adopted article 5 to the effect that "A State cannot avoid international responsibility by invoking the state of its municipal law" (document C.351(c) M.145(c).1930.V; reproduced in *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3).

[89] See General Assembly resolution 375 (IV) of 6 December 1949, annex. For the debate in the Commission, see *Yearbook ... 1949*, pp. 105–106, 150 and 171. For the debate in the Assembly, see *Official Records of the General Assembly, Fourth Session, Sixth Committee*, 168th–173rd meetings, 18–25 October 1949; 175th–183rd meetings, 27 October–3 November 1949; and *ibid.*, *Fourth Session, Plenary Meetings*, 270th meeting, 6 December 1949.

[90] Article 46 of the Convention provides for the invocation of provisions of internal law regarding competence to conclude treaties in limited circumstances, viz., where the violation of such provisions "was manifest and concerned a rule of … internal law of fundamental importance".

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(8) As regards the wording of the rule, the formulation "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law", which is similar to article 5 of the draft adopted on first reading at the 1930 Hague Conference and also to article 27 of the 1969 Vienna Convention, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, such a formulation sounds like a rule of procedure and is inappropriate for a statement of principle. Issues of the invocation of responsibility belong to Part Three, whereas this principle addresses the underlying question of the origin of responsibility. In addition, there are many cases where issues of internal law are relevant to the existence or otherwise of responsibility. As already noted, in such cases it is international law which determines the scope and limits of any reference to internal law. This element is best reflected by saying, first, that the characterization of State conduct as internationally wrongful is governed by international law, and secondly by affirming that conduct which is characterized as wrongful under international law cannot be excused by reference to the legality of that conduct under internal law.

(9) As to terminology, in the English version the term "internal law" is preferred to "municipal law", because the latter is sometimes used in a narrower sense, and because the 1969 Vienna Convention speaks of "internal law". Still less would it be appropriate to use the term "national law", which in some legal systems refers only to the laws emanating from the central legislature, as distinct from provincial, cantonal or local authorities. The principle in article 3 applies to all laws and regulations adopted within the framework of the State, by whatever authority and at whatever level.[91] In the French version the expression *droit interne* is preferred to *législation interne* and *loi interne*, because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.

[91] Cf. *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 9, at p. 16, para. 28.

## Chapter II

## ATTRIBUTION OF CONDUCT TO A STATE

### *Commentary*

(1) In accordance with article 2, one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. Chapter II defines the circumstances in which such attribution is justified, i.e. when conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.

(2) In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.[92]

(3) As a corollary, the conduct of private persons is not as such attributable to the State. This was established, for example, in the *Tellini* case of 1923. The Council of the League of Nations referred to a Special Commission of Jurists certain questions arising from an incident between Italy and Greece.[93] This involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. In reply to question five, the Commission stated that:

> The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.[94]

(4) The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link

[92] See, e.g., I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), pp. 132–166; D. D. Caron, "The basis of responsibility: attribution and other trans-substantive rules", *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. Magraw, eds. (Irvington-on-Hudson, N.Y., Transnational, 1998), p. 109; L. Condorelli, "L'imputation à l'État d'un fait internationalement illicite : solutions classiques et nouvelles tendances", *Recueil des cours…, 1984–VI* (Dordrecht, Martinus Nijhoff, 1988), vol. 189, p. 9; H. Dipla, *La responsabilité de l'État pour violation des droits de l'homme: problèmes d'imputation* (Paris, Pedone, 1994); A. V. Freeman, "Responsibility of States for unlawful acts of their armed forces", *Recueil des cours…, 1955–II* (Leiden, Sijthoff, 1956), vol. 88, p. 261; and F. Przetacznik, "The international responsibility of States for the unauthorized acts of their organs", *Sri Lanka Journal of International Law*, vol. 1 (June 1989), p. 151.

[93] League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1349.

[94] *Ibid.*, 5th Year, No. 4 (April 1924), p. 524. See also the *Janes* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 82 (1925).

of factual causality. As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.[95] In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.

(5) The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. Thus the Head of State or Government or the minister of foreign affairs is regarded as having authority to represent the State without any need to produce full powers.[96] Such rules have nothing to do with attribution for the purposes of State responsibility. In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.[97] Thus, the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government.

(6) In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.[98] Conduct engaged in by organs of the State in excess of their competence may also be attributed to the State under international law, whatever the position may be under internal law.[99]

(7) The purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. In internal law, it is common for the "State" to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.

(8) Chapter II consists of eight articles. Article 4 states the basic rule attributing to the State the conduct of its organs. Article 5 deals with conduct of entities empowered to exercise the governmental authority of a State, and article 6 deals with the special case where an organ of one State is placed at the disposal of another State and empowered to exercise the governmental authority of that State. Article 7 makes it clear that the conduct of organs or entities empowered to exercise governmental authority is attributable to the State even if it was carried out outside the authority of the organ or person concerned or contrary to instructions. Articles 8 to 11 then deal with certain additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State in international law. Article 8 deals with conduct carried out on the instructions of a State organ or under its direction or control. Article 9 deals with certain conduct involving elements of governmental authority, carried out in the absence of the official authorities. Article 10 concerns the special case of responsibility in defined circumstances for the conduct of insurrectional movements. Article 11 deals with conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own.

(9) These rules are cumulative but they are also limitative. In the absence of a specific undertaking or guarantee (which would be a *lex specialis*[100]), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter. As the Iran-United States Claims Tribunal has affirmed, "in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State".[101] This follows already from the provisions of article 2.

[95] See *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above).

[96] See articles 7, 8, 46 and 47 of the 1969 Vienna Convention.

[97] The point was emphasized, in the context of federal States, in *LaGrand* (see footnote 91 above). It is not of course limited to federal States. See further article 5 and commentary.

[98] See paragraph (11) of the commentary to article 4; see also article 5 and commentary.

[99] See article 7 and commentary.

[100] See article 55 and commentary.

[101] *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 17 , p. 92, at pp. 101–102 (1987).

### *Article 4. Conduct of organs of a State*

**1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.**

**2. An organ includes any person or entity which has that status in accordance with the internal law of the State.**

*Commentary*

(1) *Paragraph 1* of article 4 states the first principle of attribution for the purposes of State responsibility in international law—that the conduct of an organ of the State is attributable to that State. The reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.

(2) Certain acts of individuals or entities which do not have the status of organs of the State may be attributed to the State in international law, and these cases are dealt with in later articles of this chapter. But the rule is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, under article 8 conduct which is authorized by the State, so as to be attributable to it, must have been authorized by an organ of the State, either directly or indirectly.

(3) That the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions. In the *Moses* case, for example, a decision of a Mexico-United States Mixed Claims Commission, Umpire Lieber said: "An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority."[102] There have been many statements of the principle since then.[103]

(4) The replies by Governments to the Preparatory Committee for the 1930 Hague Conference[104] were unanimously of the view that the actions or omissions of organs of the State must be attributed to it. The Third Committee of the Conference adopted unanimously on first reading an article 1, which provided that international responsibility shall be incurred by a State as a consequence of "any failure on the part of its organs to carry out the international obligations of the State".[105]

(5) The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility. It goes without saying that there is no category of organs specially designated for the commission of internationally wrongful acts, and virtually any State organ may be the author of such an act. The diversity of international obligations does not permit any general distinction between organs which can commit internationally wrongful acts and those which cannot. This is reflected in the closing words of paragraph 1, which clearly reflect the rule of international law in the matter.

(6) Thus, the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs. Thus, in the *Salvador Commercial Company* case, the tribunal said that:

> a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.[106]

ICJ has also confirmed the rule in categorical terms. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it said:

> According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule … is of a customary character.[107]

In that case the Court was principally concerned with decisions of State courts, but the same principle applies to legislative and executive acts.[108] As PCIJ said in *Certain German Interests in Polish Upper Silesia (Merits)*:

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[102] Moore, *History and Digest*, vol. III, p. 3127, at p. 3129 (1871).

[103] See, e.g., *Claims of Italian Nationals* (footnote 41 above); *Salvador Commercial Company*, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455, at p. 477 (1902); and *Finnish Shipowners (Great Britain/Finland)*, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1479, at p. 1501 (1934).

[104] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), pp. 25, 41 and 52; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points; Replies of Canada and the United States of America* (document C.75(a)M.69(a).1929.V), pp. 2–3 and 6.

[105] Reproduced in *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

[106] See *Salvador Commercial Company* (footnote 103 above). See also *Chattin* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 282, at pp. 285–286 (1927); and *Dispute concerning the interpretation of article 79 of the Treaty of Peace*, *ibid.*, vol. XIII (Sales No. 64.V.3), p. 389, at p. 438 (1955).

[107] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 56 above), p. 87, para. 62, referring to the draft articles on State responsibility, article 6, now embodied in article 4.

[108] As to legislative acts, see, e.g., *German Settlers in Poland* (footnote 65 above), at pp. 35–36; *Treatment of Polish Nationals* (footnote 75 above), at pp. 24–25; *Phosphates in Morocco* (footnote 34 above), at pp. 25–26; and *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 176, at pp. 193–194. As to executive acts, see, e.g., *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above); and *ELSI* (footnote 85 above). As to judicial acts, see, e.g., *"Lotus"* (footnote 76 above); *Jurisdiction of the Courts of Danzig* (footnote 82 above); and *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 10, at pp. 21–22. In some cases, the conduct in question may involve both executive and judicial acts; see, e.g., *Application of the Convention of 1902* (footnote 83 above) at p. 65.

From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.[109]

Thus, article 4 covers organs, whether they exercise "legislative, executive, judicial or any other functions". This language allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character. Moreover, the term is one of extension, not limitation, as is made clear by the words "or any other functions".[110] It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as *acta iure gestionis*. Of course, the breach by a State of a contract does not as such entail a breach of international law.[111] Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4,[112] and it might in certain circumstances amount to an internationally wrongful act.[113]

(7) Nor is any distinction made at the level of principle between the acts of "superior" and "subordinate" officials, provided they are acting in their official capacity. This is expressed in the phrase "whatever position it holds in the organization of the State" in article 4. No doubt lower-level officials may have a more restricted scope of activity and they may not be able to make final decisions. But conduct carried out by them in their official capacity is nonetheless attributable to the State for the purposes of article 4. Mixed commissions after the Second World War often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officers, and consistently treated the acts of such persons as attributable to the State.[114]

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units. This principle has long been recognized. For example, the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise* case said:

For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.[115]

This principle was strongly supported during the preparatory work for the 1930 Hague Conference. Governments were expressly asked whether the State became responsible as a result of "[a]cts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)". All answered in the affirmative.[116]

(9) It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations. The award in the *"Montijo"* case is the starting point for a consistent series of decisions to this effect.[117] The French-Mexican Claims Commission in the *Pellat* case reaffirmed "the principle of the international responsibility ... of a federal State for all the acts of its separate States which give rise to claims by foreign States" and noted specially that such responsibility "... cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law".[118] That rule has since been consistently applied. Thus, for example, in the *LaGrand* case, ICJ said:

Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.[119]

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[109] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, at p. 19.

[110] These functions might involve, e.g. the giving of administrative guidance to the private sector. Whether such guidance involves a breach of an international obligation may be an issue, but as "guidance" it is clearly attributable to the State. See, e.g., GATT, Report of the Panel, Japan–Trade in Semi-conductors, 24 March 1988, paras. 110–111; and WTO, Report of the Panel, Japan–Measures affecting Consumer Photographic Film and Paper (WT/DS44/R), paras. 10.12–10.16.

[111] See article 3 and commentary.

[112] See, e.g., the decisions of the European Court of Human Rights in *Swedish Engine Drivers' Union* v. *Sweden, Eur. Court H.R., Series A, No. 20* (1976), at p. 14; and *Schmidt and Dahlström* v. *Sweden, ibid., Series A, No. 21* (1976), at p. 15.

[113] The irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the Commission (see *Yearbook ... 1998*, vol. II (Part Two), p. 17, para. 35).

[114] See, e.g., the *Currie* case, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 21, at p. 24 (1954); *Dispute concerning the interpretation of article 79* (footnote 106 above), at pp. 431–432; and *Mossé* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 486, at pp. 492–493 (1953). For earlier decisions, see the *Roper* case, *ibid.*, vol. IV (Sales No. 1951.V.1), p. 145 (1927); *Massey, ibid.*, p. 155 (1927); *Way, ibid.*, p. 391, at p. 400 (1928); and *Baldwin, ibid.*, vol. VI (Sales No. 1955.V.3), p. 328 (1933). Cf. the consideration of the requisition of a plant by the Mayor of Palermo in *ELSI* (see footnote 85 above), e.g. at p. 50, para. 70.

[115] UNRIAA, vol. XIII (Sales No. 64.V.3), p. 150, at p. 161 (1951). For earlier decisions, see, e.g., the *Pieri Dominique and Co.* case, *ibid.*, vol. X (Sales No. 60.V.4), p. 139, at p. 156 (1905).

[116] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 104 above), p. 90; *Supplement to Vol. III …* (*ibid.*), pp. 3 and 18.

[117] See Moore, *History and Digest*, vol. II, p. 1440, at p. 1440 (1874). See also *De Brissot and others*, Moore, *History and Digest*, vol. III, p. 2967, at pp. 2970–2971 (1855); *Pieri Dominique and Co.* (footnote 115 above), at pp. 156–157; *Davy* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 467, at p. 468 (1903); *Janes* case (footnote 94 above); *Swinney*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 101 (1925); *Quintanilla*, *ibid.*, p. 101, at p. 103 (1925); *Youmans*, *ibid.*, p. 110, at p. 116 (1925); *Mallén*, *ibid.*, p. 173, at p. 177 (1927); *Venable*, *ibid.*, p. 218, at p. 230 (1925); and *Tribolet*, *ibid.*, p. 598, at p. 601 (1925).

[118] UNRIAA, vol. V (Sales No. 1952.V.3), p. 534, at p. 536 (1929).

[119] *LaGrand, Provisional Measures* (see footnote 91 above). See also *LaGrand (Germany* v. *United States of America), Judgment, I.C.J.Reports 2001*, p. 466, at p. 495, para. 81.

(10) The reasons for this position are reinforced by the fact that federal States vary widely in their structure and distribution of powers, and that in most cases the constituent units have no separate international legal personality of their own (however limited), nor any treaty-making power. In those cases where the constituent unit of a federation is able to enter into international agreements on its own account,[120] the other party may well have agreed to limit itself to recourse against the constituent unit in the event of a breach. In that case the matter will not involve the responsibility of the federal State and will fall outside the scope of the present articles. Another possibility is that the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty.[121] This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty and in the matters which the treaty covers. It has effect by virtue of the *lex specialis* principle, dealt with in article 55.

(11) *Paragraph 2* explains the relevance of internal law in determining the status of a State organ. Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law will not itself perform the task of classification. Even if it does so, the term "organ" used in internal law may have a special meaning, and not the very broad meaning it has under article 4. For example, under some legal systems the term "government" refers only to bodies at the highest level such as the Head of State and the cabinet of ministers. In others, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the State.[122] Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word "includes" in paragraph 2.

(12) The term "person or entity" is used in article 4, paragraph 2, as well as in articles 5 and 7. It is used in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc. The term "entity" is used in a similar sense[123] in the draft articles on jurisdictional immunities of States and their property, adopted in 1991.

(13) Although the principle stated in article 4 is clear and undoubted, difficulties can arise in its application. A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct of a State organ and purely private conduct has been clearly drawn in international arbitral decisions. For example, the award of the Mexico-United States General Claims Commission in the *Mallén* case involved, first, the act of an official acting in a private capacity and, secondly, another act committed by the same official in his official capacity, although in an abusive way.[124] The latter action was, and the former was not, held attributable to the State. The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where "the act had no connexion with the official function and was, in fact, merely the act of a private individual".[125] The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.[126] In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.

### *Article 5. Conduct of persons or entities exercising elements of governmental authority*

**The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.**

*Commentary*

(1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.

[120] See, e.g., articles 56, paragraph 3, and 172, paragraph 3, of the Constitution of the Swiss Confederation of 18 April 1999.

[121] See, e.g., article 34 of the Convention for the Protection of the World Cultural and Natural Heritage.

[122] See, e.g., the *Church of Scientology* case, Germany, Federal Supreme Court, Judgment of 26 September 1978, case No. *VI ZR* 267/76, *Neue Juristische Wochenschrift*, No. 21 (May 1979), p. 1101; ILR, vol. 65, p. 193; and *Propend Finance Pty Ltd.* v. *Sing*, England, Court of Appeal, ILR, vol. 111, p. 611 (1997). These were State immunity cases, but the same principle applies in the field of State responsibility.

[123] See *Yearbook … 1991*, vol. II (Part Two), pp. 14–18.

[124] *Mallén* (see footnote 117 above), at p. 175.

[125] UNRIAA, vol. V (Sales No. 1952.V.3), p. 516, at p. 531 (1929). See also the *Bensley* case in Moore, *History and Digest*, vol. III, p. 3018 (1850) ("a wanton trespass … under no color of official proceedings, and without any connection with his official duties"); and the *Castelain* case *ibid.*, p. 2999 (1880). See further article 7 and commentary.

[126] See paragraph (7) of the commentary to article 7.

(2) The generic term "entity" reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the tribunal's jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.[127]

(3) The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.

(4) Parastatal entities may be considered a relatively modern phenomenon, but the principle embodied in article 5 has been recognized for some time. For example, the replies to the request for information made by the Preparatory Committee for the 1930 Hague Conference indicated strong support from some Governments for the attribution to the State of the conduct of autonomous bodies exercising public functions of an administrative or legislative character. The German Government, for example, asserted that:

> when, by delegation of powers, bodies act in a public capacity, *e.g.*, police an area … the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.[128]

The Preparatory Committee accordingly prepared the following basis of discussion, though the Third Committee of the Conference was unable in the time available to examine it:

> A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such … autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.[129]

(5) The justification for attributing to the State under international law the conduct of "parastatal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling stock).

(6) Article 5 does not attempt to identify precisely the scope of "governmental authority" for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. On the other hand, article 5 does not extend to cover, for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; i.e. where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.

### *Article 6. Conduct of organs placed at the disposal of a State by another State*

**The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is**

[127] *Hyatt International Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 9, p. 72, at pp. 88–94 (1985).

[128] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), p. 90. The German Government noted that these remarks would extend to the situation where "the State, as an exceptional measure, invests private organisations with public powers and duties or authorities [*sic*] them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force", *ibid.*

[129] *Ibid.*, p. 92.

**acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.**

*Commentary*

(1) Article 6 deals with the limited and precise situation in which an organ of a State is effectively put at the disposal of another State so that the organ may temporarily act for its benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

(2) The words "placed at the disposal of" in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ "placed at the disposal of" the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise.[130]

(3) Examples of situations that could come within this limited notion of a State organ "placed at the disposal" of another State might include a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State. On the other hand, mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by article 6. For example, armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter.[131]

(4) Thus, what is crucial for the purposes of article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving State. The notion of an organ "placed at the disposal" of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status: for example, cultural missions, diplomatic or consular missions, foreign relief or aid organizations. Also excluded from the ambit of article 6 are situations in which functions of the "beneficiary" State are performed without its consent, as when a State placed in a position of dependence, territorial occupation or the like is compelled to allow the acts of its own organs to be set aside and replaced to a greater or lesser extent by those of the other State.[132]

(5) There are two further criteria that must be met for article 6 to apply. First, the organ in question must possess the status of an organ of the sending State; and secondly its conduct must involve the exercise of elements of the governmental authority of the receiving State. The first of these conditions excludes from the ambit of article 6 the conduct of private entities or individuals which have never had the status of an organ of the sending State. For example, experts or advisers placed at the disposal of a State under technical assistance programmes do not usually have the status of organs of the sending State. The second condition is that the organ placed at the disposal of a State by another State must be "acting in the exercise of elements of the governmental authority" of the receiving State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, article 6 covers only a specific and limited notion of "transferred responsibility". Yet, in State practice the situation is not unknown.

(6) In the *Chevreau* case, a British consul in Persia, temporarily placed in charge of the French consulate, lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that: "the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power."[133] It is implicit in the Arbitrator's finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for the Consul's acts. If a third State had brought a claim, the proper respondent in accordance with article 6 would have been the State on whose behalf the conduct in question was carried out.

(7) Similar issues were considered by the European Commission of Human Rights in two cases relating to the exercise by Swiss police in Liechtenstein of "delegated" powers.[134] At the relevant time Liechtenstein was not

[130] Thus, the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania: *Xhavara and Others* v. *Italy and Albania*, application No. 39473/98, *Eur. Court H.R.*, decision of 11 January 2001. Conversely, the conduct of Turkey taken in the context of the Turkey-European Communities customs union was still attributable to Turkey: see WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (WT/DS34/R), 31 May 1999, paras. 9.33–9.44.

[131] See also article 47 and commentary.

[132] For the responsibility of a State for directing, controlling or coercing the internationally wrongful act of another, see articles 17 and 18 and commentaries.

[133] UNRIAA, vol. II (Sales No. 1949.V.1), p. 1113, at p. 1141 (1931).

[134] *X and Y* v. *Switzerland*, application Nos. 7289/75 and 7349/76, decision of 14 July 1977; Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 9, p. 57; and *Yearbook of the European Convention on Human Rights, 1977*, vol. 20 (1978), p. 372, at pp. 402–406.

a party to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), so that if the conduct was attributable only to Liechtenstein no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter's consent and in their mutual interest. The officers in question were governed exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not "placed at the disposal" of the receiving State.[135]

(8) A further, long-standing example of a situation to which article 6 applies is the Judicial Committee of the Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth. Decisions of the Privy Council on appeal from an independent Commonwealth State will be attributable to that State and not to the United Kingdom. The Privy Council's role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.[136] There are many examples of judges seconded by one State to another for a time: in their capacity as judges of the receiving State, their decisions are not attributable to the sending State, even if it continues to pay their salaries.

(9) Similar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State's governmental authority. This is even more exceptional than the inter-State cases to which article 6 is limited. It also raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these articles. Article 57 accordingly excludes from the ambit of the articles all questions of the responsibility of international organizations or of a State for the acts of an international organization. By the same token, article 6 does not concern those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty.[137] In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct.

### *Article 7. Excess of authority or contravention of instructions*

**The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.**

*Commentary*

(1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.

(2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question.[138] Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.

(3) The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals,[139] State practice came to support the proposition, articulated by the British Government in response to an Italian request, that "all Governments should always be held responsible for all acts committed by their agents by virtue of their official capacity".[140] As the Spanish Government pointed out: "If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received."[141] At this time the United States supported "a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but

[135] See also *Drozd and Janousek* v. *France and Spain, Eur. Court H.R., Series A, No. 240* (1992), paras. 96 and 110. See also *Controller and Auditor-General* v. *Davison* (New Zealand, Court of Appeal), ILR, vol. 104 (1996), p. 526, at pp. 536–537 (Cooke, P.) and pp. 574–576 (Richardson, J.). An appeal to the Privy Council on other grounds was dismissed, *Brannigan* v. *Davison*, *ibid.*, vol. 108, p. 622.

[136] For example, Agreement relating to Appeals to the High Court of Australia from the Supreme Court of Nauru (Nauru, 6 September 1976) (United Nations, *Treaty Series*, vol. 1216, No. 19617, p. 151).

[137] See, e.g., article 89 of the Rome Statute of the International Criminal Court.

[138] See, e.g., the "Star and Herald" controversy, Moore, *Digest*, vol. VI, p. 775.

[139] In a number of early cases, international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority: see, e.g., the following cases: *"Only Son"*, Moore, *History and Digest*, vol. IV, pp. 3404–3405; *"William Lee"*, *ibid.*, p. 3405; and *Donoughho's*, *ibid.*, vol. III, p. 3012. Where the question was expressly examined, tribunals did not consistently apply any single principle: see, e.g., the *Lewis's* case, *ibid.*, p. 3019; the *Gadino* case, UNRIAA, vol. XV (Sales No. 66.V.3), p. 414 (1901); the *Lacaze* case, Lapradelle-Politis, vol. II, p. 290, at pp. 297–298; and the *"William Yeaton"* case, Moore, *History and Digest*, vol. III, p. 2944, at p. 2946.

[140] For the opinions of the British and Spanish Governments given in 1898 at the request of Italy in respect of a dispute with Peru, see *Archivio del Ministero degli Affari esteri italiano*, serie politica P, No. 43.

[141] Note verbale by Duke Almodóvar del Río, 4 July 1898, *ibid.*

of their apparent authority".[142] It is probable that the different formulations had essentially the same effect, since acts falling outside the scope of both real and apparent authority would not be performed "by virtue of … official capacity". In any event, by the time of the 1930 Hague Conference, a majority of States responding to the Preparatory Committee's request for information were clearly in favour of the broadest formulation of the rule, providing for attribution to the State in the case of "[a]cts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority".[143] The Basis of Discussion prepared by the Committee reflected this view. The Third Committee of the Conference adopted an article on first reading in the following terms:

> International responsibility is … incurred by a State if damage is sustained by a foreigner as a result of unauthorised acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.[144]

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.[145] It is confirmed, for example, in article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which provides that: "A Party to the conflict … shall be responsible for all acts committed by persons forming part of its armed forces": this clearly covers acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and "correspond[s] to the general principles of law on international responsibility".[146]

(5) A definitive formulation of the modern rule is found in the *Caire* case. The case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him. The Commission held:

> that the two officers, even if they are deemed to have acted outside their competence … and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.[147]

(6) International human rights courts and tribunals have applied the same rule. For example, the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case said:

> This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.[148]

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been "carried out by persons cloaked with governmental authority".[149]

(8) The problem of drawing the line between unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression "if the organ, person or entity acts in that capacity" in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.[150] In short, the question is whether they were acting with apparent authority.

(9) As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, i.e.

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[142] "American Bible Society" incident, statement of United States Secretary of State, 17 August 1885, Moore, *Digest*, vol. VI, p. 743; "Shine and Milligen", G. H. Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1943), vol. V, p. 575; and "Miller", *ibid.*, pp. 570–571.

[143] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), point V, No. 2 (*b*), p. 74, and *Supplement to Vol. III …* (see footnote 104 above), pp. 3 and 17.

[144] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* ..., document C.351(c)M.145(c).1930. V (see footnote 88 above), p. 237. For a more detailed account of the evolution of the modern rule, see *Yearbook … 1975*, vol. II, pp. 61–70.

[145] For example, the 1961 revised draft by the Special Rapporteur, Mr. García Amador, provided that "an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity" (*Yearbook ... 1961*, vol. II, p. 53).

[146] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), pp. 1053–1054.

[147] *Caire* (see footnote 125 above). For other statements of the rule, see *Maal*, UNRIAA, vol. X (Sales No. 60.V.4), pp. 732–733 (1903); *La Masica, ibid.*, vol. XI (Sales No. 61.V.4), p. 560 (1916); *Youmans* (footnote 117 above); *Mallén*, *ibid.*; *Stephens*, UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 267–268 (1927); and *Way* (footnote 114 above), pp. 400–401. The decision of the United States Court of Claims in *Royal Holland Lloyd* v. *United States*, 73 Ct. Cl. 722 (1931) (*Annual Digest of Public International Law Cases* (London, Butterworth, 1938), vol. 6, p. 442) is also often cited.

[148] *Velásquez Rodríguez* (see footnote 63 above); see also ILR, vol. 95, p. 232, at p. 296.

[149] *Petrolane, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 27, p. 64, at p. 92 (1991). See also paragraph (13) of the commentary to article 4.

[150] One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The articles are not concerned with questions that would then arise as to the validity of the transaction (cf. the 1969 Vienna Convention, art. 50). So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

only to those cases of attribution covered by articles 4, 5 and 6. Problems of unauthorized conduct by other persons, groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.

(10) As a rule of attribution, article 7 is not concerned with the question whether the conduct amounted to a breach of an international obligation. The fact that instructions given to an organ or entity were ignored, or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.[151] Equally, article 7 is not concerned with the admissibility of claims arising from internationally wrongful acts committed by organs or agents acting *ultra vires* or contrary to their instructions. Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim.[152]

### *Article 8. Conduct directed or controlled by a State*

**The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.**

*Commentary*

(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control.[153] Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery.

(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence.[154] In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves "governmental activity". Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.

(3) More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

(4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary Activities in and against Nicaragua* case. The question was whether the conduct of the contras was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the contras. This was analysed by ICJ in terms of the notion of "control". On the one hand, it held that the United States was responsible for the "planning, direction and support" given by the United States to Nicaraguan operatives.[155] But it rejected the broader claim of Nicaragua that all the conduct of the contras was attributable to the United States by reason of its control over them. It concluded that:

> [D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.
>
> …
>
> All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[156]

Thus while the United States was held responsible for its own support for the contras, only in certain individual instances were the acts of the contras themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be

[151] See *ELSI* (footnote 85 above), especially at pp. 52, 62 and 74.

[152] See further article 44, subparagraph (*b*), and commentary.

[153] Separate issues are raised where one State engages in internationally wrongful conduct at the direction or under the control of another State: see article 17 and commentary, and especially paragraph (7) for the meaning of the words "direction" and "control" in various languages.

[154] See, e.g., the *Zafiro* case, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 160 (1925); the *Stephens* case (footnote 147 above), p. 267; and *Lehigh Valley Railroad Company and Others (U.S.A.)* v. *Germany (Sabotage* cases*)*: "*Black Tom"* and *"Kingsland"* incidents, *ibid*., vol. VIII (Sales No. 58.V.2), p. 84 (1930) and p. 458 (1939).

[155] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 51, para. 86.

[156] *Ibid.*, pp. 62 and 64–65, paras. 109 and 115. See also the concurring opinion of Judge Ago, *ibid.*, p. 189, para. 17.

insufficient to justify attribution of the conduct to the State.

(5) The Appeals Chamber of the International Tribunal for the Former Yugoslavia has also addressed these issues. In the *Tadić*, case, the Chamber stressed that:

> The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.[157]

The Appeals Chamber held that the requisite degree of control by the Yugoslavian "authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations".[158] In the course of their reasoning, the majority considered it necessary to disapprove the ICJ approach in the *Military and Paramilitary Activities in and against Nicaragua* case. But the legal issues and the factual situation in the *Tadić* case were different from those facing the Court in that case. The tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law.[159] In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.[160]

(6) Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion.[161] The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.[162] Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property.[163] On the other hand, where there was evidence that the corporation was exercising public powers,[164] or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,[165] the conduct in question has been attributed to the State.[166]

(7) It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms "instructions", "direction" and "control" are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.

(8) Where a State has authorized an act, or has exercised direction or control over it, questions can arise as to the State's responsibility for actions going beyond the scope of the authorization. For example, questions might arise if the agent, while carrying out lawful instructions or directions, engages in some activity which contravenes both the instructions or directions given and the international obligations of the instructing State. Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored.

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[157] *Prosecutor* v. *Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1518, at p. 1541, para. 117. For the judgment of the Trial Chamber (Case IT-94-1-T (1997)), see ILR, vol. 112, p. 1.

[158] ILM, vol. 38, No. 6 (November 1999), p. 1546, para. 145.

[159] See the explanation given by Judge Shahabuddeen, *ibid.*, pp. 1614–1615.

[160] The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by the Iran-United States Claims Tribunal and the European Court of Human Rights: *Yeager* (see footnote 101 above), p. 103. See also *Starrett Housing Corporation* v. *Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 4, p. 122, at p. 143 (1983); *Loizidou* v. *Turkey, Merits, Eur. Court H.R., Reports*, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and *ibid., Preliminary Objections, Eur. Court H.R., Series A, No. 310*, p. 23, para. 62 (1995).

[161] *Barcelona Traction* (see footnote 25 above), p. 39, paras. 56–58.

[162] For example, the Workers' Councils considered in *Schering Corporation* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 5, p. 361 (1984); *Otis Elevator Company* v. *The Islamic Republic of Iran, ibid.*, vol. 14, p. 283 (1987); and *Eastman Kodak Company* v. *The Government of Iran, ibid.*, vol. 17, p. 153 (1987).

[163] *SEDCO, Inc.* v. *National Iranian Oil Company*, *ibid*., vol. 15, p. 23 (1987). See also *International Technical Products Corporation* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 9, p. 206 (1985); and *Flexi-Van Leasing, Inc.* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 12, p. 335, at p. 349 (1986).

[164] *Phillips Petroleum Company Iran* v. *The Islamic Republic of Iran*, *ibid.*, vol. 21, p. 79 (1989); and *Petrolane* (see footnote 149 above).

[165] *Foremost Tehran, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. *ibid.*, vol. 10, p. 228 (1986); and *American Bell International Inc.* v. *The Islamic Republic of Iran*, *ibid.*, vol. 12, p. 170 (1986).

[166] See *Hertzberg et al.* v. *Finland* (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex XIV, communication No. R.14/61, p. 161, at p. 164, para. 9.1) (1982). See also *X* v. *Ireland*, application No. 4125/69, *Yearbook of the European Convention on Human Rights, 1971*, vol. 14 (1973), p. 199; and *Young, James and Webster* v. *the United Kingdom, Eur. Court H.R., Series A, No. 44* (1981).

The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with article 8.

(9) Article 8 uses the words "person or group of persons", reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a *de facto* basis. Thus, while a State may authorize conduct by a legal entity such as a corporation, it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective.

### *Article 9. Conduct carried out in the absence or default of the official authorities*

**The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.**

*Commentary*

(1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase "in circumstances such as to call for". Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g. after foreign occupation.

(2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces:[167] in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State responsibility. Thus, the position of the Revolutionary Guards or "Komitehs" immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as covered by the principle expressed in article 9. *Yeager* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The tribunal held the conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards:

at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.[168]

(3) Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.

(4) As regards the first condition, the person or group acting must be performing governmental functions, though they are doing so on their own initiative. In this respect, the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State. It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* Government. The cases envisaged by article 9 presuppose the existence of a Government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* Government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a Government is covered by article 4 rather than article 9.[169]

(5) In respect of the second condition, the phrase "in the absence or default of" is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality. The phrase "absence or default" seeks to capture both situations.

(6) The third condition for attribution under article 9 requires that the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons. The term "call for" conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority. There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.[170]

[167] This principle is recognized as legitimate by article 2 of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land); and by article 4, paragraph A (6), of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

[168] *Yeager* (see footnote 101 above), p. 104, para. 43.

[169] See, e.g., the award of 18 October 1923 by Arbitrator Taft in the *Tinoco* case (footnote 87 above), pp. 381–382. On the responsibility of the State for the conduct of *de facto* Governments, see also J. A. Frowein, *Das de facto-Regime im Völkerrecht* (Cologne, Heymanns, 1968), pp. 70–71. Conduct of a Government in exile might be covered by article 9, depending on the circumstances.

[170] See, e.g., the *Sambiaggio* case, UNRIAA, vol. X (Sales No. 60.V.4), p. 499, at p. 512 (1904); see also article 10 and commentary.

### *Article 10. Conduct of an insurrectional or other movement*

**1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.**

**2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.**

**3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.**

*Commentary*

(1) Article 10 deals with the special case of attribution to a State of conduct of an insurrectional or other movement which subsequently becomes the new Government of the State or succeeds in establishing a new State.

(2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals. It can be placed on the same footing as that of persons or groups who participate in a riot or mass demonstration and it is likewise not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9.

(3) Ample support for this general principle is found in arbitral jurisprudence. International arbitral bodies, including mixed claims commissions[171] and arbitral tribunals[172] have uniformly affirmed what Commissioner Nielsen in the *Solis* case described as a "well-established principle of international law", that no Government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.[173] Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to the State. This can be seen, for example, from the preparatory work for the 1930 Hague Conference. Replies of Governments to point IX of the request for information addressed to them by the Preparatory Committee indicated substantial agreement that: (*a*) the conduct of organs of an insurrectional movement could not be attributed as such to the State or entail its international responsibility; and (*b*) only conduct engaged in by organs of the State in connection with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility, and then only if such conduct constituted a breach of an international obligation of that State.[174]

(4) The general principle that the conduct of an insurrectional or other movement is not attributable to the State is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State. This will be the case where the State successfully puts down the revolt. In contrast, where the movement achieves its aims and either installs itself as the new Government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual Government. Thus the term "conduct" only concerns the conduct of the movement as such and not the individual acts of members of the movement, acting in their own capacity.

(5) Where the insurrectional movement, as a new Government, replaces the previous Government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. In such a case, the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. Moreover, it is the only subject of international law to which responsibility can be attributed. The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established Government.

(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity be-

[171] See the decisions of the various mixed commissions: *Zuloaga and Miramon Governments*, Moore, *History and Digest*, vol. III, p. 2873; *McKenny* case, *ibid.*, p. 2881; *Confederate States*, *ibid.*, p. 2886; *Confederate Debt*, *ibid.*, p. 2900; and *Maximilian Government*, *ibid.*, p. 2902, at pp. 2928–2929.

[172] See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote 44 above), p. 642; and the *Iloilo Claims*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 158, at pp. 159–160 (1925).

[173] UNRIAA, vol. IV (Sales No. 1951.V.1), p. 358, at p. 361 (1928) (referring to *Home Frontier and Foreign Missionary Society*, *ibid.*, vol. VI (Sales No. 1955.V.3), p. 42 (1920)); cf. the *Sambiaggio* case (footnote 170 above), p. 524.

[174] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (see footnote 88 above), p. 108; and *Supplement to Volume III* … (see footnote 104 above), pp. 3 and 20.

tween the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the Government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule.

(7) *Paragraph 1* of article 10 covers the scenario in which the insurrectional movement, having triumphed, has substituted its structures for those of the previous Government of the State in question. The phrase "which becomes the new Government" is used to describe this consequence. However, the rule in paragraph 1 should not be pressed too far in the case of Governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement. The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed Government. Thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming.

(8) *Paragraph 2* of article 10 addresses the second scenario, where the structures of the insurrectional or other revolutionary movement become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the predecessor State. The expression "or in a territory under its administration" is included in order to take account of the differing legal status of different dependent territories.

(9) A comprehensive definition of the types of groups encompassed by the term "insurrectional movement" as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement's actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) may be taken as a guide. Article 1, paragraph 1, refers to "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol", and it contrasts such groups with "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (art. 1, para. 2). This definition of "dissident armed forces" reflects, in the context of the Protocols, the essential idea of an "insurrectional movement".

(10) As compared with paragraph 1, the scope of the attribution rule articulated by paragraph 2 is broadened to include "insurrectional or other" movements. This terminology reflects the existence of a greater variety of movements whose actions may result in the formation of a new State. The words do not, however, extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State. Nor does it cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. This is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be.

(11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international "legitimacy" or of any illegality in respect of their establishment as a Government, despite the potential importance of such distinctions in other contexts.[175] From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new Government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.[176] Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.

(12) Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10. The international arbitral decisions, e.g. those of the mixed commissions established in respect of Venezuela (1903) and Mexico (1920–1930), support the attribution of conduct by insurgents where the movement is successful in achieving its revolutionary aims. For example, in the *Bolívar Railway Company* claim, the principle is stated in the following terms:

> The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result.[177]

The French-Venezuelan Mixed Claims Commission in its decision concerning the *French Company of Venezuelan Railroads* case emphasized that the State cannot be held responsible for the acts of revolutionaries "unless the revolution was successful", since such acts then involve the responsibility of the State "under the well-recognized rules of public law".[178] In the *Pinson* case, the French-Mexican Claims Commission ruled that:

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[175] See H. Atlam, "National liberation movements and international responsibility", *United Nations Codification of State Responsibility*, B. Simma and M. Spinedi, eds. (New York, Oceana, 1987), p. 35.

[176] As ICJ said, "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States", *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*, p. 16, at p. 54, para. 118.

[177] UNRIAA, vol. IX (Sales No. 59.V.5), p. 445, at p. 453 (1903). See also *Puerto Cabello and Valencia Railway Company*, *ibid.*, p. 510, at p. 513 (1903).

[178] *Ibid.*, vol. X (Sales No. 60.V.4), p. 285, at p. 354 (1902). See also the *Dix* case, *ibid.*, vol. IX (Sales No. 59.V.5), p. 119 (1902).

if the injuries originated, for example, in requisitions or forced contributions demanded ... by revolutionaries before their final success, or if they were caused ... by offences committed by successful revolutionary forces, the responsibility of the State ... cannot be denied.[179]

(13) The possibility of holding the State responsible for the conduct of a successful insurrectional movement was brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Hague Conference. On the basis of replies received from a number of Governments, the Preparatory Committee drew up the following Basis of Discussion: "A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops." [180] Although the proposition was never discussed, it may be considered to reflect the rule of attribution now contained in paragraph 2.

(14) More recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in article 10. In one case, the Supreme Court of Namibia went even further in accepting responsibility for "anything done" by the predecessor administration of South Africa.[181]

(15) Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but improperly failed to do so. This possibility is preserved by paragraph 3 of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of other provisions in chapter II. The term "however related to that of the movement concerned" is intended to have a broad meaning. Thus, the failure by a State to take available steps to protect the premises of diplomatic missions, threatened from attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3.

(16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present articles, which are concerned only with the responsibility of States.

[179] *Ibid.*, vol. V (Sales No. 1952.V.3), p. 327, at p. 353 (1928).

[180] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (see footnote 88 above), pp. 108 and 116; and Basis of discussion No. 22 (*c*), *ibid.*, p. 118; reproduced in *Yearbook ... 1956*, vol. II, p. 223, at p. 224, document A/CN.4/96.

[181] Guided in particular by a constitutional provision, the Supreme Court of Namibia held that "the new government inherits responsibility for the acts committed by the previous organs of the State", *Minister of Defence, Namibia* v. *Mwandinghi, South African Law Reports*, 1992 (2), p. 355, at p. 360; and ILR, vol. 91, p. 341, at p. 361. See, on the other hand, *44123 Ontario Ltd.* v. *Crispus Kiyonga and Others*, 11 *Kampala Law Reports* 14, pp. 20–21 (1992); and ILR, vol. 103, p. 259, at p. 266 (High Court, Uganda).

### *Article 11. Conduct acknowledged and adopted by a State as its own*

**Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.**

*Commentary*

(1) All the bases for attribution covered in chapter II, with the exception of the conduct of insurrectional or other movements under article 10, assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act. Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.

(2) In many cases, the conduct which is acknowledged and adopted by a State will be that of private persons or entities. The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law. This conclusion holds irrespective of the circumstances in which the private person acts and of the interests affected by the person's conduct.

(3) Thus, like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction … and eventually continued by her, even after the acquisition of territorial sovereignty over the island".[182] In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.[183] However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.

(4) Outside the context of State succession, the *United States Diplomatic and Consular Staff in Tehran* case provides a further example of subsequent adoption by a

[182] *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIAA, vol. XII (Sales No. 63.V.3), p. 155, at p. 198 (1956).

[183] The matter is reserved by article 39 of the Vienna Convention on Succession of States in respect of Treaties (hereinafter "the 1978 Vienna Convention").

State of particular conduct. There ICJ drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court:

> The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.[184]

In that case it made no difference whether the effect of the "approval" of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.[185] In other cases no such prior responsibility will exist. Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the tribunal did in the *Lighthouses* arbitration.[186] This is consistent with the position established by article 10 for insurrectional movements and avoids gaps in the extent of responsibility for what is, in effect, the same continuing act.

(5) As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann's capture, a charge neither admitted nor denied by Israeli Foreign Minister Golda Meir, during the discussion in the Security Council of the complaint. She referred to Eichmann's captors as a "volunteer group".[187] Security Council resolution 138 (1960) of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann's captors were "in fact acting on the instructions of, or under the direction or control of" Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State.

(6) The phrase "acknowledges and adopts the conduct in question as its own" is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.[188] ICJ in the *United States Diplomatic and Consular Staff in Tehran* case used phrases such as "approval", "endorsement", "the seal of official governmental approval" and "the decision to perpetuate [the situation]".[189] These were sufficient in the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies, States often take positions which amount to "approval" or "endorsement" of conduct in some general sense but do not involve any assumption of responsibility. The language of "adoption", on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct. Indeed, provided the State's intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases where a State has accepted responsibility for conduct of which it did not approve, which it had sought to prevent and which it deeply regretted. However such acceptance may be phrased in the particular case, the term "acknowledges and adopts" in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.

(7) The principle established by article 11 governs the question of attribution only. Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law. By the same token, a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity. Such an assumption of responsibility would have to go further and amount to an agreement to indemnify for the wrongful act of another.

(8) The phrase "if and to the extent that" is intended to convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State. Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words, a State may elect to acknowledge and adopt only some of the conduct in question. Thirdly, the act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.

(9) The conditions of acknowledgement and adoption are cumulative, as indicated by the word "and". The order of the two conditions indicates the normal sequence of

[184] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 35, para. 74.

[185] *Ibid.*, pp. 31–33, paras. 63–68.

[186] *Lighthouses* arbitration (see footnote 182 above), pp. 197–198.

[187] *Official Records of the Security Council, Fifteenth Year*, 866th meeting, 22 June 1960, para. 18.

[188] The separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.

[189] See footnote 59 above.

events in cases in which article 11 is relied on. Acknowledgement and adoption of conduct by a State might be express (as for example in the *United States Diplomatic and Consular Staff in Tehran* case), or it might be inferred from the conduct of the State in question.

## CHAPTER III

## BREACH OF AN INTERNATIONAL OBLIGATION

*Commentary*

(1) There is a breach of an international obligation when conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it or, to use the language of article 2, subparagraph (*b*), when such conduct constitutes "a breach of an international obligation of the State". This chapter develops the notion of a breach of an international obligation, to the extent that this is possible in general terms.

(2) It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States.[190] In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc. There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration. Nonetheless, a number of basic principles can be stated.

(3) The essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. Such conduct gives rise to the new legal relations which are grouped under the common denomination of international responsibility. Chapter III, therefore, begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (art. 12). The basic concept having been defined, the other provisions of the chapter are devoted to specifying how this concept applies to various situations. In particular, the chapter deals with the question of the intertemporal law as it applies to State responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach (art. 13), with the equally important question of continuing breaches (art. 14), and with the special problem of determining whether and when there has been a breach of an obligation which is directed not at single but at composite acts, i.e. where the essence of the breach lies in a series of acts defined in aggregate as wrongful (art. 15).

[190] See paragraphs (2) to (4) of the general commentary.

(4) For the reason given in paragraph (2) above, it is neither possible nor desirable to deal in the framework of this Part with all the issues that can arise in determining whether there has been a breach of an international obligation. Questions of evidence and proof of such a breach fall entirely outside the scope of the articles. Other questions concern rather the classification or typology of international obligations. These have only been included in the text where they can be seen to have distinct consequences within the framework of the secondary rules of State responsibility.[191]

### *Article 12. 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 is not in conformity with what is required of it by that obligation, regardless of its origin or character.**

*Commentary*

(1) As stated in article 2, a breach by a State of an international obligation incumbent upon it gives rise to its international responsibility. It is first necessary to specify what is meant by a breach of an international obligation. This is the purpose of article 12, which defines in the most general terms what constitutes a breach of an international obligation by a State. In order to conclude that there is a breach of an international obligation in any specific case, it will be necessary to take account of the other provisions of chapter III which specify further conditions relating to the existence of a breach of an international obligation, as well as the provisions of chapter V dealing with circumstances which may preclude the wrongfulness of an act of a State. But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.

(2) In introducing the notion of a breach of an international obligation, it is necessary again to emphasize the autonomy of international law in accordance with the principle stated in article 3. In the terms of article 12, the breach of an international obligation consists in the disconformity between the conduct required of the State by that obligation and the conduct actually adopted by the State—i.e. between the requirements of international law and the facts of the matter. This can be expressed in different ways. For example, ICJ has used such expressions as "incompatibility with the obligations" of a State,[192] acts "contrary to" or "inconsistent with" a given rule,[193] and

[191] See, e.g., the classification of obligations of conduct and results, paragraphs (11) to (12) of the commentary to article 12.

[192] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 29, para. 56.

[193] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 64, para. 115, and p. 98, para. 186, respectively.

"failure to comply with its treaty obligations".[194] In the *ELSI* case, a Chamber of the Court asked the "question whether the requisition was in conformity with the requirements … of the FCN Treaty".[195] The expression "not in conformity with what is required of it by that obligation" is the most appropriate to indicate what constitutes the essence of a breach of an international obligation by a State. It allows for the possibility that a breach may exist even if the act of the State is only partly contrary to an international obligation incumbent upon it. In some cases precisely defined conduct is expected from the State concerned; in others the obligation only sets a minimum standard above which the State is free to act. Conduct proscribed by an international obligation may involve an act or an omission or a combination of acts and omissions; it may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition. In every case, it is by comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation that one can determine whether or not there is a breach of that obligation. The phrase "is not in conformity with" is flexible enough to cover the many different ways in which an obligation can be expressed, as well as the various forms which a breach may take.

(3) Article 12 states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation "regardless of its origin". As this phrase indicates, the articles are of general application. They apply to all international obligations of States, whatever their origin may be. International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. States may assume international obligations by a unilateral act.[196] An international obligation may arise from provisions stipulated in a treaty (a decision of an organ of an international organization competent in the matter, a judgment given between two States by ICJ or another tribunal, etc.). It is unnecessary to spell out these possibilities in article 12, since the responsibility of a State is engaged by the breach of an international obligation whatever the particular origin of the obligation concerned. The formula "regardless of its origin" refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law. The word "source" is sometimes used in this context, as in the preamble to the Charter of the United Nations which stresses the need to respect "the obligations arising from treaties and other sources of international law". The word "origin", which has the same meaning, is not attended by the doubts and doctrinal debates the term "source" has provoked.

(4) According to article 12, the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State, nor does it, as such, affect the regime of State responsibility thereby arising. Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act.[197] Moreover, these various grounds of obligation interact with each other, as practice clearly shows. Treaties, especially multilateral treaties, can contribute to the formation of general international law; customary law may assist in the interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on. Thus, international courts and tribunals have treated responsibility as arising for a State by reason of any "violation of a duty imposed by an international juridical standard".[198] In the *"Rainbow Warrior"* arbitration, the tribunal said that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation".[199] In the *Gabčíkovo-Nagymaros Project* case, ICJ referred to the relevant draft article provisionally adopted by the Commission in 1976 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".[200]

(5) Thus, there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, i.e. for responsibility arising *ex contractu* or *ex delicto*. In the *"Rainbow Warrior"* arbitration, the tribunal affirmed that "in the field of international law there is no distinction between contractual and tortious responsibility".[201] As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the "civil" and "criminal" responsibility as is the case in internal legal systems.

(6) State responsibility can arise from breaches of bilateral obligations or of obligations owed to some States

[194] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 46, para. 57.

[195] *ELSI* (see footnote 85 above), p. 50, para. 70.

[196] Thus, France undertook by a unilateral act not to engage in further atmospheric nuclear testing: *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand* v. *France)*, *ibid.*, p. 457. The extent of the obligation thereby undertaken was clarified in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand* v. *France) Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 288.

[197] ICJ has recognized "[t]he existence of identical rules in international treaty law and customary law" on a number of occasions, *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 95, para. 177; see also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38–39, para. 63.

[198] *Dickson Car Wheel Company* (see footnote 42 above); cf. the *Goldenberg* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 901, at pp. 908–909 (1928); *International Fisheries Company* (footnote 43 above), p. 701 ("some principle of international law"); and *Armstrong Cork Company* (footnote 45 above), p. 163 ("any rule whatsoever of international law").

[199] *"Rainbow Warrior"* (see footnote 46 above), p. 251, para. 75. See also *Barcelona Traction* (footnote 25 above), p. 46, para. 86 ("breach of an international obligation arising out of a treaty or a general rule of law").

[200] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 38, para. 47. The qualification "likely to be involved" may have been inserted because of possible circumstances precluding wrongfulness in that case.

[201] *"Rainbow Warrior"* (see footnote 46 above), p. 251, para. 75.

or to the international community as a whole. It can involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law. Questions of the gravity of the breach and the peremptory character of the obligation breached can affect the consequences which arise for the responsible State and, in certain cases, for other States also. Certain distinctions between the consequences of certain breaches are accordingly drawn in Parts Two and Three of these articles.[202] But the regime of State responsibility for breach of an international obligation under Part One is comprehensive in scope, general in character and flexible in its application: Part One is thus able to cover the spectrum of possible situations without any need for further distinctions between categories of obligation concerned or the category of the breach.

(7) Even fundamental principles of the international legal order are not based on any special source of law or specific law-making procedure, in contrast with rules of constitutional character in internal legal systems. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is "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". Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts. But this is an issue belonging to the content of State responsibility.[203] So far at least as Part One of the articles is concerned, there is a unitary regime of State responsibility which is general in character.

(8) Rather similar considerations apply with respect to obligations arising under the Charter of the United Nations. Since the Charter is a treaty, the obligations it contains are, from the point of view of their origin, treaty obligations. The special importance of the Charter, as reflected in its Article 103,[204] derives from its express provisions as well as from the virtually universal membership of States in the United Nations.

(9) The general scope of the articles extends not only to the conventional or other origin of the obligation breached but also to its subject matter. International awards and decisions specifying the conditions for the existence of an internationally wrongful act speak of the breach of an international obligation without placing any restriction on the subject matter of the obligation breached.[205] Courts and tribunals have consistently affirmed the principle that there is no *a priori* limit to the subject matters on which States may assume international obligations. Thus, PCIJ stated in its first judgment, in the *S.S. "Wimbledon"* case, that "the right of entering into international engagements is an attribute of State sovereignty".[206] That proposition has often been endorsed.[207]

(10) In a similar perspective, it has sometimes been argued that an obligation dealing with a certain subject matter could only have been breached by conduct of the same description. That proposition formed the basis of an objection to the jurisdiction of ICJ in the *Oil Platforms* case. It was argued that a treaty of friendship, commerce and navigation could not in principle have been breached by conduct involving the use of armed force. The Court responded in the following terms:

> 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 reach of the Treaty of 1955.[208]

Thus, the breach by a State of an international obligation constitutes an internationally wrongful act, whatever the subject matter or content of the obligation breached, and whatever description may be given to the non-conforming conduct.

(11) Article 12 also states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation, "regardless of its … character". In practice, various classifications of international obligations have been adopted. For example, a distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive,[209] and it does not seem to bear specific or direct consequences as far as the present articles are concerned. In the *Colozza* case, for example, the European Court of Human Rights was concerned with the trial in absentia of a person who, without actual notice of his trial, was sentenced to six years' imprisonment and was not allowed subsequently to contest his conviction.

[202] See Part Three, chapter II and commentary; see also article 48 and commentary.

[203] See articles 40 and 41 and commentaries.

[204] According to which "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

[205] See, e.g., *Factory at Chorzów, Jurisdiction* (footnote 34 above); *Factory at Chorzów, Merits* (*ibid.*); and *Reparation for Injuries* (footnote 38 above). In these decisions it is stated that "any breach of an international engagement" entails international responsibility. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (footnote 39 above), p. 228.

[206] *S.S. "Wimbledon"* (see footnote 34 above), p. 25.

[207] See, e.g., *Nottebohm, Second Phase*, *Judgment, I.C.J. Reports 1955*, p. 4, at pp. 20–21; *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6, at p. 33; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 131, para. 259.

[208] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at pp. 811–812, para. 21.

[209] Cf. *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 77, para. 135, where the Court referred to the parties having accepted "obligations of conduct, obligations of performance, and obligations of result".

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" ... 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*.[210]

The Court thus considered that article 6, paragraph 1, imposed an obligation of result.[211] But, in order to decide whether there had been a breach of the Convention in the circumstances of the case, it did not simply compare 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, it examined what more Italy could have done to make the applicant's right "effective".[212] The distinction between obligations of conduct and result was not determinative of the actual decision that there had been a breach of article 6, paragraph 1.[213]

(12) The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation *prima facie* conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down that is applicable to all cases.[214] Certain obligations may be breached by the mere passage of incompatible legislation.[215] Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the legislature itself being an organ of the State for the purposes of the attribution of responsibility.[216] In other circumstances, the enactment of legislation may not in and of itself amount to a breach,[217] especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.[218]

### *Article 13. International obligation in force for a State*

**An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.**

*Commentary*

(1) Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when the State is bound by the obligation. This is but the application in the field of State responsibility of the general principle of intertemporal law, as stated by Judge 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.[219]

Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation ("does not constitute … unless …") is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.

(2) International tribunals have applied the principle stated in article 13 in many cases. An instructive example is provided by the decision of Umpire Bates of the United States-Great Britain Mixed Commission concerning the

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[210] *Colozza* v. *Italy, Eur. Court H.R., Series A, No. 89* (1985), pp. 15–16, para. 30, citing *De Cubber* v. *Belgium, ibid., No. 86* (1984), p. 20, para. 35.

[211] Cf. *Plattform "Ärzte für das Leben"* v. *Austria*, 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" (*Eur. Court H.R., Series A, No. 139*, p. 12, para. 34 (1988)).

In the *Colozza* case (see footnote 210 above), the Court used similar language but concluded that the obligation was an obligation of result. Cf. C. Tomuschat, "What is a 'breach' of the European Convention on Human Rights?", *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, Lawson and de Blois, eds. (Dordrecht, Martinus Nijhoff, 1994), vol. 3, p. 315, at p. 328.

[212] *Colozza* case (see footnote 210 above), para. 28.

[213] See also *The Islamic Republic of Iran* v. *The United States of America*, cases A15 (IV) and A24, Iran-U.S. C.T.R., vol. 32, p. 115 (1996).

[214] Cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (footnote 83 above), p. 30, para. 42.

[215] A uniform law treaty will generally be construed as requiring immediate implementation, i.e. as embodying an obligation to make the provisions of the uniform law a part of the law of each State party: see, e.g., B. Conforti, "Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme", *Rivista di diritto internazionale privato e processuale*, vol. 24 (1988), p. 233.

[216] See article 4 and commentary. For illustrations, see, e.g., the findings of the European Court of Human Rights in *Norris* v. *Ireland*, *Eur. Court H.R., Series A, No. 142*, para. 31 (1988), citing *Klass and Others* v. *Germany, ibid., No. 28*, para. 33 (1978); *Marckx* v. *Belgium, ibid., No. 31*, para. 27 (1979); *Johnston and Others* v. *Ireland, ibid., No. 112*, para. 42 (1986); *Dudgeon* v. *the United Kingdom, ibid., No. 45*, para. 41 (1981); and *Modinos* v. *Cyprus, ibid., No. 259*, para. 24 (1993). See also *International responsibility for the promulgation and enforcement of laws in violation of the Convention (arts. 1 and 2 American Convention on Human Rights)*, Advisory Opinion OC–14/94, Inter-American Court of Human Rights, Series A, No. 14 (1994). The Inter-American Court also considered it possible to determine whether draft legislation was compatible with the provisions of human rights treaties: *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC–3/83, Series A, No. 3 (1983).

[217] As ICJ held in *LaGrand*, *Judgment* (see footnote 119 above), p. 497, paras. 90–91.

[218] See, e.g., WTO, Report of the Panel (footnote 73 above), paras. 7.34–7.57.

[219] *Island of Palmas* (Netherlands/United States of America), UNRIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845 (1928). Generally on intertemporal law, see resolution I adopted in 1975 by the Institute of International Law at its Wiesbaden session, *Annuaire de l'Institut de droit international*, vol. 56 (1975), pp. 536–540; for the debate, *ibid.*, pp. 339–374; for M. Sørensen's reports, *ibid.*, vol. 55 (1973), pp. 1–116. See further W. Karl, "The time factor in the law of State responsibility", Spinedi and Simma, eds., *op. cit*. (footnote 175 above), p. 95.

conduct of British authorities who had seized United States vessels engaged in the slave trade and freed slaves belonging to United States nationals. The incidents referred to the Commission had taken place at different times and the umpire had to determine whether, at the time each incident took place, slavery was "contrary to the law of nations". Earlier incidents, dating back to a time when the slave trade was considered lawful, amounted to a breach on the part of the British authorities of the international obligation to respect and protect the property of foreign nationals.[220] The later incidents occurred when the slave trade had been "prohibited by all civilized nations" and did not involve the responsibility of Great Britain.[221]

(3) Similar principles were applied by Arbitrator Asser in deciding whether the seizure and confiscation by Russian authorities of United States vessels engaged in seal hunting outside Russia's territorial waters should be considered internationally wrongful. In his award in the *"James Hamilton Lewis"* case, he observed that the question had to be settled "according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the vessel".[222] Since, under the principles in force at the time, Russia had no right to seize the United States vessel, the seizure and confiscation of the vessel were unlawful acts for which Russia was required to pay compensation.[223] The same principle has consistently been applied by the European Commission and the European Court of Human Rights to deny claims relating to periods during which the European Convention on Human Rights was not in force for the State concerned.[224]

(4) State practice also supports the principle. A requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place is a common stipulation in arbitration agreements,[225] and undoubtedly is made by way of explicit confirmation of a generally recognized principle. International law writers who have dealt with the question recognize that the wrongfulness of an act must be established on the basis of the obligations in force at the time when the act was performed.[226]

(5) State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence, as contemplated by article 64 of the 1969 Vienna Convention, this does not entail any retrospective assumption of responsibility. Article 71, paragraph 2 (*b*), provides that such a new peremptory norm "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".

(6) Accordingly, it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application. It is, however, without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State. In fact, cases of the retrospective assumption of responsibility are rare. The *lex specialis* principle (art. 55) is sufficient to deal with any such cases where it may be agreed or decided that responsibility will be assumed retrospectively for conduct which was not a breach of an international obligation at the time it was committed.[227]

(7) In international law, the principle stated in article 13 is not only a necessary but also a sufficient basis for responsibility. In other words, once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law. Thus, as ICJ said in the *Northern Cameroons* case:

> [I]f during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust.[228]

Similarly, in the *"Rainbow Warrior"* arbitration, the arbitral tribunal held that, although the relevant treaty obli-

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[220] See the *"Enterprize"* case, Lapradelle-Politis (footnote 139 above), vol. I, p. 703 (1855); and Moore, *History and Digest*, vol. IV, p. 4349, at p. 4373. See also the *"Hermosa"* and *"Créole"* cases, Lapradelle-Politis, *op. cit*., p. 704 (1855); and Moore, *History and Digest*, vol. IV, pp. 4374–4375.

[221] See the *"Lawrence"* case, Lapradelle-Politis, *op. cit*., p. 741; and Moore, *History and Digest*, vol. III, p. 2824. See also the *"Volusia"* case, Lapradelle-Politis, *op. cit*., p. 741.

[222] *Affaire des navires Cape Horn Pigeon, James Hamilton Lewis, C. H. White et Kate and Anna*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 66, at p. 69 (1902).

[223] See also the *"C. H. White"* case, *ibid.*, p. 74. In these cases the arbitrator was required by the arbitration agreement itself to apply the law in force at the time the acts were performed. Nevertheless, the intention of the parties was clearly to confirm the application of the general principle in the context of the arbitration agreement, not to establish an exception. See further the *S.S. "Lisman"* case, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1767, at p. 1771 (1937).

[224] See, e.g., *X* v. *Germany*, application No. 1151/61, Council of Europe, European Commission of Human Rights, *Recueil des décisions*, No. 7 (March 1962), p. 119 (1961) and many later decisions.

[225] See, e.g., Declarations exchanged between the Government of the United States of America and the Imperial Government of Russia, for the submission to arbitration of certain disputes concerning the international responsibility of Russia for the seizure of American ships, UNRIAA, vol. IX (Sales No. 59.V.5), p. 57 (1900).

[226] See, e.g., P. Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public: problèmes de droit intertemporel ou de droit transitoire* (Paris, Librairie générale de droit et de jurisprudence, 1970), pp. 119, 135 and 292; D. Bindschedler-Robert, "De la rétroactivité en droit international public", *Recueil d'études de droit international en hommage à Paul Guggenheim* (University of Geneva Law Faculty/Graduate Institute of International Studies, 1968), p. 184; M. Sørensen, "Le problème intertemporel dans l'application de la Convention européenne des droits de l'homme", *Mélanges offerts à Polys Modinos* (Paris, Pedone, 1968), p. 304; T. O. Elias, "The doctrine of intertemporal law", AJIL, vol. 74, No. 2 (April 1980), p. 285; and R. Higgins, "Time and the law: international perspectives on an old problem", *International and Comparative Law Quarterly*, vol. 46 (July 1997), p. 501.

[227] As to the retroactive effect of the acknowledgement and adoption of conduct by a State, see article 11 and commentary, especially paragraph (4). Such acknowledgement and adoption would not, without more, give retroactive effect to the obligations of the adopting State.

[228] *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15, at p. 35.

gation had terminated with the passage of time, France's responsibility for its earlier breach remained.[229]

(8) Both aspects of the principle are implicit in the ICJ decision in the *Certain Phosphate Lands in Nauru* case. 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.[230] 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 [*sic*] 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.[231]

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. 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 subsequently terminated.[232]

(9) The basic principle stated in article 13 is thus well established. One possible qualification concerns the progressive interpretation of obligations, by a majority of the Court in the *Namibia* case.[233] But the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permissible in certain cases,[234] 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. Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation.[235]

[229] *"Rainbow Warrior"* (see footnote 46 above), pp. 265–266.

[230] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at pp. 253–255, paras. 31–36. See article 45, subparagraph (*b*), and commentary.

[231] *Certain Phosphate Lands in Nauru*, *ibid.*, p. 255, para. 36.

[232] The case was settled before the Court had the opportunity to consider the merits: *Certain Phosphate Lands in Nauru, Order of 13 September 1993, I.C.J. Reports 1993*, p. 322; for the settlement agreement, see Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru (Nauru, 10 August 1993) (United Nations, *Treaty Series*, vol. 1770, No. 30807, p. 379).

[233] *Namibia* case (see footnote 176 above), pp. 31–32, para. 53.

[234] See, e.g., *Tyrer* v. *the United Kingdom, Eur. Court H.R., Series A, No. 26*, pp. 15–16 (1978).

[235] See, e.g., *Zana* v. *Turkey*, *Eur. Court H.R., Reports*, 1997–VII, p. 2533 (1997); and J. Pauwelyn, "The concept of a 'continuing violation' of an international obligation: selected problems", BYBIL, *1995*, vol. 66, p. 415, at pp. 443–445.

### *Article 14. Extension in time of the breach of an international obligation*

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

**2. The breach of an international obligation by an act of a State having a continuing character extends 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 remains not in conformity with that obligation.**

*Commentary*

(1) The problem of identifying when a wrongful act begins and how long it continues is one which arises frequently[236] and has consequences in the field of State responsibility, including the important question of cessation of continuing wrongful acts dealt with in article 30. Although the existence and duration of a breach of an international obligation depends for the most part on the existence and content of the obligation and on the facts of the particular breach, certain basic concepts are established. These are introduced in article 14. Without seeking to be comprehensive in its treatment of the problem, article 14 deals with several related questions. In particular, it develops the distinction between breaches not extending in time and continuing wrongful acts (see paragraphs (1) and (2) respectively), and it also deals with the application of that distinction to the important case of obligations of prevention. In each of these cases it takes into account the question of the continuance in force of the obligation breached.

(2) Internationally wrongful acts usually take some time to happen. The critical distinction for the purpose of article 14 is between a breach which is continuing and one which has already been completed. In accordance with *paragraph 1*, a completed act occurs "at the moment when the act is performed", even though its effects or consequences may continue. The words "at the moment" are intended to provide a more precise description of the time frame when a completed wrongful act is performed,

[236] See, e.g., *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35; *Phosphates in Morocco* (footnote 34 above), pp. 23–29; *Electricity Company of Sofia and Bulgaria, Judgment, 1939*, *P.C.I.J., Series A/B, No. 77*, p. 64, at pp. 80–82; and *Right of Passage over Indian Territory* (footnote 207 above), pp. 33–36. The issue has often been raised before the organs of the European Convention on Human Rights. See, e. g., the decision of the European Commission of Human Rights in the *De Becker* v. *Belgium* case, application No. 214/56, *Yearbook of the European Convention on Human Rights, 1958–1959*, p. 214, at pp. 234 and 244; and the Court's judgments in *Ireland* v. *the United Kingdom, Eur. Court H.R., Series A, No. 25*, p. 64 (1978); *Papamichalopoulos and Others* v. *Greece, ibid., No. 260–B*, para. 40 (1993); and *Agrotexim and Others* v. *Greece, ibid., No. 330–A*, p. 22, para. 58 (1995). See also E. Wyler, "Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite", RGDIP, vol. 95, p. 881 (1991).

without requiring that the act necessarily be completed in a single instant.

(3) In accordance with *paragraph 2*, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period.[237] Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent.

(4) Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. For example, the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for.[238] The question whether a wrongful taking of property is a completed or continuing act likewise depends to some extent on the content of the primary rule said to have been violated. Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act. The position with a *de facto*, "creeping" or disguised occupation, however, may well be different.[239] Exceptionally, 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.[240]

(5) Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin. In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect, it is covered by paragraph 1 of article 14.

(6) An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.

(7) The notion of continuing wrongful acts is common to many national legal systems and owes its origins in international law to Triepel.[241] It has been repeatedly referred to by ICJ and by other international tribunals. For example, in the *United States Diplomatic and Consular Staff in Tehran* case, the Court referred to "successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963".[242]

(8) The consequences of a continuing wrongful act will depend on the context, as well as on the duration of the obligation breached. For example, 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. The arbitral tribunal referred with approval to the Commission's draft articles (now amalgamated in article 14) and to the distinction between instantaneous and continuing wrongful acts, and said:

> 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.[243]

The tribunal went on to draw further legal consequences from the distinction in terms of the duration of French obligations under the agreement.[244]

(9) 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. The issue arises because the Court's jurisdiction may be limited to events occurring after the respondent State became a party to the Convention or the relevant Protocol and accepted the right of individual petition. Thus, in the *Papamichalopoulos* case, 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 to the European Convention on Human Rights,

[237] See article 13 and commentary, especially para. (2).

[238] *Blake*, Inter-American Court of Human Rights, Series C, No. 36, para. 67 (1998).

[239] *Papamichalopoulos* (see footnote 236 above).

[240] *Loizidou*, *Merits* (see footnote 160 above), p. 2216.

[241] H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 289. The concept was subsequently taken up in various general studies on State responsibility as well as in works on the interpretation of the formula "situations or facts prior to a given date" used in some declarations of acceptance of the compulsory jurisdiction of ICJ.

[242] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 37, para. 80. See also pages 36–37, paras. 78–79.

[243] *"Rainbow Warrior"* (see footnote 46 above), p. 264, para. 101.

[244] *Ibid*., pp. 265–266, paras. 105–106. But see the separate opinion of Sir Kenneth Keith, *ibid*., pp. 279–284.

which continued after the Protocol had come into force; it accordingly upheld its jurisdiction over the claim.[245]

(10) In the *Loizidou* case,[246] similar reasoning was applied by the Court 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 argued that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus 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 Constitution so that the expropriation was not completed at that time and the property continued to belong to the applicant. The conduct of the Turkish Republic 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 after that time.[247]

(11) The Human Rights Committee has likewise endorsed the idea of continuing wrongful acts. For example, in *Lovelace*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a registered member of an Indian group, 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.[248]

It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, was 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 application of article 27 as the most directly relevant provision of the Covenant to the facts in hand.

(12) Thus, conduct which has 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 State responsibility. For example, the obligation of cessation contained in article 30 applies to continuing wrongful acts.

(13) A question common to wrongful acts whether completed or continuing is when a breach of international law occurs, as distinct from being merely apprehended or imminent. As noted in the context of article 12, that question can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct,[249] incitement or attempt,[250] in which case the threat, incitement or attempt is itself a wrongful act. On the other hand, where the internationally wrongful act is the occurrence of some event—e.g. the diversion of an international river—mere preparatory conduct is not necessarily wrongful.[251] In the *Gabčíkovo-Nagymaros Project* case, the question was when the diversion scheme ("Variant C") was put into effect. ICJ held that the breach did not occur until the actual diversion of the Danube. 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". [252]

Thus, the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Preparatory conduct does not itself amount to a

[245] See footnote 236 above.

[246] *Loizidou, Merits* (see footnote 160 above), p. 2216.

[247] *Ibid*., pp. 2230–2232 and 2237–2238, paras. 41–47 and 63–64. See, however, the dissenting opinion of Judge Bernhardt, p. 2242, para. 2 (with whom Judges Lopes Rocha, Jambrek, Pettiti, Baka and Gölcüklü in substance agreed). See also *Loizidou, Preliminary Objections* (footnote 160 above), pp. 33–34, paras. 102–105; and *Cyprus* v. *Turkey*, application No. 25781/94, judgement of 10 May 2001, *Eur. Court H.R., Reports*, 2001–IV.

[248] *Lovelace* v. *Canada*, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), annex XVIII, communication No. R.6/24, p. 172, paras. 10–11 (1981).

[249] 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* (footnote 54 above), pp. 246–247, paras. 47–48; see also R. Sadurska, "Threats of force", AJIL, vol. 82, No. 2 (April 1988), p. 239.

[250] A particularly comprehensive formulation is that of article III of the Convention on the Prevention and Punishment of the Crime of Genocide which prohibits conspiracy, direct and public incitement, attempt and complicity in relation to genocide. See also article 2 of the International Convention for the Suppression of Terrorist Bombings and article 2 of the International Convention for the Suppression of the Financing of Terrorism.

[251] 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 K. Zweigert and H. Kötz, *Introduction to Comparative Law*, 3rd rev. ed., trans. T. Weir (Oxford, Clarendon Press, 1998), p. 508. Other systems achieve similar results without using this concept, e.g. by construing a refusal to perform in advance of the time for performance as a "positive breach of contract", *ibid*., p. 494 (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". Such a repudiation could occur in advance of the time for performance.

[252] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 54, para. 79, citing the draft commentary to what is now article 30.

breach if it does not "predetermine the final decision to be taken". Whether that is so in any given case will depend on the facts and on the content of the primary obligation. 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 various possibilities are intended to be covered by the use of the term "occurs" in paragraphs 1 and 3 of article 14.

(14) *Paragraph 3* of article 14 deals with the temporal dimensions of a particular category of breaches of international obligations, namely the breach of obligations to prevent the occurrence of a given event. Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur. The breach of an obligation of prevention may well be a continuing wrongful act, although, as for other continuing wrongful acts, the effect of article 13 is that the breach only continues if the State is bound by the obligation for the period during which the event continues and remains not in conformity with what is required by the obligation. For example, the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration,[253] was breached for as long as the pollution continued to be emitted. Indeed, in such cases the breach may be progressively aggravated by the failure to suppress it. However, not all obligations directed to preventing an act from occurring will be of this kind. If the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act.[254] If the obligation in question has ceased, any continuing conduct by definition ceases to be wrongful at that time.[255] Both qualifications are intended to be covered by the phrase in paragraph 3, "and remains not in conformity with that obligation".

### *Article 15. Breach consisting of a composite act*

**1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.**

**2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.**

*Commentary*

(1) Within the basic framework established by the distinction between completed and continuing acts in article 14, article 15 deals with a further refinement, viz. the notion of a composite wrongful act. Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.

(2) Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is "a series of acts or omissions defined in aggregate as wrongful". Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc. Some of the most serious wrongful acts in international law are defined in terms of their composite character. The importance of these obligations in international law justifies special treatment in article 15.[256]

(3) Even though it has special features, the prohibition of genocide, formulated in identical terms in the Convention on the Prevention and Punishment of the Crime of Genocide and in later instruments,[257] may be taken as an illustration of a "composite" obligation. It implies that the responsible entity (including a State) will have adopted a systematic policy or practice. According to article II, subparagraph (*a*), of the Convention, the prime case of genocide is "[k]illing members of the [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. Genocide has also to be carried out with the relevant intention, aimed at physically eliminating the group "as such". 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. Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide.[258]

(4) It is necessary to distinguish composite obligations from simple obligations breached by a "composite" act. Composite acts may be more likely to give rise to

[253] *Trail Smelter*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905 (1938, 1941).

[254] An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation 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.

[255] See the *"Rainbow Warrior"* case (footnote 46 above), p. 266.

[256] See further J. J. A. Salmon, "Le fait étatique complexe: une notion contestable", *Annuaire français de droit international*, vol. 28 (1982), p. 709.

[257] See, e.g., article 4 of the statute of the International Tribunal for the Former Yugoslavia, originally published as an annex to document S/25704 and Add.1, approved by the Security Council in its resolution 827 (1993) of 25 May 1993, and amended on 13 May 1998 by resolution 1166 (1998) and on 30 November 2000 by resolution 1329 (2000); article 2 of the statute of the International Tribunal for Rwanda, approved by the Security Council in its resolution 955 (1994) of 8 November 1994; and article 6 of the Rome Statute of the International Criminal Court.

[258] The intertemporal principle does not apply to the Convention, which according to its article I is declaratory. Thus, the obligation to prosecute relates to genocide whenever committed. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (footnote 54 above), p. 617, para. 34.

continuing breaches, but simple acts can cause continuing breaches as well. The position is different, however, where the obligation itself is defined in terms of the cumulative character of the conduct, i.e. where the cumulative conduct constitutes 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 or racially motivated killing.

(5) In *Ireland* v. *the United Kingdom*, Ireland complained of a practice of unlawful treatment of detainees in Northern Ireland which was said to amount to torture or inhuman or degrading treatment, and the case 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 VII of the Convention on the Prevention and Punishment of the Crime of Genocide, 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.[259]

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.

(6) A further distinction must be drawn 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 by a State is internationally wrongful,[260] even though 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 its essence such discrimination is not a composite act, but it may be necessary for the purposes of proving it to produce evidence of a practice amounting to such an act.

(7) A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.

(8) *Paragraph 1* of article 15 defines the time at which a composite act "occurs" as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series. Similar considerations apply as for completed and continuing wrongful acts in determining when a breach of international law exists; the matter is dependent upon the precise facts and the content of the primary obligation. The number of actions or omissions which must occur to constitute a breach of the obligation is also determined by the formulation and purpose of the primary rule. The actions or omissions must be part of a series but the article does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided a sufficient number of acts has occurred to constitute a breach. At the time when the act occurs which is sufficient to constitute the breach it may not be clear that further acts are to follow and that the series is not complete. Further, the fact that the series of actions or omissions was interrupted so that it was never completed will not necessarily prevent those actions or omissions which have occurred being classified as a composite wrongful act if, taken together, they are sufficient to constitute the breach.

(9) While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation. For example, the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful. Nor does it affect the temporal element in the commission of the acts: a series of acts or omissions may occur at the same time or sequentially, at different times.

(10) *Paragraph 2* of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined.

(11) The word "remain" in paragraph 2 is inserted to deal with the intertemporal principle set out in article 13. In accordance with that principle, the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In

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[259] *Ireland* v. *the United Kingdom* (see footnote 236 above), p. 64, para. 159; see also page 63, para. 157. See further the United States counterclaim in *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.

[260] See, e.g., article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination; and article 26 of the International Covenant on Civil and Political Rights.

cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).

## Chapter IV

## RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

### *Commentary*

(1) In accordance with the basic principles laid down in chapter I, each State is responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it under chapter II which is in breach of an international obligation of that State in accordance with chapter III.[261] The principle that State responsibility is specific to the State concerned underlies the present articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities.

(2) However, internationally wrongful conduct often results from the collaboration of several States rather than of one State acting alone.[262] This may involve independent conduct by several States, each playing its own role in carrying out an internationally wrongful act. Or it may be that a number of States act through a common organ to commit a wrongful act.[263] Internationally wrongful conduct can also arise out of situations where a State acts on behalf of another State in carrying out the conduct in question.

(3) Various forms of collaborative conduct can coexist in the same case. For example, three States, Australia, New Zealand and the United Kingdom, together constituted the Administering Authority for the Trust Territory of Nauru. In the *Certain Phosphate Lands in Nauru* case, proceedings were commenced against Australia alone in respect of acts performed on the "joint behalf" of the three States.[264] The acts performed by Australia involved both "joint" conduct of several States and day-to-day administration of a territory by one State acting on behalf of other States as well as on its own behalf. By contrast, if the relevant organ of the acting State is merely "placed at the disposal" of the requesting State, in the sense provided for in article 6, only the requesting State is responsible for the act in question.

(4) In certain circumstances the wrongfulness of a State's conduct may depend on the independent action of another State. A State may engage in conduct in a situation where another State is involved and the conduct of the other State may be relevant or even decisive in assessing whether the first State has breached its own international obligations. For example, in the *Soering* case the European Court of Human Rights held that the proposed extradition of a person to a State not party to the European Convention on Human Rights where he was likely to suffer inhuman or degrading treatment or punishment involved a breach of article 3 of the Convention by the extraditing State.[265] Alternatively, 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. Thus, the basis of responsibility in the *Corfu Channel* case[266] was Albania's failure to warn the United Kingdom of the presence of mines in Albanian waters which had been laid by a third State. Albania's responsibility in the circumstances was original and not derived from the wrongfulness of the conduct of any other State.

(5) In most cases of collaborative conduct by States, responsibility for the wrongful act will be determined according to the principle of independent responsibility referred to in paragraph (1) above. But there may be cases where conduct of the organ of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, and this may be so 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 defines these exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another.

(6) Three situations are covered in chapter IV. Article 16 deals with cases where one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter. Article 17 deals with cases where one State is responsible for the internationally wrongful act of another State because it has exercised powers of direction and control over the commission of an internationally wrongful act by the latter. Article 18 deals with the extreme case where one State deliberately coerces another into committing an act which is, or but for

[261] See, in particular, article 2 and commentary.

[262] See M. L. Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (Milan, Giuffrè, 1990); Brownlie, *System of the Law of Nations …* (footnote 92 above), pp. 189–192; J. Quigley, "Complicity in international law: a new direction in the law of State responsibility", BYBIL, *1986*, vol. 57, p. 77; J. E. Noyes and B. D. Smith, "State responsibility and the principle of joint and several liability", *Yale Journal of International Law*, vol. 13 (1988), p. 225; and B. Graefrath, "Complicity in the law of international responsibility", *Revue belge de droit international*, vol. 29 (1996), p. 370.

[263] In some cases, the act in question may be committed by the organs of an international organization. This raises issues of the international responsibility of international organizations which fall outside the scope of the present articles. See article 57 and commentary.

[264] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 258, para. 47; see also the separate opinion of Judge Shahabuddeen, *ibid*., p. 284.

[265] *Soering* v. *the United Kingdom*, *Eur. Court H.R., Series A, No. 161*, pp. 33–36, paras. 85–91 (1989). See also *Cruz Varas and Others* v. *Sweden*, *ibid.*, *No. 201*, p. 28, paras. 69–70 (1991); and *Vilvarajah and Others* v. *the United Kingdom, ibid.*, *No. 215*, p. 37, paras. 115–116 (1991).

[266] *Corfu Channel, Merits* (see footnote 35 above), p. 22.

the coercion would be,[267] an internationally wrongful act on the part of the coerced State. 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 be, 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 and control over or its coercion of the acting State. But there are important differences between the three cases. Under article 16, the State primarily responsible is the acting State and the assisting State has a mere supporting role. Similarly under article 17, the acting State commits the internationally wrongful act, albeit under the direction and control of another State. By contrast, in the case of coercion under article 18, the coercing State is the prime mover in respect of the conduct and the coerced State is merely its instrument.

(7) A feature of this chapter is that it specifies certain conduct as internationally wrongful. This may seem to blur the distinction maintained in the articles between the primary or substantive obligations of the State and its secondary obligations of responsibility.[268] It is justified on the basis that responsibility under chapter IV is in a sense derivative.[269] 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 obligations. 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.

(8) On the other hand, the situations covered in chapter IV have a special character. They are exceptions to the principle of independent responsibility and they only cover certain cases. In formulating these exceptional cases where one State is responsible for the internationally wrongful acts of another, it is necessary to bear in mind certain features of the international system. First, there is the possibility that the same conduct may be internationally wrongful so far as one State is concerned but not for another State having regard to its own international obligations. Rules of derived responsibility cannot be allowed to undermine the principle, stated in article 34 of the 1969 Vienna Convention, that a "treaty does not create either obligations or rights for a third State without its consent"; similar issues arise with respect to unilateral obligations and even, in certain cases, rules of general international law. Hence it is only in the extreme case of coercion that a State may become responsible under this chapter for conduct which would not have been internationally wrongful if performed by that State. Secondly, States engage in a wide variety of activities through a multiplicity of organs and agencies. For example, a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be internationally unlawful. Thus, it is necessary to establish a close connection between the action of the assisting, directing or coercing State on the one hand and that of the State committing the internationally wrongful act on the other. Thus, the articles in this chapter require that the former State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of the assisting, directing or coercing State. This is done without prejudice to the general question of "wrongful intent" in matters of State responsibility, on which the articles are neutral.[270]

(9) Similar considerations dictate the exclusion of certain situations of "derived responsibility" from chapter IV. One of these is incitement. The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State.[271] However, there can be specific treaty obligations prohibiting incitement under certain circumstances.[272] Another concerns the issue which is described in some systems of internal law as being an "accessory after the fact". It seems that there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred. Again it is a matter for specific treaty obligations to establish any such obligation of suppression after the event. There are, however, two important qualifications here. First, in some circumstances assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that act by the former State. In such cases responsibility for that act potentially arises pursuant to article 11. Secondly, special obligations of cooperation in putting an end to an unlawful situation arise in the case of serious breaches of obligations under peremptory norms of general international law. By definition, in such cases States will have agreed that no derogation from such obligations is to be permitted and, faced with a serious breach of such an obligation, certain obligations of cooperation arise. These are dealt with in article 41.

### *Article 16. Aid or assistance in the commission of an internationally wrongful act*

**A State which aids or assists another State in the commission of an internationally wrongful act by the latter 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.**

[267] If a State has been coerced, the wrongfulness of its act may be precluded by *force majeure*: see article 23 and commentary.

[268] See paras. (1)–(2) and (4) of the general commentary for an explanation of the distinction.

[269] Cf. the term *responsabilité dérivée* used by Arbitrator Huber in *British Claims in the Spanish Zone of Morocco* (footnote 44 above), p. 648.

[270] See above, the commentary to paragraphs (3) and (10) of article 2.

[271] See the statement of the United States-French Commissioners relating to the *French Indemnity of 1831* case in Moore, *History and Digest*, vol. V, p. 4447, at pp. 4473–4476. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 129, para. 255, and the dissenting opinion of Judge Schwebel, p. 389, para. 259.

[272] See, e.g., article III (*c*) of the Convention on the Prevention and Punishment of the Crime of Genocide; and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

*Commentary*

(1) Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term "by the latter" in the *chapeau* to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, 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.[273] Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as 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 16.

(3) Article 16 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.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase "knowledge of the circumstances of the internationally wrongful act". A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. 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.

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State *vis-à-vis* third States. This basic principle is also embodied in articles 34 and 35 of the 1969 Vienna Convention. Correspondingly, a State is free to act for itself in a way which is inconsistent with the obligations of another State *vis-à-vis* third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided *vis-à-vis* the injured State. Thus, it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 the Islamic Republic of Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.[274] The Government of the United Kingdom denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.[275] In 1998, a similar allegation surfaced that the Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq's representative to the United Nations.[276]

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic of Germany

[273] See, e.g., the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex); and article 3 (*f*) of the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

[274] *The New York Times*, 6 March 1984, p. A1.

[275] *Ibid*., 5 March 1984, p. A3.

[276] *Ibid*., 26 August 1998, p. A8.

in response to an allegation that Germany had participated in an armed attack by allowing United States military aircraft to use airfields in its territory in connection with the United States intervention in Lebanon. While denying that the measures taken by the United States and the United Kingdom in the Near East constituted intervention, the Federal Republic of Germany nevertheless seems to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act.[277] Another example arises from the Tripoli bombing incident in April 1986. The Libyan Arab Jamahiriya charged the United Kingdom with responsibility for the event, based on the fact that the United Kingdom had allowed several of its air bases to be used for the launching of United States fighter planes to attack Libyan targets.[278] The Libyan Arab Jamahiriya asserted that the United Kingdom "would be held partly responsible" for having "supported and contributed in a direct way" to the raid.[279] The United Kingdom denied responsibility on the basis that the raid by the United States was lawful as an act of self-defence against Libyan terrorist attacks on United States targets.[280] A proposed Security Council resolution concerning the attack was vetoed, but the General Assembly issued a resolution condemning the "military attack" as "a violation of the Charter of the United Nations and of international law", and calling upon all States "to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya".[281]

(9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the Security Council[282] or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.[283] Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.

[277] For the text of the note from the Federal Government, see *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 20 (August 1960), pp. 663–664.

[278] See United States of America, *Department of State Bulletin*, No. 2111 (June 1986), p. 8.

[279] See the statement of Ambassador Hamed Houdeiry, Libyan People's Bureau, Paris, *The Times*, 16 April 1986, p. 6.

[280] Statement of Mrs. Margaret Thatcher, Prime Minister, *House of Commons Debates*, 6th series, vol. 95, col. 737 (15 April 1986), reprinted in BYBIL, *1986*, vol. 57, pp. 637–638.

[281] General Assembly resolution 41/38 of 20 November 1986, paras. 1 and 3.

[282] See, e.g., Report by President Clinton, AJIL, vol. 91, No. 4 (October 1997), p. 709.

[283] Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII (A/37/745), p. 50.

(10) In accordance with article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State. In some cases this may be a distinction without a difference: where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State.[284] In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct.

(11) Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State. ICJ has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, "it would have to rule, as a prerequisite, on the lawfulness"[285] of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle.[286] That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter. This may present practical difficulties in some cases in establishing the responsibility of the aiding or assisting State, but it does not vitiate the purpose of article 16. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such. Moreover, that principle is not all-embracing, and the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case. In any event, wrongful assistance given to another State has frequently led to diplomatic protests. States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.

### *Article 17. Direction and control exercised over the commission of an internationally wrongful act*

**A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:**

**(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and**

[284] For the question of concurrent responsibility of several States for the same injury, see article 47 and commentary.

[285] *East Timor* (see footnote 54 above), p. 105, para. 35.

[286] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19, at p. 32; *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 261, para. 55.

**(*b*) the act would be internationally wrongful if committed by that State.**

*Commentary*

(1) Article 17 deals with a second case of derived responsibility, the exercise of direction and control by one State over the commission of an internationally wrongful act by another. Under article 16, a State providing aid or assistance with a view to the commission of an internationally wrongful act incurs international responsibility only to the extent of the aid or assistance given. By contrast, a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety.

(2) Some examples of international responsibility flowing from the exercise of direction and control over the commission of a wrongful act by another State are now largely of historical significance. International dependency relationships such as "suzerainty" or "protectorate" warranted treating the dominant State as internationally responsible for conduct formally attributable to the dependent State. For example, in *Rights of Nationals of the United States of America in Morocco*,[287] France commenced proceedings under the Optional Clause in respect of a dispute concerning the rights of United States nationals in Morocco under French protectorate. The United States objected that any eventual judgment might not be considered as binding upon Morocco, which was not a party to the proceedings. France confirmed that it was acting both in its own name and as the protecting power over Morocco, with the result that the Court's judgment would be binding both on France and on Morocco,[288] and the case proceeded on that basis.[289] The Court's judgment concerned questions of the responsibility of France in respect of the conduct of Morocco which were raised both by the application and by the United States counterclaim.

(3) With the developments in international relations since 1945, and in particular the process of decolonization, older dependency relationships have been terminated. Such links do not involve any legal right to direction or control on the part of the representing State. In cases of representation, the represented entity remains responsible for its own international obligations, even though diplomatic communications may be channelled through another State. The representing State in such cases does not, merely because it is the channel through which communications pass, assume any responsibility for their content. This is not in contradiction to the *British Claims in the Spanish Zone of Morocco* arbitration, which affirmed that "the responsibility of the protecting State … proceeds … from the fact that the protecting State alone represents the protected territory in its international relations",[290] and that the protecting State is answerable "in place of the protected State".[291] The principal concern in the arbitration was to ensure that, in the case of a protectorate which put an end to direct international relations by the protected State, international responsibility for wrongful acts committed by the protected State was not erased to the detriment of third States injured by the wrongful conduct. The acceptance by the protecting State of the obligation to answer in place of the protected State was viewed as an appropriate means of avoiding that danger.[292] The justification for such an acceptance was not based on the relationship of "representation" as such but on the fact that the protecting State was in virtually total control over the protected State. It was not merely acting as a channel of communication.

(4) Other relationships of dependency, such as dependent territories, fall entirely outside the scope of article 17, which is concerned only with the responsibility of one State for the conduct of another State. In most relationships of dependency between one territory and another, the dependent territory, even if it may possess some international personality, is not a State. 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 State: the normal principles specified in articles 4 to 9 of the draft articles apply, 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.[293]

(5) Nonetheless, instances exist or can be envisaged where one State exercises the power to direct and control the activities of another State, whether by treaty or as a result of a military occupation or for some other reason. For example, during the belligerent occupation of Italy by Germany in the Second World War, it was generally acknowledged that the Italian police in Rome operated under the control of the occupying Power. Thus, the protest by the Holy See in respect of wrongful acts committed by Italian police who forcibly entered the Basilica of St. Paul in Rome in February 1944 asserted the responsibility of the German authorities.[294] In such cases the occupying State is responsible for acts of the occupied State which it directs and controls.

(6) Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State. International tribunals have consistently refused to infer responsibility on the part of a dominant State merely because

[287] *Rights of Nationals of the United States of America in Morocco* (see footnote 108 above), p. 176.

[288] *Ibid., I.C.J. Pleadings*, vol. I, p. 235; and vol. II, pp. 431–433; the United States thereupon withdrew its preliminary objection: *ibid*., p. 434.

[289] See *Rights of Nationals of the United States of America in Morocco* (footnote 108 above), p. 179.

[290] *British Claims in the Spanish Zone of Morocco* (see footnote 44 above), p. 649.

[291] *Ibid*., p. 648.

[292] *Ibid*.

[293] See, e.g., *LaGrand, Provisional Measures* (footnote 91 above).

[294] See R. Ago, "L'occupazione bellica di Roma e il Trattato lateranense", *Comunicazioni e Studi* (Milan, Giuffrè, 1945), vol. II, pp. 167–168.

the latter may have the power to interfere in matters of administration internal to a dependent State, if that power is not exercised in the particular case. In the *Brown* case, for example, the arbitral tribunal 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".[295] It went on to deny that Great Britain possessed power to interfere in matters of internal administration and continued that there was no evidence "that Great Britain ever did undertake to interfere in this way".[296] Accordingly, the relation of suzerainty "did not operate to render Great Britain liable for the acts complained of".[297] In the *Heirs of 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. Its decision was not based on the absence of Allied power to requisition the property, or to stop Italy from doing so. 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".[298] The mere fact that a State may have power to exercise direction and control over another State in some field is not a sufficient basis for attributing to it any wrongful acts of the latter State in that field.[299]

(7) In the formulation of article 17, the term "controls" refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word "directs" does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind. Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility. The choice of the expression, common in English, "*direction and control*", raised some problems in other languages, owing in particular to the ambiguity of the term "*direction*" which may imply, as is the case in French, complete power, whereas it does not have this implication in English.

(8) Two further conditions attach to responsibility under article 17. First, the dominant State is only responsible if it has knowledge of the circumstances making the conduct of the dependent State wrongful. Secondly, it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling State itself. This condition is significant in the context of bilateral obligations, which are not opposable to the directing State. In cases of multilateral obligations and especially of obligations to the international community, it is of much less significance. The essential principle is that a State should not be able to do through another what it could not do itself.

(9) As to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse under chapter V of Part One. If the conduct in question would involve a breach of its international obligations, it is incumbent upon it to decline to comply with the direction. The defence of "superior orders" does not exist for States in international law. This is not to say that the wrongfulness of the directed and controlled State's conduct may not be precluded under chapter V, but this will only be so if it can show the existence of a circumstance precluding wrongfulness, e.g. *force majeure*. In such a case it is to the directing State alone that the injured State must look. But as between States, genuine cases of *force majeure* or coercion are exceptional. Conversely, it is no excuse for the directing State to show that the directed State was a willing or even enthusiastic participant in the internationally wrongful conduct, if in truth the conditions laid down in article 17 are met.

### *Article 18. Coercion of another State*

**A State which coerces another State to commit an act is internationally responsible for that act if:**

**(*a*) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and**

**(*b*) the coercing State does so with knowledge of the circumstances of the act.**

*Commentary*

(1) The third case of derived responsibility dealt with by chapter IV is that of coercion of one State by another. Article 18 is concerned with the specific problem of coercion deliberately exercised in order to procure the breach of one State's obligation to a third State. In such cases the responsibility of the coercing State with respect to the third State derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State. Responsibility for the coercion itself is that of the coercing State *vis-à-vis* the coerced State, whereas responsibility under article 18 is the responsibility of the coercing State *vis-à-vis* a victim of the coerced act, in particular a third State which is injured as a result.

(2) Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct: such questions are covered by the preceding articles. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the

[295] *Robert E. Brown (United States)* v. *Great Britain*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 120, at p. 130 (1923).

[296] *Ibid*., p. 131.

[297] *Ibid*.

[298] *Heirs of the Duc de Guise* (see footnote 115 above). See also, in another context, *Drozd and Janousek* v. *France and Spain* (footnote 135 above); see also *Iribarne Pérez* v. *France*, *Eur. Court H.R., Series A, No. 325–C*, pp. 62–63, paras. 29–31 (1995).

[299] 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 State apparatus does not exclude the possibility that control was exercised in fact by an occupying Power. Cf. *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)*, Kammergericht of Berlin, ILR, vol. 44, p. 301, at pp. 340–342 (1965).

coerced act merely make it more difficult for the coerced State to comply with the obligation.

(3) Though coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion.[300] As a practical matter, most cases of coercion meeting the requirements of the article 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. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in article 49, 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.[301] However, coercion could possibly take other forms, e.g. serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached.

(4) The equation of coercion with *force majeure* means that in most cases where article 18 is applicable, the responsibility of the coerced State will be precluded *vis-à-vis* the injured third State. This is reflected in the phrase "but for the coercion" in subparagraph (*a*) of article 18. Coercion amounting to *force majeure* may be the reason why the wrongfulness of an act is precluded *vis-à-vis* the coerced State. Therefore, the act is not described as an internationally wrongful act in the opening clause of the article, as is done in articles 16 and 17, where no comparable circumstance would preclude the wrongfulness of the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded *vis-à-vis* the coercing State. On the contrary, if the coercing State cannot be held responsible for the act in question, the injured State may have no redress at all.

(5) It is a further requirement for responsibility under article 18 that the coercing State must be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct. The reference to "circumstances" in subparagraph (*b*) is understood as reference to the factual situation rather than to the coercing State's judgement of the legality of the act. This point is clarified by the phrase "circumstances of the act". Hence, while ignorance of the law is no excuse, ignorance of the facts is material in determining the responsibility of the coercing State.

(6) A State which sets out to procure by coercion a breach of another State's obligations to a third State will be held responsible to the third State for the consequences, regardless of whether the coercing State is also bound by the obligation in question. Otherwise, the injured State would potentially be deprived of any redress, because the acting State may be able to rely on *force majeure* as a circumstance precluding wrongfulness. Article 18 thus differs from articles 16 and 17 in that it does not allow for an exemption from responsibility for the act of the coerced State in circumstances where the coercing State is not itself bound by the obligation in question.

(7) State practice lends support to the principle that a State bears responsibility for the internationally wrongful conduct of another State which it coerces. In the *Romano-Americana* case, the claim of the United States Government in respect of the destruction of certain oil storage and other facilities owned by a United States company on the orders of the Government of Romania during the First World War was originally addressed to the British Government. At the time the facilities were destroyed, Romania was at war with Germany, which was preparing to invade the country, and the United States claimed that the Romanian authorities had been "compelled" by Great Britain to take the measures in question. In support of its claim, the United States Government argued that the circumstances of the case revealed "a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, compelled a weaker Ally to acquiesce in an operation which it carried out on the territory of that Ally".[302] The British Government denied responsibility, asserting that its influence over the conduct of the Romanian authorities "did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause".[303] The point of disagreement between the Governments of the United States and of Great Britain was not as to the responsibility of a State for the conduct of another State which it has coerced, but rather the existence of "compulsion" in the particular circumstances of the case.[304]

### *Article 19. Effect of this chapter*

**This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.**

*Commentary*

(1) Article 19 serves three purposes. First, it preserves the responsibility of the State which has committed the internationally wrongful act, albeit with the aid or assistance, under the direction and control or subject to the coercion of another State. It recognizes that the attribution of international responsibility to an assisting, directing or coercing State does not preclude the responsibility of the assisted, directed or coerced State.

(2) Secondly, the article makes 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 under any rule of international law defining particular conduct as wrongful. The phrase "under

[300] P. Reuter, *Introduction to the Law of Treaties*, 2nd rev. ed. (London, Kegan Paul International, 1995), paras. 271–274.

[301] See article 49, para. 2, and commentary.

[302] Note from the United States Embassy in London, dated 16 February 1925, in Hackworth, *op. cit.* (footnote 142 above), p. 702.

[303] Note from the British Foreign Office dated 5 July 1928, *ibid.*, p. 704.

[304] For a different example involving the coercion of a breach of contract in circumstances amounting to a denial of justice, see C. L. Bouvé, "Russia's liability in tort for Persia's breach of contract", AJIL, vol. 6, No. 2 (April 1912), p. 389.

other provisions of these articles" is a reference, *inter alia*, to article 23 (*Force majeure*), which might affect the question of responsibility. The phrase also draws attention to the fact that other provisions of the draft articles may be relevant to the State committing the act in question, and that chapter IV in no way precludes the issue of its responsibility in that regard.

(3) Thirdly, article 19 preserves the responsibility "of any other State" to whom the internationally wrongful conduct might also be attributable under other provisions of the articles.

(4) Thus, article 19 is intended to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance, or from acts otherwise attributable to any State under chapter II. The article covers both the implicated and the acting State. It makes it clear that chapter IV is concerned only with situations in which the act which lies at the origin of the wrong is an act committed by one State and not by the other. If both States commit the act, then that situation would fall within the realm of co-perpetrators, dealt with in chapter II.

## CHAPTER V

## CIRCUMSTANCES PRECLUDING WRONGFULNESS

### *Commentary*

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

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

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

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

(3) This distinction emerges clearly from the decisions of international tribunals. In the *"Rainbow Warrior"* arbitration, the tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while it was in force, including the question whether the wrongfulness of the conduct in question was precluded.[308] In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

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

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

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory

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

[306] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 39, para. 48.

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

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

[309] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para. 101; see also page 38, para. 47.

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

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

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

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

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

### *Article 20. Consent*

**Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.**

*Commentary*

(1) Article 20 reflects the basic international law principle of consent in the particular context of Part One. In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.

(2) It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between consent in relation to a particular situation or a particular course of

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

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

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

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

[314] See article 73 of the Convention.

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

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

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

[318] See, e.g., *Factory at Chorzów, Jurisdiction* (footnote 34 above), p. 31; cf. *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 67, para. 110.

[319] See J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, vol. 10 (1964), p. 225; A. Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux", *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), pp. 392–394.

conduct, and consent in relation to the underlying obligation itself. In the case of a bilateral treaty, the States parties can at any time agree to terminate or suspend the treaty, in which case obligations arising from the treaty will be terminated or suspended accordingly.[320] But quite apart from that possibility, States have the right to dispense with the performance of an obligation owed to them individually, or generally to permit conduct to occur which (absent such permission) would be unlawful so far as they are concerned. In such cases, the primary obligation continues to govern the relations between the two States, but it is displaced on the particular occasion or for the purposes of the particular conduct by reason of the consent given.

(3) Consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. By contrast, cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility. This is dealt with in article 45.

(4) In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be "valid". Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor.[321] Indeed there may be a question whether the State could validly consent at all. The reference to a "valid consent" in article 20 highlights the need to consider these issues in certain cases.

(5) Whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State for the purposes of chapter II. For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central Government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State under article 4.[322] In other cases, the "legitimacy" of the Government which has given the consent has been questioned. Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State's internal law. These questions depend on the rules of international law relating to the expression of the will of the State, as well as rules of internal law to which, in certain cases, international law refers.

(6) Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority. But in any case, certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.

(7) Apart from drawing attention to prerequisites to a valid consent, including issues of the authority to consent, the requirement for consent to be valid serves a further function. It points to the existence of cases in which consent may not be validly given at all. This question is discussed in relation to article 26 (compliance with peremptory norms), which applies to chapter V as a whole.[323]

(8) Examples of consent given by a State which has the effect of rendering certain conduct lawful include commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operations and the arrest or detention of persons on foreign territory. In the *Savarkar* case, the arbitral tribunal considered that the arrest of Savarkar was not a violation of French sovereignty as France had implicitly consented to the arrest through the conduct of its gendarme, who aided the British authorities in the arrest.[324] In considering the application of article 20 to such cases it may be necessary to have regard to the relevant primary rule. For example, only the head of a diplomatic mission can consent to the receiving State's entering the premises of the mission.[325]

(9) Article 20 is concerned with the relations between the two States in question. In circumstances where the consent of a number of States is required, the consent of one State will not preclude wrongfulness in relation to another.[326] Furthermore, where consent is relied on to

[320] 1969 Vienna Convention, art. 54 (*b*).

[321] See, e.g., the issue of Austrian consent to the *Anschluss* of 1938, dealt with by the Nuremberg Tribunal. The tribunal denied that Austrian consent had been given; even if it had, it would have been coerced and did not excuse the annexation. See "International Military Tribunal (Nuremberg), judgment and sentences October 1, 1946: judgment", reprinted in AJIL, vol. 41, No. 1 (January 1947) p. 172, at pp. 192–194.

[322] This issue arose with respect to the dispatch of Belgian troops to the Republic of the Congo in 1960. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, particularly the statement of the representative of Belgium, paras. 186–188 and 209.

[323] See paragraph (6) of the commentary to article 26.

[324] UNRIAA, vol. XI (Sales No. 61.V.4), p. 243, at pp. 252–255 (1911).

[325] Vienna Convention on Diplomatic Relations, art. 22, para. 1.

[326] Austrian consent to the proposed customs union of 1931 would not have precluded its wrongfulness in regard of the obligation to respect Austrian independence owed by Germany to all the parties to the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles). Likewise, Germany's consent would not have precluded the wrongfulness of the customs union in respect of the obligation of the maintenance of its complete independence imposed on Austria by the Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye). See *Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41*, p. 37, at pp. 46 and 49.

preclude wrongfulness, it will be necessary to show that the conduct fell within the limits of the consent. Consent to overflight by commercial aircraft of another State would not preclude the wrongfulness of overflight by aircraft transporting troops and military equipment. Consent to the stationing of foreign troops for a specific period would not preclude the wrongfulness of the stationing of such troops beyond that period.[327] These limitations are indicated by the words "given act" in article 20 as well as by the phrase "within the limits of that consent".

(10) Article 20 envisages only the consent of States to conduct otherwise in breach of an international obligation. International law may also take into account the consent of non-State entities such as 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 Convention on the Settlement of Investment Disputes between States and Nationals of other States (art. 27, para. 1), consent by an investor to arbitration under the Convention has the effect of suspending the right of diplomatic protection by the investor's national State. The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual's free consent may be relevant to their application.[328] In these cases the particular rule of international law itself allows for the consent in question and deals with its effect. By contrast, article 20 states a general principle so far as enjoyment of the rights and performance of the obligations of States are concerned.

### *Article 21. Self-defence*

**The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.**

*Commentary*

(1) The existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed. Article 51 of the Charter of the United Nations preserves a State's "inherent right" of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph 4. Thus, 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.[329]

(2) Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems 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.[330] In the Charter period, 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.[331] 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".

(3) This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions for the protection of war victims of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law.[332] Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.

(4) ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapon*s provided some guidance on this question. One issue before the Court was whether a use of nuclear weapons would necessarily be a breach of environmental obligations because of the massive and long-term damage such weapons can cause. 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.
>
> 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

[327] The non-observance of a condition placed on the consent will not necessarily take conduct outside of the limits of the consent. For example, consent to a visiting force on the territory of a State may be subject to a requirement to pay rent for the use of facilities. While the non-payment of the rent would no doubt be a wrongful act, it would not transform the visiting force into an army of occupation.

[328] See, e.g., International Covenant on Civil and Political Rights, arts. 7; 8, para. 3; 14, para. 3 (*g*); and 23, para. 3.

[329] Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), p. 244, para. 38, and p. 263, para. 96, emphasizing the lawfulness of the use of force in self-defence.

[330] See further Lord McNair and A. D. Watts, *The Legal Effects of War*, 4th ed. (Cambridge University Press, 1966).

[331] In *Oil Platforms, Preliminary Objection* (see footnote 208 above), it was not denied that the 1955 Treaty of Amity, Economic Relations and Consular Rights remained in force, despite many actions by United States naval forces against the Islamic Republic of Iran. In that case both parties agreed that to the extent that any such actions were justified by self-defence they would be lawful.

[332] As the Court said of the rules of international humanitarian law in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 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.

is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.[333]

A State acting in self-defence is "totally restrained" by an international obligation if that obligation is expressed or intended to apply as a definitive constraint even to States in armed conflict.[334]

(5) The essential effect of article 21 is to preclude the wrongfulness of conduct of a State acting in self-defence *vis-à-vis* an attacking State. But there may be effects *vis-à-vis* third States in certain circumstances. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court 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.[335]

The law of neutrality distinguishes between conduct as against a belligerent and conduct as against a neutral. But neutral States are not unaffected by the existence of a state of war. Article 21 leaves open all issues of the effect of action in self-defence *vis-à-vis* third States.

(6) Thus, article 21 reflects the generally accepted position that self-defence precludes the wrongfulness of the conduct taken within the limits laid down by international law. The reference is to action "taken in conformity with the Charter of the United Nations". In addition, the term "lawful" implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.

### *Article 22. Countermeasures in respect of an internationally wrongful act*

**The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.**

*Commentary*

(1) In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury. Article 22 deals with this situation from the perspective of circumstances precluding wrongfulness. Chapter II of Part Three regulates countermeasures in further detail.

(2) Judicial decisions, State practice and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. In the *Gabčíkovo-Nagymaros Project* case, ICJ clearly accepted that countermeasures might justify otherwise unlawful conduct "taken in response to a previous international wrongful act of another State and … directed against that State",[336] provided certain conditions are met. Similar recognition of the legitimacy of measures of this kind in certain cases can be found in arbitral decisions, in particular the *"Naulilaa"*,[337] *"Cysne"*,[338] and *Air Service Agreement*[339] awards.

(3) In the literature concerning countermeasures, reference is sometimes made to the application of a "sanction", or to a "reaction" to a prior internationally wrongful act; historically the more usual terminology was that of "legitimate reprisals" or, more generally, measures of "self-protection" or "self-help". The term "sanctions" has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the Charter of the United Nations—despite the fact that the Charter uses the term "measures", not "sanctions". The term "reprisals" is now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force. At least since the *Air Service Agreement* arbitration,[340] the term "countermeasures" has been preferred, and it has been adopted for the purposes of the present articles.

(4) Where countermeasures are taken in accordance with article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied. These conditions are set out in Part Three, chapter II, to which article 22 refers. As a response to internationally wrongful conduct of another State, countermeasures may be justified only in relation to that State. This is emphasized by the phrases "if and to the extent" and "countermeasures taken against" the responsible State. An act directed against a third State would not fit this definition and could not be justified as a countermeasure. On the other hand, indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside the scope of article 22.

(5) Countermeasures may only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act.

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[333] *Ibid.*, p. 242, para. 30.

[334] See, e.g., the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques.

[335] *I.C.J. Reports 1996* (see footnote 54 above), p. 261, para. 89.

[336] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83.

[337] *Portuguese Colonies* case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1011, at pp. 1025–1026 (1928).

[338] *Ibid.*, p. 1035, at p. 1052 (1930).

[339] *Air Service Agreement* (see footnote 28 above).

[340] *Ibid.*, especially pp. 443–446, paras. 80–98.

The principle is clearly expressed in the *"Cysne"* case, where the tribunal stressed that:

> reprisals, which constitute an act in principle contrary to the law of nations, are defensible only insofar as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible.* Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible.[341]

Accordingly, the wrongfulness of Germany's conduct *vis-à-vis* Portugal was not precluded. Since it involved the use of armed force, this decision concerned belligerent reprisals rather than countermeasures in the sense of article 22. But the same principle applies to countermeasures, as the Court confirmed in the *Gabčíkovo-Nagymaros Project* case when it stressed that the measure in question must be "directed against" the responsible State.[342]

(6) If article 22 had stood alone, it would have been necessary to spell out other conditions for the legitimacy of countermeasures, including in particular the requirement of proportionality, the temporary or reversible character of countermeasures and the status of certain fundamental obligations which may not be subject to countermeasures. Since these conditions are dealt with in Part Three, chapter II, it is sufficient to make a cross reference to them here. Article 22 covers any action which qualifies as a countermeasure in accordance with those conditions. One issue is whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed the obligation which has been breached.[343] For example, in the case of an obligation owed to the international community as a whole ICJ has affirmed that all States have a legal interest in compliance.[344] Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.

### *Article 23.* 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*, that is the occurrence of an irresistible force or of an unforeseen 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 situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or**

**(*b*) the State has assumed the risk of that situation occurring.**

*Commentary*

(1) *Force majeure* is quite often invoked as a ground for precluding the wrongfulness of an act of a State.[345] It involves a situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it. *Force majeure* differs from a situation of distress (art. 24) or necessity (art. 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.

(2) A situation of *force majeure* precluding wrongfulness only arises where three elements are met: (*a*) the act in question must be brought about by an irresistible force or an unforeseen event; (*b*) which is beyond the control of the State concerned; and (*c*) which makes it materially impossible in the circumstances to perform the obligation. The adjective "irresistible" qualifying the word "force" emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been "unforeseen" the event must have been neither foreseen nor of an easily foreseeable kind. Further the "irresistible force" or "unforeseen event" must be causally linked to the situation of material impossibility, as indicated by the words "due to *force majeure* … making it materially impossible". Subject to paragraph 2, where these elements are met, the wrongfulness of the State's conduct is precluded for so long as the situation of *force majeure* subsists.

(3) Material impossibility of performance giving rise to *force majeure* may be due to a natural or physical event (e.g. stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (e.g. loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two. Certain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the various requirements of article 23. In particular, the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects. *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis. Nor does it cover situations brought about by the neglect or

[341] *"Cysne"* (see footnote 338 above), pp. 1056–1057.

[342] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83.

[343] For the distinction between injured States and other States entitled to invoke State responsibility, see articles 42 and 48 and commentaries.

[344] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[345] "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine", study prepared by the Secretariat (*Yearbook … 1978*, vol. II (Part One), p. 61, document A/CN.4/315).

default of the State concerned,[346] even if the resulting injury itself was accidental and unintended.[347]

(4) In drafting what became article 61 of the 1969 Vienna Convention, ILC took the view that *force majeure* was a circumstance precluding wrongfulness in relation to treaty performance, just as supervening impossibility of performance was a ground for termination of a treaty.[348] The same view was taken at the United Nations Conference on the Law of Treaties.[349] But in the interests of the stability of treaties, the Conference insisted on a narrow formulation of article 61 so far as treaty termination is concerned. The degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 for termination of a treaty 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.[350]

(5) In practice, many of the cases where "impossibility" has been relied upon have not involved actual impossibility as distinct from increased difficulty of performance and the plea of *force majeure* has accordingly failed. But cases of material impossibility have occurred, e.g. where a State aircraft is forced, due to damage or loss of control of the aircraft owing to weather, into the airspace of another State without the latter's authorization. In such cases the principle that wrongfulness is precluded has been accepted.[351]

(6) Apart from aerial incidents, the principle in article 23 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 (the United Nations Convention on the Law of the Sea, art. 18, para. 2), as well as in article 7, paragraph 1, of the Convention on Transit Trade of Land-locked States. In these provisions, *force majeure* is incorporated as a constituent element of the relevant primary rule; nonetheless, its acceptance in these cases helps to confirm the existence of a general principle of international law to similar effect.

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited the unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.[352] In the *Lighthouses* arbitration, 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 arbitral tribunal denied the French claim for restoration of the lighthouse on grounds of *force majeur*e.[353] In the *Russian Indemnity* case, the principle was accepted but the plea of *force majeure* failed because the payment of the debt was not materially impossible.[354] *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.[355] More recently, 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

[346] For example, in relation to occurrences such as the bombing of La Chaux-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airman on 26 April 1917, ascribed to negligence on the part of the airmen, the belligerent undertook to punish the offenders and make reparation for the damage suffered (study prepared by the Secretariat, *ibid*., paras. 255–256).

[347] For example, in 1906 an American officer on the USS *Chattanooga* was mortally wounded by a bullet from a French warship as his ship entered the Chinese harbour of Chefoo. The United States Government obtained reparation, having maintained that:

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

M. M. Whiteman, *Damages in International Law* (Washington, D.C., United States Government Printing Office, 1937), vol. I, p. 221. See also the study prepared by the Secretariat (footnote 345 above), para. 130.

[348] *Yearbook … 1966*, vol. II, p. 255.

[349] See, e.g., the proposal of the representative of Mexico, *United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, p. 182, para. 531 (*a*).

[350] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para. 102.

[351] See, e.g., the cases of accidental intrusion into airspace attributable to weather, and the cases of accidental bombing of neutral territory attributable to navigational errors during the First World War discussed in the study prepared by the Secretariat (footnote 345 above), paras. 250–256. See also the exchanges of correspondence between the States concerned in the incidents involving United States military aircraft entering the airspace of Yugoslavia in 1946, United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XV, No. 376 (15 September 1946), p. 502, reproduced in the study prepared by the Secretariat, para. 144, and the incident provoking the application to ICJ in 1954, *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of the United States of America*, p. 14 (note to the Hungarian Government of 17 March 1953). It is not always clear whether these cases are based on distress or *force majeure*.

[352] See, e.g., the decision of the American-British Claims Commission in the *Saint Albans Raid* case, Moore, *History and Digest*, vol. IV, p. 4042 (1873), and the study prepared by the Secretariat (footnote 345 above), para. 339; the decisions of the United States-Venezuela Claims Commission in the *Wipperman* case, Moore, *History and Digest*, vol. III, p. 3039, and the study prepared by the Secretariat, paras. 349–350; *De Brissot and others* case (footnote 117 above), and the study prepared by the Secretariat, para. 352; and the decision of the British-Mexican Claims Commission in the *Gill* case, UNRIAA, vol. V (Sales No. 1952.V.3), p. 157 (1931), and the study prepared by the Secretariat, para. 463.

[353] *Lighthouses* arbitration (see footnote 182 above), pp. 219–220.

[354] UNRIAA, vol. XI (Sales No. 61.V.4), p. 421, at p. 443 (1912).

[355] *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, pp. 39–40; *Brazilian Loans, Judgment No. 15, ibid., No. 21*, p. 120.

absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.[356]

(8) 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 commercial arbitration, and may qualify as a general principle of law.[357]

(9) A State may not invoke *force majeure* if it has caused or induced the situation in question. In *Libyan Arab Foreign Investment Company and The Republic of Burundi*, the arbitral tribunal rejected a plea of *force majeure* because "the alleged impossibility [was] 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 ..."[358] Under the equivalent 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". By analogy with this provision, *paragraph 2* (a) excludes the plea in circumstances where *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it. For paragraph 2 (*a*) to apply it is not enough that the State invoking *force majeure* has contributed to the situation of material impossibility; the situation of *force majeure* must be "due" to the conduct of the State invoking it. This allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen. Paragraph 2 (*a*) requires that the State's role in the occurrence of *force majeure* must be substantial.

(10) *Paragraph 2* (b) deals with situations in which the State has already accepted the risk of the occurrence of *force majeure*, whether it has done so in terms of the obligation itself or by its conduct or by virtue of some unilateral act. This reflects the principle that *force majeure* should not excuse performance if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk.[359] Once a State accepts the responsibility for a particular risk it cannot then claim *force majeure* to avoid responsibility. But the assumption of risk must be unequivocal and directed towards those to whom the obligation is owed.

### *Article 24. 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 has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.**

**2. Paragraph 1 does not apply if:**

**(*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or**

**(*b*) the act in question is likely to create a comparable or greater peril.**

*Commentary*

(1) Article 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. The article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life. Unlike situations of *force majeure* dealt with in article 23, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril.[360] Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterize situations of necessity under article 25. The interest concerned is the immediate one of saving people's lives, irrespective of their nationality.

(2) In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.[361] An example is the entry of United States military aircraft into Yugoslavia's airspace in 1946. On two occasions, United States military aircraft entered Yugoslav airspace without authorization and were attacked by Yugoslav air defences. The United States Government protested the Yugoslav action on the basis that the aircraft had entered Yugoslav airspace solely in order to escape extreme danger. The Yugoslav Government responded by denouncing the systematic violation of its airspace, which it claimed could only be intentional in view of its frequency. A later note from the Yugoslav chargé d'affaires informed the United States Department of State that Marshal Tito had

[356] *"Rainbow Warrior"* (see footnote 46 above), p. 253.

[357] On *force majeure* in the case law of the Iran-United States Claims Tribunal, see G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 306–320. *Force majeure* has also been recognized as a general principle of law by the European Court of Justice: see, e.g., case 145/85, *Denkavit* v. *Belgium*, *Eur. Court H.R., Reports* 1987–2, p. 565; case 101/84, *Commission of the European Communities* v. *Italian Republic*, *ibid*., *Reports* 1985–6, p. 2629. See also article 79 of the United Nations Convention on Contracts for the International Sale of Goods; P. Schlechtriem, ed., *Commentary on the UN Convention on the International Sale of Goods*, 2nd ed. (trans. G. Thomas) (Oxford, Clarendon Press, 1998), pp. 600–626; and article 7.1.7 of the UNIDROIT Principles, *Principles of International Commercial Contracts* (Rome, Unidroit, 1994), pp. 169–171.

[358] ILR, vol. 96 (1994), p. 318, para. 55.

[359] As the study prepared by the Secretariat (footnote 345 above), para. 31, points out, 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.

[360] For this reason, writers who have considered this situation have often defined it as one of "relative impossibility" of complying with the international obligation. See, e.g., O. J. Lissitzyn, "The treatment of aerial intruders in recent practice and international law", AJIL, vol. 47, No. 4 (October 1953), p. 588.

[361] See the study prepared by the Secretariat (footnote 345 above), paras. 141–142 and 252.

forbidden any firing on aircraft which flew over Yugoslav territory without authorization, presuming that, for its part, the United States Government "would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities".[362] The reply of the United States Acting Secretary of State reiterated the assertion that no United States planes had flown over Yugoslavia intentionally without prior authorization from Yugoslav authorities "unless forced to do so in an emergency". However, the Acting Secretary of State added:

> I presume that the Government of Yugoslavia recognizes that *in case a plane and its occupants are jeopardized, the aircraft may change its course so as to seek safety, even though such action may result in flying over Yugoslav territory without prior clearance*.[363]

(3) Claims of distress have also been made in cases of violation of maritime boundaries. For example, in December 1975, after British naval vessels entered Icelandic territorial waters, the British Government claimed that the vessels in question had done so in search of "shelter from severe weather, as they have the right to do under customary international law".[364] Iceland maintained that British vessels were in its waters for the sole purpose of provoking an incident, but did not contest the point that if the British vessels had been in a situation of distress, they could enter Icelandic territorial waters.

(4) Although historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases.[365] The *"Rainbow Warrior"* arbitration involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft. 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".[366] 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.[367]

In fact, the danger to one of the officers, 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, 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 (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations.[368]

(5) The plea of distress is also accepted in many treaties as a circumstance justifying conduct which would otherwise be wrongful. Article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone permits stopping and anchoring by ships during their passage through foreign territorial seas insofar as this conduct is rendered necessary by distress. This provision is repeated in much the same terms in article 18, paragraph 2, of the United Nations Convention on the Law of the Sea.[369] Similar provisions appear in the international conventions on the prevention of pollution at sea.[370]

(6) Article 24 is limited to cases where human life is at stake. The tribunal in the *"Rainbow Warrior"* arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice. The problem with extending article 24 to less than life-threatening situations 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 a wide range of possibilities. 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

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[362] United States of America, *Department of State Bulletin* (see footnote 351 above), reproduced in the study prepared by the Secretariat (see footnote 345 above), para. 144.

[363] Study prepared by the Secretariat (see footnote 345 above), para. 145. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to ICJ in relation to another aerial incident (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 358–359).

[364] *Official Records of the Security Council, Thirtieth Year*, 1866th meeting, 16 December 1975, para. 24; see the study prepared by the Secretariat (footnote 345 above), para. 136.

[365] There have also been cases involving the violation of a land frontier in order to save the life of a person in danger. See, e.g., the case of violation of the Austrian border by Italian soldiers in 1862, study prepared by the Secretariat (footnote 345 above), para. 121.

[366] *"Rainbow Warrior"* (see footnote 46 above), pp. 254–255, para. 78.

[367] *Ibid*., p. 255, para. 79.

[368] *Ibid*., p. 263, para. 99.

[369] See also articles 39, paragraph 1 (*c*), 98 and 109, of the Convention.

[370] See, e.g., the International Convention for the Prevention of Pollution of the Sea by Oil, article IV, paragraph 1 (*a*) of which provides that the prohibition on the discharge of oil into the sea does not apply if the discharge takes place "for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea". See also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, article V, paragraph 1 of which provides that the prohibition on dumping of wastes does not apply when it is "necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea … in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat". See also the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (art. 8, para. 1); and the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention), annex I, regulation 11 (*a*).

not seem necessary to extend the scope of distress beyond threats to life itself. In situations in which a State agent is in distress and has to act to save lives, there should however be a certain degree of flexibility in the assessment of the conditions of distress. The "no other reasonable way" criterion in article 24 seeks to strike a balance between the desire to provide some flexibility regarding the choices of action by the agent in saving lives and the need to confine the scope of the plea having regard to its exceptional character.

(7) Distress may only be invoked as a circumstance precluding wrongfulness in cases where a State agent has acted to save his or her own life or where there exists a special relationship between the State organ or agent and the persons in danger. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.

(8) Article 24 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 the cargo.[371]

(9) As in the case of *force majeure*, a situation which has been caused or induced by the invoking State is not one of distress. In many cases the State invoking distress may well have contributed, even if indirectly, to the situation. Priority should be given to necessary life-saving measures, however, and under *paragraph 2* (a), distress is only excluded if the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it. This is the same formula as that adopted in respect of article 23, paragraph 2 (*a*).[372]

(10) Distress can only preclude wrongfulness where the interests sought to be protected (e.g. the lives of passengers or crew) clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress. For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious breakdown might cause radioactive contamination to a port in which it sought refuge. *Paragraph 2* (b) stipulates that distress does not apply if the act in question is likely to create a comparable or greater peril. This is consistent with paragraph 1, which in asking whether the agent had "no other reasonable way" to save life establishes an objective test. The words "comparable or greater peril" must be assessed in the context of the overall purpose of saving lives.

[371] See *Cashin and Lewis* v. *The King, Canada Law Reports* (1935), p. 103 (even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). See also the *"Rebecca"*, Mexico-United States General Claims Commission, AJIL, vol. 23, No. 4 (October 1929), p. 860 (vessel 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 *"May"* v. *The King, Canada Law Reports* (1931), p. 374; the *"Queen City"* v. *The King, ibid*., p. 387; and *Rex* v. *Flahaut*, *Dominion Law Reports* (1935), p. 685 (test of "real and irresistible distress" applied).

[372] See paragraph (9) of the commentary to article 23.

### *Article 25. 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 the act:**

**(*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and**

**(*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.**

**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 excludes the possibility of invoking necessity; or**

**(*b*) the State has contributed to the situation of necessity.**

*Commentary*

(1) The term "necessity" (*état de nécessité*) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.

(2) The plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.[373]

(3) There is substantial authority in support of the existence of necessity as a circumstance precluding wrongful-

[373] Perhaps the classic case of such an abuse was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of necessity. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs, in J. B. Scott, ed., *Diplomatic Documents relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), part I, pp. 749–750, and the speech in the Reichstag by the German Chancellor von Bethmann-Hollweg, on 4 August 1914, containing the well-known words: *wir sind jetzt in der Notwehr; und Not kennt kein Gebot!* (we are in a state of self-defence and necessity knows no law), *Jahrbuch des Völkerrechts*, vol. III (1916), p. 728.

ness. It has been invoked by States and has been dealt with by a number of international tribunals. In these cases the plea of necessity has been accepted in principle, or at least not rejected.

(4) In an Anglo-Portuguese dispute of 1832, the Portuguese Government argued that the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances had justified its appropriation of property owned by British subjects, notwithstanding a treaty stipulation. The British Government was advised that:

> the Treaties between this Country and Portugal are [not] of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.
>
> The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.[374]

(5) The *"Caroline"* incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has at present. In that case, British armed forces entered United States territory and attacked and destroyed a vessel owned by United States citizens which was carrying recruits and military and other material to Canadian insurgents. In response to the protests by the United States, the British Minister in Washington, Fox, referred to the "necessity of self-defence and self-preservation"; the same point was made by counsel consulted by the British Government, who stated that "the conduct of the British Authorities" was justified because it was "absolutely necessary as a measure of precaution".[375] Secretary of State Webster replied to Minister Fox that "nothing less than a clear and absolute necessity can afford ground of justification" for the commission "of hostile acts within the territory of a Power at Peace", and observed that the British Government must prove that the action of its forces had really been caused by "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[376] In his message to Congress of 7 December 1841, President Tyler reiterated that:

> This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government."[377]

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed that "a strong overpowering necessity may arise when this great principle may and must be suspended". "It must be so", added Lord Ashburton, the British Government's *ad hoc* envoy to Washington, "for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity".[378]

(6) In the *Russian Fur Seals* controversy of 1893, the "essential interest" to be safeguarded against a "grave and imminent peril" was the natural environment in an area not subject to the jurisdiction of any State or to any international regulation. Facing the danger of extermination of a fur seal population by unrestricted hunting, the Russian Government issued a decree prohibiting sealing in an area of the high seas. In a letter to the British Ambassador dated 12 February (24 February) 1893, the Russian Minister for Foreign Affairs explained that the action had been taken because of the "absolute necessity of immediate provisional measures" in view of the imminence of the hunting season. He "emphasize[d] the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances"[379] and declared his willingness to conclude an agreement with the British Government with a view to a longer-term settlement of the question of sealing in the area.

(7) In the *Russian Indemnity* case, the Government of the Ottoman Empire, to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which it described as *"force majeure"* but which was more like a state of necessity. The arbitral tribunal accepted the plea in principle:

> *The exception of force majeure*, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits ... that the obligation for a State to execute treaties may be weakened "if the very existence of the State is endangered, if observation of the international duty is ... *self-destructive*".[380]

It considered, however, that:

> It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation.[381]

In its view, compliance with an international obligation must be "self-destructive" for the wrongfulness of the conduct not in conformity with the obligation to be precluded.[382]

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[374] Lord McNair, ed., *International Law Opinions* (Cambridge University Press, 1956), vol. II, Peace, p. 232.

[375] See respectively W. R. Manning, ed., *Diplomatic Correspondence of the United States: Canadian Relations 1784–1860* (Washington, D.C., Carnegie Endowment for International Peace, 1943), vol. III, p. 422; and Lord McNair, ed., *International Law Opinions* (footnote 374 above), p. 221, at p. 228.

[376] *British and Foreign State Papers, 1840–1841* (London, Ridgway, 1857), vol. 29, p. 1129.

[377] *Ibid.*, 1841–1842, vol. 30, p. 194.

[378] *Ibid.*, p. 195. See Secretary of State Webster's reply on page 201.

[379] *Ibid.*, *1893–1894* (London, HM Stationery Office, 1899), vol. 86, p. 220; and the study prepared by the Secretariat (see footnote 345 above), para. 155.

[380] See footnote 354 above; see also the study prepared by the Secretariat (footnote 345 above), para. 394.

[381] *Ibid.*

[382] A case in which the parties to the dispute agreed that very serious financial difficulties could justify a different mode of discharging the obligation other than that originally provided for arose in connection with the enforcement of the arbitral award in *Forests of Central Rhodopia*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405 (1933); see League of Nations, *Official Journal*, 15th Year, No. 11 (part I) (November 1934), p. 1432.

(8) In *Société commerciale de Belgique*,[383] the Greek Government owed money to a Belgian company under two arbitral awards. Belgium applied to PCIJ for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its international obligations. The Greek Government pleaded the country's serious budgetary and monetary situation.[384] The Court noted that it was not within its mandate to declare whether the Greek Government was justified in not executing the arbitral awards. However, the Court implicitly accepted the basic principle, on which the two parties were in agreement.[385]

(9) In March 1967 the Liberian oil tanker *Torrey Canyon* went aground on submerged rocks off the coast of Cornwall outside British territorial waters, spilling large amounts of oil which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully. The British Government did not advance any legal justification for its conduct, but stressed the existence of a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed.[386] No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution.[387]

(10) In the *"Rainbow Warrior"* arbitration, the arbitral tribunal expressed doubt as to the existence of the excuse of necessity. It noted that the Commission's draft article "allegedly authorizes a State to take unlawful action invoking a state of necessity" and described the Commission's proposal as "controversial".[388]

(11) By contrast, in the *Gabčíkovo-Nagymaros Project* case, ICJ carefully considered an argument based on the Commission's draft article (now article 25), expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the principle itself, the Court noted that the parties had both relied on the Commission's draft article as an appropriate formulation, and continued:

> The Court considers ... 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 ...
>
> 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 ... 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. [389]

(12) The plea of necessity was apparently an issue in the *Fisheries Jurisdiction* case.[390] Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization (NAFO) but had, in Canada's opinion, proved ineffective for various reasons. By the Coastal Fisheries Protection Act 1994, Canada declared that the straddling stocks of the Grand Banks 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". 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 Spanish Government 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".[391] 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".[392] The Court held that it had no jurisdiction over the case.[393]

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[383] *Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 160.

[384] *P.C.I.J., Series C, No. 87*, pp. 141 and 190; study prepared by the Secretariat (footnote 345 above), para. 278. See generally paragraphs 276–287 for the Greek arguments relative to the state of necessity.

[385] See footnote 383 above; and the study prepared by the Secretariat (footnote 345 above), para. 288. See also the *Serbian Loans* case, where the positions of the parties and the Court on the point were very similar (footnote 355 above); the *French Company of Venezuelan Railroads* case (footnote 178 above) p. 353; and the study prepared by the Secretariat (footnote 345 above), paras. 263–268 and 385–386. In his separate opinion in the *Oscar Chinn* case, Judge Anzilotti accepted the principle that "necessity may excuse the non-observance of international obligations", but denied its applicability on the facts (*Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65, at pp. 112–114).

[386] *The "Torrey Canyon"*, Cmnd. 3246 (London, HM Stationery Office, 1967).

[387] International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

[388] *"Rainbow Warrior"* (see footnote 46 above), p. 254. In *Libyan Arab Foreign Investment Company and The Republic of Burundi* (see footnote 358 above), p. 319, 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".

[389] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 40–41, paras. 51–52.

[390] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432.

[391] *Ibid*., p. 443, para. 20. For the European Community protest of 10 March 1995, asserting that the arrest "cannot be justified by any means", see Memorial of Spain (Jurisdiction of the Court), *I.C.J. Pleadings, Fisheries Jurisdiction (Spain* v. *Canada)*, p. 17, at p. 38, para. 15.

[392] *Fisheries Jurisdiction* (see footnote 390 above), p. 443, para. 20. See also the Canadian Counter-Memorial (29 February 1996), *I.C.J. Pleadings* (footnote 391 above), paras. 17–45.

[393] By an Agreed Minute between Canada and the European Community, Canada undertook to repeal the regulations applying the 1994 Act to Spanish and Portuguese vessels in the NAFO area and to 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 Con-

(13) The existence and limits of a plea of necessity have given rise to a long-standing controversy among writers. It was for the most part explicitly accepted by the early writers, subject to strict conditions.[394] In the nineteenth century, abuses of necessity associated with the idea of "fundamental rights of States" led to a reaction against the doctrine. During the twentieth century, the number of writers opposed to the concept of state of necessity in international law increased, but the balance of doctrine has continued to favour the existence of the plea.[395]

(14) On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25. The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin.[396] It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population. But stringent conditions are imposed before any such plea is allowed. This is reflected in article 25. In particular, to emphasize the exceptional nature of necessity and concerns about its possible abuse, article 25 is cast in negative language ("Necessity may not be invoked … unless").[397] In this respect it mirrors the language of article 62 of the 1969 Vienna Convention dealing with fundamental change of circumstances. It also mirrors that language in establishing, in paragraph 1, two conditions without which necessity may not be invoked and excluding, in paragraph 2, two situations entirely from the scope of the excuse of necessity.[398]

servation and Management of Fish Stocks (Brussels, 20 April 1995), ILM, vol. 34, No. 5 (September 1995), p. 1260. 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.

[394] See B. Ayala, *De jure et officiis bellicis et disciplina militari, libri tres* (1582) (Washington, D.C., Carnegie Institution, 1912), vol. II, p. 135; A. Gentili, *De iure belli, libri tres* (1612) (Oxford, Clarendon Press, 1933), vol. II, p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646) (Oxford, Clarendon Press, 1925), vol. II, pp. 193 et seq.; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688) (Oxford, Clarendon Press, 1934), vol. II, pp. 295–296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764) (Oxford, Clarendon Press, 1934), pp. 173–174; and E. de Vattel, *The Law of Nations or the Principles of Natural Law* (1758) (Washington, D.C., Carnegie Institution, 1916), vol. III, p. 149.

[395] For a review of the earlier doctrine, see *Yearbook … 1980*, vol. II (Part Two), pp. 47–49; see also P. A. Pillitu, *Lo stato di necessità nel diritto internazionale* (University of Perugia/Editrice Licosa, 1981); J. Barboza, "Necessity (revisited) in international law", *Essays in International Law in Honour of Judge Manfred Lachs*, J. Makarczyk, ed. (The Hague, Martinus Nijhoff, 1984), p. 27; and R. Boed, "State of necessity as a justification for internationally wrongful conduct", *Yale Human Rights and Development Law Journal*, vol. 3 (2000), p. 1.

[396] Generally on the irrelevance of the source of the obligation breached, see article 12 and commentary.

[397] This negative formulation was referred to by ICJ in the *Gabčíkovo-Nagymaros Project* case (see footnote 27 above), p. 40, para. 51.

[398] A further exclusion, common to all the circumstances precluding wrongfulness, concerns peremptory norms (see article 26 and commentary).

(15) The first condition, set out in *paragraph 1* (a), is that necessity may only be invoked to safeguard an essential interest from a grave and imminent peril. The extent to which a given interest is "essential" depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole. Whatever the interest may be, however, it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave, the peril has to be imminent in the sense of proximate. However, as the Court in the *Gabčíkovo-Nagymaros Project* case said:

> That does not exclude ... 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.[399]

Moreover, the course of action taken must be the "only way" available to safeguard that interest. The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient. Thus, in the *Gabčíkovo-Nagymaros Project* case, the Court was not convinced that the unilateral suspension and abandonment of the Project was the only course open in the circumstances, having regard in particular to the amount of work already done and the money expended on it, and the possibility of remedying any problems by other means.[400] The word "way" in paragraph 1 (*a*) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations (for example, conservation measures for a fishery taken through the competent regional fisheries agency). Moreover, the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered.

(16) It is not sufficient for the purposes of paragraph 1 (*a*) that the peril is merely apprehended or contingent. It is true that in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be issues of scientific uncertainty and different views may be taken by informed 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. By definition, in cases of necessity the peril will not yet have occurred. In the *Gabčíkovo-Nagymaros Project* case the Court noted that the invoking State could not be the sole judge of the necessity,[401] but a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.

(17) The second condition for invoking necessity, set out in *paragraph 1* (b), is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as

[399] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 42, para. 54.

[400] *Ibid*., pp. 42–43, para. 55.

[401] *Ibid*., p. 40, para. 51.

a whole (see paragraph (18) below). In other words, the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.[402]

(18) As a matter of terminology, it is sufficient to use the phrase "international community as a whole" rather than "international community of States as a whole", which is used in the specific context of article 53 of the 1969 Vienna Convention. The insertion of the words "of States" in article 53 of the Convention was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of norms of a peremptory character. On the other hand, ICJ used the phrase "international community as a whole" in the *Barcelona Traction* case,[403] and it is frequently used in treaties and other international instruments in the same sense as in paragraph 1(*b*).[404]

(19) Over and above the conditions in paragraph 1, *paragraph 2* lays down two general limits to any invocation of necessity. This is made clear by the use of the words "in any case". *Paragraph 2* (a) concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus, certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.

(20) According to *paragraph 2* (b), necessity may not be relied on if the responsible State has contributed to the situation of necessity. Thus, in the *Gabčíkovo-Nagymaros Project* case, ICJ considered that because Hungary had "helped, by act or omission to bring about" the situation of alleged necessity, it could not then rely on that situation as a circumstance precluding wrongfulness.[405] For a plea of necessity to be precluded under paragraph 2 (*b*), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral. Paragraph 2 (*b*) is phrased in more categorical terms than articles 23, paragraph 2 (*a*), and 24, paragraph 2 (*a*), because necessity needs to be more narrowly confined.

(21) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of "military necessity". It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention.[406] The question whether 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 is not covered by article 25.[407] The same thing is true of the doctrine of "military necessity" which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law.[408] In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.[409]

### *Article 26. Compliance with peremptory norms*

**Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.**

*Commentary*

(1) In accordance with article 53 of the 1969 Vienna Convention, a treaty which conflicts with a peremptory norm of general international law is void. Under article 64, an earlier treaty which conflicts with a new peremp-

[402] In the *Gabčíkovo-Nagymaros Project* case ICJ affirmed the need to take into account any countervailing interest of the other State concerned (see footnote 27 above), p. 46, para. 58.

[403] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[404] See, e.g., third preambular paragraph of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; fourth preambular paragraph of the International Convention Against the Taking of Hostages; fifth preambular paragraph of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; third preambular paragraph of the Convention on the Safety of United Nations and Associated Personnel; tenth preambular paragraph of the International Convention for the Suppression of Terrorist Bombings; ninth preambular paragraph of the Rome Statute of the International Criminal Court; and ninth preambular paragraph of the International Convention for the Suppression of the Financing of Terrorism.

[405] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 46, para. 57.

[406] For example, in 1960 Belgium invoked necessity to justify its military intervention in the Congo. The matter was discussed in the Security Council but not in terms of the plea of necessity as such. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, paras. 144, 182 and 192; 877th meeting, 20–21 July 1960, paras. 31 et seq. and para. 142; 878th meeting, 21 July 1960, paras. 23 and 65; and 879th meeting, 21–22 July 1960, paras. 80 et seq. and paras. 118 and 151. For the *"Caroline"* incident, see above, paragraph (5).

[407] See also article 26 and commentary for the general exclusion of the scope of circumstances precluding wrongfulness of conduct in breach of a peremptory norm.

[408] See, e.g., article 23 (*g*) of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907), which prohibits the destruction of enemy property "unless such destruction or seizure be imperatively demanded by the necessities of war". Similarly, article 54, paragraph 5, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), appears to permit attacks on objects indispensable to the survival of the civilian population if "imperative military necessity" so requires.

[409] See, e.g., M. Huber, "Die Kriegsrechtlichen Verträge und die Kriegsraison", *Zeitschrift für Völkerrecht*, vol. VII (1913), p. 351; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, p. 207; C. De Visscher, "Les lois de la guerre et la théorie de la nécessité", RGDIP, vol. 24 (1917), p. 74; N. C. H. Dunbar, "Military necessity in war crimes trials", BYBIL, *1952*, vol. 29, p. 442; C. Greenwood, "Historical development and legal basis", *The Handbook of Humanitarian Law in Armed Conflicts*, D. Fleck, ed. (Oxford University Press, 1995), p. 1, at pp. 30–33; and Y. Dinstein, "Military necessity", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 1997), vol. 3, pp. 395–397.

tory norm becomes void and terminates.[410] The question is what implications these provisions may have for the matters dealt with in chapter V.

(2) Sir Gerald Fitzmaurice as Special Rapporteur on the Law of Treaties treated this question on the basis of an implied condition of "continued compatibility with international law", noting that:

> A treaty obligation the observance of which is incompatible 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.[411]

The Commission did not, however, propose with any specific articles on this question, apart from articles 53 and 64 themselves.

(3) Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory, one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred.[412] Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.

(4) It is, however, desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law. For example, a State taking countermeasures may not derogate from such a norm: for example, a genocide cannot justify a counter-genocide.[413] The plea of necessity likewise cannot excuse the breach of a peremptory norm. It would be possible to incorporate this principle expressly in each of the articles of chapter V, but it is both more economical and more in keeping with the overriding character of this class of norms to deal with the basic principle separately. Hence, article 26 provides that nothing in chapter V can preclude the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.[414]

(5) The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.[415] Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[416]

(6) In accordance with article 26, circumstances precluding wrongfulness cannot justify or excuse a breach of a State's obligations under a peremptory rule of general international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V. One State cannot dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, whether by treaty or otherwise.[417] But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility.[418]

### *Article 27. Consequences of invoking a circumstance precluding wrongfulness*

**The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:**

**(*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;**

**(*b*) the question of compensation for any material loss caused by the act in question.**

[410] See also article 44, paragraph 5, which provides that in cases falling under article 53, no separation of the provisions of the treaty is permitted.

[411] Fourth report on the law of treaties, *Yearbook … 1959* (see footnote 307 above), p. 46. See also S. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985), p. 63.

[412] For a possible analogy, 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*, p. 325, at pp. 439–441. ICJ did not address these issues in its order.

[413] As ICJ noted in its decision in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, "in no case could one breach of the Convention serve as an excuse for another" (*Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243, at p. 258, para. 35).

[414] For convenience, this limitation is spelled out again in the context of countermeasures in Part Three, chapter II. See article 50 and commentary, paras. (9) and (10).

[415] See, e.g., the decisions of the International Tribunal for the Former Yugoslavia in case IT-95-17/1-T, *Prosecutor* v. *Furundzija*, judgement of 10 December 1998; ILM, vol. 38, No. 2 (March 1999), p. 317, and of the British House of Lords in *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate and Others*, ex parte *Pinochet Ugarte (No. 3)*, ILR, vol. 119. Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), p. 257, para. 79.

[416] Cf. *East Timor* (footnote 54 above).

[417] See paragraph (4) of the commentary to article 45.

[418] See paragraphs (4) to (7) of the commentary to article 20.

*Commentary*

(1) Article 27 is a without prejudice clause dealing with certain incidents or consequences of invoking circumstances precluding wrongfulness under chapter V. It deals with two issues. First, it makes it clear that circumstances precluding wrongfulness do not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect. Secondly, it refers to the possibility of compensation in certain cases. Article 27 is framed as a without prejudice clause because, as to the first point, it may be that the effect of the facts which disclose a circumstance precluding wrongfulness may also give rise to the termination of the obligation and, as to the second point, because it is not possible to specify in general terms when compensation is payable.

(2) *Subparagraph* (a) of article 27 addresses the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate. It makes 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. The words "and to the extent" are intended to cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation.

(3) This principle was affirmed by the tribunal in the *"Rainbow Warrior"* arbitration,[419] and even more clearly by ICJ in the *Gabčíkovo-Nagymaros Project* case. In considering Hungary's argument that the wrongfulness of its conduct in discontinuing work on the Project was precluded by a state of necessity, the Court remarked that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives".[420] It may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation. Thus, 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 by the injured State. 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 article 27 can resolve, other than by providing that the invocation of circumstances precluding wrongfulness is without prejudice to "compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists". Here "compliance with the obligation in question" includes cessation of the wrongful conduct.

(4) *Subparagraph* (b) of article 27 is a reservation as to questions of possible compensation for damage in cases covered by chapter V. Although the article uses the term "compensation", it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather, it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference to "material loss" is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.

(5) Subparagraph (*b*) is a proper condition, in certain cases, for allowing a State to rely on a circumstance precluding wrongfulness. Without the possibility of such recourse, the State whose conduct would otherwise be unlawful might seek to shift the burden of the defence of its own interests or concerns onto an innocent third State. This principle was accepted by Hungary in invoking the plea of necessity in the *Gabčíkovo-Nagymaros Project* case. 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".[421]

(6) Subparagraph (*b*) does not attempt to specify in what circumstances compensation should be payable. Generally, the range of possible situations covered by chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.

## Part Two

## CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

(1) Whereas Part One of the articles defines the general conditions necessary for State responsibility to arise, Part Two deals with the legal consequences for the responsible State. It is true that a State may face legal consequences of conduct which is internationally wrongful outside the sphere of State responsibility. For example, a material breach of a treaty may give an injured State the right to terminate or suspend the treaty in whole or in part.[422] The focus of Part Two, however, is on the new legal relationship which arises upon the commission by a State of an internationally wrongful act. This constitutes the substance or content of the international responsibility of a State under the articles.

(2) Within the sphere of State responsibility, the consequences which arise by virtue of an internationally wrongful act of a State may be specifically provided for in such terms as to exclude other consequences, in whole or

[419] *"Rainbow Warrior"* (see footnote 46 above), pp. 251–252, para. 75.

[420] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para 101; see also page 38, para. 47.

[421] *Ibid.*, p. 39, para. 48. A separate issue was that of accounting for accrued costs associated with the Project (*ibid*., p. 81, paras. 152–153).

[422] 1969 Vienna Convention, art. 60.

in part.[423] In the absence of any specific provision, however, international law attributes to the responsible State new obligations, and in particular the obligation to make reparation for the harmful consequences flowing from that act. The close link between the breach of an international obligation and its immediate legal consequence in the obligation of reparation was recognized in article 36, paragraph 2, of the PCIJ Statute, which was carried over without change as Article 36, paragraph 2, of the ICJ Statute. In accordance with article 36, paragraph 2, States parties to the Statute may recognize as compulsory the Court's jurisdiction, *inter alia*, in all legal disputes concerning:

(*c*) The existence of any fact which, if established, would constitute a breach of an international obligation;

(*d*) The nature or extent of the reparation to be made for the breach of an international obligation.

Part One of the articles sets out the general legal rules applicable to the question identified in subparagraph (*c*), while Part Two does the same for subparagraph (*d*).

(3) Part Two consists of three chapters. Chapter I sets out certain general principles and specifies more precisely the scope of Part Two. Chapter II focuses on the forms of reparation (restitution, compensation, satisfaction) and the relations between them. Chapter III deals with the special situation which arises in case of a serious breach of an obligation arising under a peremptory norm of general international law, and specifies certain legal consequences of such breaches, both for the responsible State and for other States.

## Chapter I

## GENERAL PRINCIPLES

*Commentary*

(1) Chapter I of Part Two comprises six articles, which define in general terms the legal consequences of an internationally wrongful act of a State. Individual breaches of international law can vary across a wide spectrum from the comparatively trivial or minor up to cases which imperil the survival of communities and peoples, the territorial integrity and political independence of States and the environment of whole regions. This may be true whether the obligations in question are owed to one other State or to some or all States or to the international community as a whole. But over and above the gravity or effects of individual cases, the rules and institutions of State responsibility are significant for the maintenance of respect for international law and for the achievement of the goals which States advance through law-making at the international level.

(2) Within chapter I, article 28 is an introductory article, affirming the principle that legal consequences are entailed whenever there is an internationally wrongful act of a State. Article 29 indicates that these consequences are without prejudice to, and do not supplant, the continued obligation of the responsible State to perform the obligation breached. This point is carried further by article 30, which deals with the obligation of cessation and assurances or guarantees of non-repetition. Article 31 sets out the general obligation of reparation for injury suffered in consequence of a breach of international law by a State. Article 32 makes clear that the responsible State may not rely on its internal law to avoid the obligations of cessation and reparation arising under Part Two. Finally, article 33 specifies the scope of the Part, both in terms of the States to which obligations are owed and also in terms of certain legal consequences which, because they accrue directly to persons or entities other than States, are not covered by Parts Two or Three of the articles.

### *Article 28. Legal consequences of an internationally wrongful act*

**The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.**

*Commentary*

(1) Article 28 serves an introductory function for Part Two and is expository in character. It links the provisions of Part One which define when the international responsibility of a State arises with the provisions of Part Two which set out the legal consequences which responsibility for an internationally wrongful act involves.

(2) The core legal consequences of an internationally wrongful act set out in Part Two are the obligations of the responsible State to cease the wrongful conduct (art. 30) and to make full reparation for the injury caused by the internationally wrongful act (art. 31). Where the internationally wrongful act constitutes a serious breach by the State of an obligation arising under a peremptory norm of general international law, the breach may entail further consequences both for the responsible State and for other States. In particular, all States in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach and not to render aid or assistance to the responsible State in maintaining the situation so created (arts. 40–41).

(3) Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations *of* the State and not only those owed *to* other States. Thus, State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent

[423] On the *lex specialis* principle in relation to State responsibility, see article 55 and commentary.

that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.

### *Article 29. Continued duty of performance*

**The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.**

*Commentary*

(1) Where a State commits a breach of an international obligation, questions as to the restoration and future of the legal relationship thereby affected are central. Apart from the question of reparation, two immediate issues arise, namely, the effect of the responsible State's conduct on the obligation which has been breached, and cessation of the breach if it is continuing. The former question is dealt with by article 29, the latter by article 30.

(2) Article 29 states the general principle that the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached. The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act (see article 14) and the obligation of cessation (see subparagraph (*a*) of article 30).

(3) It is true that in some situations the ultimate effect of a breach of an obligation may be to put an end to the obligation itself. For example, a State injured by a material breach of a bilateral treaty may elect to terminate the treaty.[424] But as the relevant provisions of the 1969 Vienna Convention make clear, the mere fact of a breach and even of a repudiation of a treaty does not terminate the treaty.[425] It is a matter for the injured State to react to the breach to the extent permitted by the Convention. The injured State may have no interest in terminating the treaty as distinct from calling for its continued performance. Where a treaty is duly terminated for breach, the termination does not affect legal relationships which have accrued under the treaty prior to its termination, including the obligation to make reparation for any breach.[426] A breach of an obligation under general international law is even less likely to affect the underlying obligation, and indeed will never do so *as such*. By contrast, the secondary legal relation of State responsibility arises on the occurrence of a breach and without any requirement of invocation by the injured State.

(4) Article 29 does not need to deal with such contingencies. All it provides is that the legal consequences of an internationally wrongful act within the field of State responsibility do not affect any continuing duty to comply with the obligation which has been breached. Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation.

### *Article 30. Cessation and non-repetition*

**The State responsible for the internationally wrongful act is under an obligation:**

**(*a*) to cease that act, if it is continuing;**

**(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.**

*Commentary*

(1) Article 30 deals with two separate but linked issues raised by the breach of an international obligation: the cessation of the wrongful conduct and the offer of assurances and guarantees of non-repetition by the responsible State if circumstances so require. Both are aspects of the restoration and repair of the legal relationship affected by the breach. Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performance. The continuation in force of the underlying obligation is a necessary assumption of both, since if the obligation has ceased following its breach, the question of cessation does not arise and no assurances and guarantees can be relevant.[427]

(2) Subparagraph (*a*) of article 30 deals with the obligation of the State responsible for the internationally wrongful act to cease the wrongful conduct. In accordance with article 2, the word "act" covers both acts and omissions. Cessation is thus relevant to all wrongful acts extending in time "regardless of whether the conduct of a State is

[424] See footnote 422 above.

[425] Indeed, in the *Gabčíkovo-Nagymaros Project* case, ICJ held that continuing material breaches by both parties did not have the effect of terminating the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System (see footnote 27 above), p. 68, para. 114.

[426] See, e.g., *"Rainbow Warrior"* (footnote 46 above), p. 266, citing Lord McNair (dissenting) in *Ambatielos, Preliminary Objection, I.C.J. Reports 1952*, p. 28, at p. 63. On that particular point the Court itself agreed, *ibid*., p. 45. In the *Gabčíkovo-Nagymaros Project* case, Hungary accepted that the legal consequences of its termination of the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System on account of the breach by Czechoslovakia were prospective only, and did not affect the accrued rights of either party (see footnote 27 above), pp. 73–74, paras. 125–127. The Court held that the Treaty was still in force, and therefore did not address the question.

[427] 1969 Vienna Convention, art. 70, para. 1.

an action or an omission … since there may be cessation consisting in abstaining from certain actions".[428]

(3) The tribunal in the *"Rainbow Warrior"* arbitration stressed "two essential conditions intimately linked" for the requirement of cessation of wrongful conduct to arise, "namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".[429] While the obligation to cease wrongful conduct will arise most commonly in the case of a continuing wrongful act,[430] article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions. The phrase "if it is continuing" at the end of subparagraph (*a*) of the article is intended to cover both situations.

(4) Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act. Cessation is often the main focus of the controversy produced by conduct in breach of an international obligation.[431] It is frequently demanded not only by States but also by the organs of international organizations such as the General Assembly and Security Council in the face of serious breaches of international law. By contrast, reparation, important though it is in many cases, may not be the central issue in a dispute between States as to questions of responsibility.[432]

(5) The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.

(6) There are several reasons for treating cessation as more than simply a function of the duty to comply with the primary obligation. First, the question of cessation only arises in the event of a breach. What must then occur depends not only on the interpretation of the primary obligation but also on the secondary rules relating to remedies, and it is appropriate that they are dealt with, at least in general terms, in articles concerning the consequences of an internationally wrongful act. Secondly, continuing wrongful acts are a common feature of cases involving State responsibility and are specifically dealt with in article 14. There is a need to spell out the consequences of such acts in Part Two.

(7) The question of cessation often arises in close connection with that of reparation, and particularly restitution. The result of cessation may be indistinguishable from restitution, for example in cases involving the freeing of hostages or the return of objects or premises seized. Nonetheless, the two must be distinguished. Unlike restitution, cessation is not subject to limitations relating to proportionality.[433] It may give rise to a continuing obligation, even when literal return to the *status quo ante* is excluded or can only be achieved in an approximate way.

(8) The difficulty of distinguishing between cessation and restitution is illustrated by the *"Rainbow Warrior"* arbitration. New Zealand sought the return of the two agents to detention on the island of Hao. According to New Zealand, France was obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was no question of cessation.[434] Evidently, the return of the two agents to the island was of no use to New Zealand if there was no continuing obligation on the part of France to keep them there. Thus, a return to the *status quo ante* may be of little or no value if the obligation breached no longer exists. Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not competent to release it from such performance. The distinction between cessation and restitution may have important consequences in terms of the obligations of the States concerned.

(9) Subparagraph (*b*) of article 30 deals with the obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Assurances and guarantees are concerned with the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases. They are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily. For example, following repeated demonstrations against the United States Embassy in Moscow from 1964 to 1965, President Johnson stated that:

> The U.S. Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between states. Expressions of regret and compensation are no substitute for adequate protection.[435]

[428] *"Rainbow Warrior"* (see footnote 46 above), p. 270, para. 113.

[429] *Ibid*., para. 114.

[430] For the concept of a continuing wrongful act, see paragraphs (3) to (11) of the commentary to article 14.

[431] The focus of the WTO dispute settlement mechanism is on cessation rather than reparation: Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), especially article 3, paragraph 7, which provides for compensation "only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, Australia-Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126/RW and Corr.1), 21 January 2000, para. 6.49.

[432] For cases where ICJ has recognized that this may be so, see, e.g., *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at pp. 201–205, paras. 65–76; and *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 81, para. 153. See also C. D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 77–92.

[433] See article 35 (*b*) and commentary.

[434] UNRIAA, vol. XX, p. 217, at p. 266, para. 105 (1990).

[435] Reprinted in ILM, vol. 4, No. 2 (July 1965), p. 698.

Such demands are not always expressed in terms of assurances or guarantees, but they share the characteristics of being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation and they are included in article 30.

(10) The question whether the obligation to offer assurances or guarantees of non-repetition may be a legal consequence of an internationally wrongful act was debated in the *LaGrand* case. This concerned an admitted failure of consular notification contrary to article 36 of the Vienna Convention on Consular Relations. In its fourth submission, Germany sought both general and specific assurances and guarantees as to the means of future compliance with the Convention. The United States argued that to give such assurances or guarantees went beyond the scope of the obligations in the Convention and that ICJ lacked jurisdiction to require them. In any event, formal assurances and guarantees were unprecedented and should not be required. Germany's entitlement to a remedy did not extend beyond an apology, which the United States had given. Alternatively, no assurances or guarantees were appropriate in the light of the extensive action it had taken to ensure that federal and State officials would in future comply with the Convention. On the question of jurisdiction, the Court held:

> that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation … Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.[436]

On the question of appropriateness, the Court noted that an apology would not be sufficient in any case in which a foreign national had been "subjected to prolonged detention or sentenced to severe penalties" following a failure of consular notification.[437] But in the light of information provided by the United States as to the steps taken to comply in future, the Court held:

> that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (*b*), must be regarded as meeting Germany's request for a general assurance of non-repetition.[438]

As to the specific assurances sought by Germany, the Court limited itself to stating that:

> if the United States, notwithstanding its commitment referred to … should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.[439]

The Court thus upheld its jurisdiction on Germany's fourth submission and responded to it in the operative part. It did not, however, discuss the legal basis for assurances of non-repetition.

(11) Assurances or guarantees of non-repetition may be sought by way of satisfaction (e.g. the repeal of the legislation which allowed the breach to occur) and there is thus some overlap between the two in practice.[440] However, they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past. In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48.

(12) Assurances are normally given verbally, while guarantees of non-repetition involve something more—for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested, international practice is not uniform. The injured State usually demands either safeguards against the repetition of the wrongful act without any specification of the form they are to take[441] or, when the wrongful act affects its nationals, assurances of better protection of persons and property.[442] In the *LaGrand* case, ICJ spelled out with some specificity the obligation that would arise for the United States from a future breach, but added that "[t]his obligation can be carried out in various ways. The choice of means must be left to the United States".[443] It noted further that a State may not be in a position to offer a firm guarantee of non-repetition.[444] Whether it could properly do so would depend on the nature of the obligation in question.

(13) In some cases, the injured State may ask the responsible State to adopt specific measures or to act in a specified way in order to avoid repetition. Sometimes the injured State merely seeks assurances from the responsible State that, in future, it will respect the rights of the injured State.[445] In other cases, the injured State requires specific instructions to be given,[446] or other specific conduct to be

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[436] *LaGrand, Judgment* (see footnote 119 above), p. 485, para. 48, citing *Factory at Chorzów, Jurisdiction* (footnote 34 above).

[437] *LaGrand, Judgment* (see footnote 119 above), p. 512, para. 123.

[438] *Ibid*., p. 513, para. 124; see also the operative part, p. 516, para. 128 (6).

[439] *Ibid*., pp. 513–514, para. 125. See also paragraph 127 and the operative part (para. 128 (7)).

[440] See paragraph (5) of the commentary to article 36.

[441] In the "Dogger Bank" incident in 1904, the United Kingdom sought "security against the recurrence of such intolerable incidents", G. F. de Martens, *Nouveau recueil général de traités*, 2nd series, vol. XXXIII, p. 642. See also the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General in Jakarta, in which the Chinese Deputy Minister for Foreign Affairs sought a guarantee that such incidents would not be repeated in the future, RGDIP, vol. 70 (1966), pp. 1013 et seq.

[442] Such assurances were given in the *Doane* incident (1886), Moore, *Digest*, vol. VI, pp. 345–346.

[443] *LaGrand, Judgment* (see footnote 119 above), p. 513, para. 125.

[444] *Ibid*., para. 124.

[445] See, e.g., the 1901 case in which the Ottoman Empire gave a formal assurance that the British, Austrian and French postal services would henceforth operate freely in its territory, RGDIP, vol. 8 (1901), p. 777, at pp. 788 and 792.

[446] See, e.g., the incidents involving the *"Herzog"* and the *"Bundesrath"*, two German ships seized by the British Navy in December 1899 and January 1900, during the Boer war, in which Germany drew the attention of Great Britain to "the necessity for issuing instructions

taken.[447] But assurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words "if circumstances so require" at the end of subparagraph (*b*). The obligation of the responsible State with respect to assurances and guarantees of non-repetition is formulated in flexible terms in order to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by States in the past.

### *Article 31. Reparation*

**1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.**

**2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.**

*Commentary*

(1) The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.[448]

In this passage, which has been cited and applied on many occasions,[449] the Court was using the term "reparation" in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.

(2) In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[450]

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.[451] In the second sentence, it dealt with that aspect of reparation encompassed by "compensation" for an unlawful act—that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

(3) The obligation placed on the responsible State by article 31 is to make "full reparation" in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed"[452] through the provision of one or more of the forms of reparation set out in chapter II of this part.

(4) The general obligation of reparation is formulated in article 31 as the immediate corollary of a State's responsibility, i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility,[453] the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

(5) The responsible State's obligation to make full reparation relates to the "injury caused by the internationally wrongful act". The notion of "injury", defined in *paragraph 2*, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, "injury" includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individu-

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to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war", Martens, *op. cit.* (footnote 441 above), vol. XXIX, p. 456 at p. 486.

[447] In the *Trail Smelter* case (see footnote 253 above), the arbitral tribunal specified measures to be adopted by the Trail Smelter, including measures designed to "prevent future significant fumigations in the United States" (p. 1934). Requests to modify or repeal legislation are frequently made by international bodies. See, e.g., the decisions of the Human Rights Committee: *Torres Ramirez* v. *Uruguay*, decision of 23 July 1980, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40* (A/35/40), p. 126, para. 19; *Lanza* v. *Uruguay*, decision of 3 April 1980, *ibid*., p. 119, para. 17; and *Dermit Barbato* v. *Uruguay*, decision of 21 October 1982, *ibid*., *Thirty-eighth Session, Supplement No. 40* (A/38/40), p. 133, para. 11.

[448] *Factory at Chorzów, Jurisdiction* (see footnote 34 above).

[449] Cf. the ICJ reference to this decision in *LaGrand, Judgment* (footnote 119 above), p. 485, para. 48.

[450] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

[451] Cf. P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des États", *Collected Courses ... 1984–V* (Dordrecht, Martinus Nijhoff, 1986), vol. 188, p. 9, at p. 94, who uses the term *restauration*.

[452] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

[453] For the States entitled to invoke responsibility, see articles 42 and 48 and commentaries. For the situation where there is a plurality of injured States, see article 46 and commentary.

ally unaffected by the breach.[454] "Material" damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. "Moral" damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.[455]

(6) The question whether damage to a protected interest is a necessary element of an internationally wrongful act has already been discussed.[456] There is in general no such requirement; rather this is a matter which is determined by the relevant primary rule. In some cases, the gist of a wrong is the causing of actual harm to another State. In some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs. In some cases there is an outright commitment to perform a specified act, e.g. to incorporate uniform rules into internal law. In each case the primary obligation will determine what is required. Hence, article 12 defines a breach of an international obligation as a failure to conform with an obligation.

(7) As a corollary there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation. In the *"Rainbow Warrior"* arbitration it was initially argued that "in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation", but the parties subsequently agreed that:

> Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.[457]

The tribunal held that the breach by France had "provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage … of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well".[458]

(8) Where two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed. For the secondary rules of State responsibility to intervene at this stage and to prescribe that there is no responsibility because no identifiable harm or damage has occurred would be unwarranted. If the parties had wished to commit themselves to that formulation of the obligation they could have done so. In many cases, the damage that may follow from a breach (e.g. harm to a fishery from fishing in the closed season, harm to the environment by emissions exceeding the prescribed limit, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless, States may enter into immediate and unconditional commitments in their mutual long-term interest in such fields. Accordingly, article 31 defines "injury" in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case.

(9) Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only "[i]njury … caused by the internationally wrongful act of a State" for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.

(10) The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses "attributable to [the wrongful] act as a proximate cause",[459] or to damage which is "too indirect, remote, and uncertain to be appraised",[460] or to "any direct loss, damage including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of" the wrongful act.[461] Thus, causality in fact is a necessary

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[454] Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. Generally on notions of injury and damage, see B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973); B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", *Collected Courses ... 1984–II* (The Hague, Nijhoff, 1985), vol. 185, p. 95; A. Tanzi, "Is damage a distinct condition for the existence of an internationally wrongful act?", Spinedi and Simma, eds., *op. cit.* (footnote 175 above), p. 1; and Brownlie, *System of the Law of Nations …* (footnote 92 above), pp. 53–88.

[455] See especially article 36 and commentary.

[456] See paragraph (9) of the commentary to article 2.

[457] *"Rainbow Warrior"* (see footnote 46 above), pp. 266–267, paras. 107 and 109.

[458] *Ibid*., p. 267, para. 110.

[459] See United States-German Mixed Claims Commission, *Administrative Decision No. II*, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 23, at p. 30 (1923). See also *Dix* (footnote 178 above), p. 121, and the Canadian statement of claim following the disintegration of the *Cosmos 954* Soviet nuclear-powered satellite over its territory in 1978, ILM, vol. 18 (1979), p. 907, para. 23.

[460] See the *Trail Smelter* arbitration (footnote 253 above), p. 1931. See also A. Hauriou, "Les dommages indirects dans les arbitrages internationaux", RGDIP, vol. 31 (1924), p. 209, citing the *"Alabama"* arbitration as the most striking application of the rule excluding "indirect" damage (footnote 87 above).

[461] Security Council resolution 687 (1991) of 3 April 1991, para. 16. This was a resolution adopted with reference to Chapter VII of the Charter of the United Nations, but it is expressed to reflect Iraq's liability "under international law … as a result of its unlawful invasion and occupation of Kuwait". UNCC and its Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under paragraph 16. See, e.g., Recommendations made by the panel of Commissioners concerning individual claims for serious personal injury or death (category "B" claims), report of 14 April 1994 (S/AC.26/1994/1), approved by the Governing Council in its decision 20 of 26 May 1994 (S/AC.26/Dec.20 (1994)); Report and recommendations made by the panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC claim"), of 15 November 1996 (S/AC.26/1996/5/Annex), paras. 66–86, approved by the Governing

but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used,[462] in others "foreseeability"[463] or "proximity".[464] But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.[465] In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage "is not a part of the law which can be satisfactorily solved by search for a single verbal formula".[466] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.[467] The point was clearly made in this sense by ICJ in the *Gabčíkovo-Nagymaros Project* case:

> Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained".
>
> It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.[468]

(12) Often two separate factors combine to cause damage. In the *United States Diplomatic and Consular Staff in Tehran* case,[469] the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students' own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,[470] the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes,[471] except in cases of contributory fault.[472] In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines even though Albania had not itself laid the mines.[473] Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *United States Diplomatic and Consular Staff in Tehran* case, the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.[474]

(13) It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct. Indeed, in the *Zafiro* claim the tribunal went further and in effect placed the

Council in its decision 40 of 17 December 1996 (S/AC.26/Dec.40 (1996)).

[462] As in Security Council resolution 687 (1991), para. 16.

[463] See, e.g., the *"Naulilaa"* case (footnote 337 above), p. 1031.

[464] For comparative reviews of issues of causation and remoteness, see, e.g., H. L. A. Hart and A. M. Honoré, *Causation in the Law*, 2nd ed. (Oxford, Clarendon Press, 1985); A. M. Honoré, "Causation and remoteness of damage", *International Encyclopedia of Comparative Law*, A. Tunc, ed. (Tübingen, Mohr/The Hague, Martinus Nijhoff, 1983), vol. XI, part I, chap. 7; Zweigert and Kötz, *op. cit*. (footnote 251 above), pp. 601–627, in particular pp. 609 et seq.; and B. S. Markesinis, *The German Law of Obligations: Volume II The Law of Torts: A Comparative Introduction*, 3rd ed. (Oxford, Clarendon Press, 1997), pp. 95–108, with many references to the literature.

[465] See, e.g., the decision of the Iran-United States Claims Tribunal in *The Islamic Republic of Iran* v. *The United States of America*, cases A15 (IV) and A24, Award No. 590–A15 (IV)/A24–FT, 28 December 1998, *World Trade and Arbitration Materials*, vol. 11, No. 2 (1999), p. 45.

[466] P. S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford, Clarendon Press, 1995), p. 466.

[467] In the WBC claim, a UNCC panel noted that "under the general principles of international law relating to mitigation of damages … the Claimant was not only permitted but indeed obligated to take reasonable steps to … mitigate the loss, damage or injury being caused" report of 15 November 1996 (S/AC.26/1996/5/Annex) (see footnote 461 above), para. 54.

[468] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 80.

[469] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 29–32.

[470] *Corfu Channel*, *Merits* (see footnote 35 above), pp. 17–18 and 22–23.

[471] This approach is consistent with the way in which these issues are generally dealt with in national law. "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause … In other words, the liability of a tortfeasor is not affected *vis-à-vis* the victim by the consideration that another is concurrently liable.": T. Weir, "Complex liabilities", A. Tunc, ed., *op. cit*. (footnote 464 above), part 2, chap. 12, p. 43. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident of 27 July 1955* case when it said, referring to Article 38, paragraph 1 (*c*) and (*d*), of the ICJ Statute, that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage" (Memorial of 2 December 1958 (see footnote 363 above), p. 229).

[472] See article 39 and commentary.

[473] See *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 244, at p. 250.

[474] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 31–33.

onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

> We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.
>
> In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.[475]

(14) Concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach. However, the notion of "proportionality" applies differently to the different forms of reparation.[476] It is addressed, as appropriate, in the individual articles in chapter II dealing with the forms of reparation.

### *Article 32. Irrelevance of internal law*

**The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.**

*Commentary*

(1) Article 3 concerns the role of internal law in the characterization of an act as wrongful. Article 32 makes clear the irrelevance of a State's internal law to compliance with the obligations of cessation and reparation. It provides that a State which has committed an internationally wrongful act may not invoke its internal law as a justification for failure to comply with its obligations under this part. Between them, articles 3 and 32 give effect for the purposes of State responsibility to the general principle that a State may not rely on its internal law as a justification for its failure to comply with its international obligations.[477]Although practical difficulties may arise for a State organ confronted with an obstacle to compliance posed by the rules of the internal legal system under which it is bound to operate, the State is not entitled to oppose its internal law or practice as a legal barrier to the fulfilment of an international obligation arising under Part Two.

(2) Article 32 is modelled on article 27 of the 1969 Vienna Convention, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This general principle is equally applicable to the international obligations deriving from the rules of State responsibility set out in Part Two. The principle may be qualified by the relevant primary rule, or by a *lex specialis*, such as article 50 of the European Convention on Human Rights, which provides for just satisfaction in lieu of full reparation "if the internal law of the High Contracting Party concerned allows only partial reparation to be made".[478]

(3) The principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions. For example, the dispute between Japan and the United States in 1906 over California's discriminatory education policies was resolved by the revision of the Californian legislation.[479] In the incident concerning article 61, paragraph 2, of the Weimar Constitution (Constitution of the Reich of 11 August 1919), a constitutional amendment was provided for in order to ensure the discharge of the obligation deriving from article 80 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).[480] In the *Peter Pázmány University* case, PCIJ specified that the property to be returned should be "freed from any measure of transfer, compulsory administration, or sequestration".[481] In short, international law does not recognize that the obligations of a responsible State under Part Two are subject to the State's internal legal system nor does it allow internal law to count as an excuse for non-performance of the obligations of cessation and reparation.

### *Article 33. Scope of international obligations set out in this Part*

**1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.**

**2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.**

*Commentary*

(1) Article 33 concludes the provisions of chapter I of Part Two by clarifying the scope and effect of the international obligations covered by the Part. In particular, *paragraph 1* makes it clear that identifying the State or States towards which the responsible State's obligations in Part Two exist depends both on the primary rule establishing

[475] The *Zafiro* case (see footnote 154 above), pp. 164–165.

[476] See articles 35 (*b*), 37, paragraph 3, and 39 and commentaries.

[477] See paragraphs (2) to (4) of the commentary to article 3.

[478] Article 41 of the Convention, as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Other examples include article 32 of the Revised General Act for the Pacific Settlement of International Disputes and article 30 of the European Convention for the Peaceful Settlement of Disputes.

[479] See R. L. Buell, "The development of the anti-Japanese agitation in the United States", *Political Science Quarterly*, vol. 37 (1922), pp. 620 et seq.

[480] See *British and Foreign State Papers, 1919* (London, HM Stationery Office, 1922), vol. 112, p. 1094.

[481] *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), Judgment, 1933, P.C.I.J., Series A/B, No. 61*, p. 208, at p. 249.

the obligation that was breached and on the circumstances of the breach. For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a single neighbouring State. Evidently, the gravity of the breach may also affect the scope of the obligations of cessation and reparation.

(2) In accordance with paragraph 1, the responsible State's obligations in a given case may exist towards another State, several States or the international community as a whole. The reference to several States includes the case in which a breach affects all the other parties to a treaty or to a legal regime established under customary international law. For instance, when an obligation can be defined as an "integral" obligation, the breach by a State necessarily affects all the other parties to the treaty.[482]

(3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights.[483] The range of possibilities is demonstrated from the ICJ judgment in the *LaGrand* case, where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".[484]

(4) Such possibilities underlie the need for *paragraph 2* of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (art. 55). The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State".

[482] See further article 42 (*b*) (ii) and commentary.

[483] Cf. *Jurisdiction of the Courts of Danzig* (footnote 82 above), pp. 17–21.

[484] *LaGrand, Judgment* (see footnote 119 above), para. 77. In the circumstances the Court did not find it necessary to decide whether the individual rights had "assumed the character of a human right" (para. 78).

## CHAPTER II

## REPARATION FOR INJURY

### *Commentary*

Chapter II deals with the forms of reparation for injury, spelling out in further detail the general principle stated in article 31, and in particular seeking to establish more clearly the relations between the different forms of reparation, viz. restitution, compensation and satisfaction, as well as the role of interest and the question of taking into account any contribution to the injury which may have been made by the victim.

### *Article 34. Forms of reparation*

**Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.**

### *Commentary*

(1) Article 34 introduces chapter II by setting out the forms of reparation which separately or in combination will discharge the obligation to make full reparation for the injury caused by the internationally wrongful act. Since the notion of "injury" and the necessary causal link between the wrongful act and the injury are defined in the statement of the general obligation to make full reparation in article 31,[485] article 34 need do no more than refer to "[f]ull reparation for the injury caused".

(2) In the *Factory at Chorzów* case, the injury was a material one and PCIJ dealt only with two forms of reparation, restitution and compensation.[486] In certain cases, satisfaction may be called for as an additional form of reparation. Thus, full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances. Article 34 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g. injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.

[485] See paragraphs (4) to (14) of the commentary to article 31.

[486] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

(3) The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.[487]

(4) The provision of each of the forms of reparation described in article 34 is subject to the conditions laid down in the articles which follow it in chapter II. This limitation is indicated by the phrase "in accordance with the provisions of this chapter". It may also be affected by any valid election that may be made by the injured State as between different forms of reparation. For example, in most circumstances the injured State is entitled to elect to receive compensation rather than restitution. This element of choice is reflected in article 43.

(5) Concerns have sometimes been expressed that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned. The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character. Thus, restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party.[488] Compensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote.[489] Satisfaction must "not be out of proportion to the injury".[490] Thus, each of the forms of reparation takes such considerations into account.

(6) The forms of reparation dealt with in chapter II represent ways of giving effect to the underlying obligation of reparation set out in article 31. There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction. Some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.[491] To the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others, especially compensation, will be correspondingly more important.

### *Article 35. Restitution*

**A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:**

**(*a*) is not materially impossible;**

**(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.**

*Commentary*

(1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act.

(2) The concept of restitution is not uniformly defined. According to one definition, restitution consists in re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Under another definition, restitution is the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 adopts the narrower definition which has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. Restitution in this narrow sense may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear.

(3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by PCIJ in the *Factory at Chorzów*

[487] Thus, in the judgment in the *LaGrand* case (see footnote 119 above), ICJ indicated that a breach of the notification requirement in article 36 of the Vienna Convention on Consular Relations, leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction "by taking account of the violation of the rights set forth in the Convention" (p. 514, para. 125). This would be a form of restitution which took into account the limited character of the rights in issue.

[488] See article 35 (*b*) and commentary.

[489] See article 31 and commentary.

[490] See article 37, paragraph 3, and commentary.

[491] For example, the *Mélanie Lachenal* case (UNRIAA, vol. XIII (Sales No. 64.V.3), p. 117, at pp. 130–131 (1954)), where compensation was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution would require difficult internal procedures. See also paragraph (4) of the commentary to article 35.

case when it said that the responsible State was under "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible". The Court went on to add that "[t]he impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution".[492] It can be seen in operation in the cases where tribunals have considered compensation only after concluding that, for one reason or another, restitution could not be effected.[493] Despite the difficulties restitution may encounter in practice, States have often insisted upon claiming it in preference to compensation. Indeed, in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation.

(4) On the other hand, there are often situations where restitution is not available or where its value to the injured State is so reduced that other forms of reparation take priority. Questions of election as between different forms of reparation are dealt with in the context of Part Three.[494] But quite apart from valid election by the injured State or other entity, the possibility of restitution may be practically excluded, e.g. because the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason. Indeed, in some cases tribunals have inferred from the terms of the *compromis* or the positions of the parties what amounts to a discretion to award compensation rather than restitution. For example, in the *Walter Fletcher Smith* case, the arbitrator, while maintaining that restitution should be appropriate in principle, interpreted the *compromis* as giving him a discretion to award compensation and did so in "the best interests of the parties, and of the public".[495] In the *Aminoil* arbitration, the parties agreed that restoration of the *status quo ante* following the annulment of the concession by the Kuwaiti decree would be impracticable.[496]

(5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an individual arrested in its territory,[497] the restitution of ships[498] or other types of property,[499] including documents, works of art, share certificates, etc.[500] The term "juridical restitution" is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law,[501] the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner[502] or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.[503] In some cases, both material and juridical restitution may be involved.[504] In others, an international court or tribunal can, by determining the legal position with binding force for the parties, award what amounts to restitution under another form.[505] The term "restitution" in article 35 thus

[492] *Factory at Chorzów, Merits* (see footnote 34 above), p. 48.

[493] See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote 44 above), pp. 621–625 and 651–742; *Religious Property Expropriated by Portugal*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 7 (1920); *Walter Fletcher Smith*, *ibid*., vol. II (Sales No. 1949.V.1), p. 913, at p. 918 (1929); and *Heirs of Lebas de Courmont*, *ibid*., vol. XIII (Sales No. 64.V.3), p. 761, at p. 764 (1957).

[494] See articles 43 and 45 and commentaries.

[495] *Walter Fletcher Smith* (see footnote 493 above). In the *Greek Telephone Company* case, the arbitral tribunal, while ordering restitution, asserted that the responsible State could provide compensation instead for "important State reasons" (see J. G. Wetter and S. M. Schwebel, "Some little known cases on concessions", BYBIL, *1964*, vol. 40, p. 216, at p. 221.

[496] *Government of Kuwait* v. *American Independent Oil Company (Aminoil)* ILR, vol. 66, p. 519, at p. 533 (1982).

[497] Examples of material restitution involving persons include the *"Trent"* (1861) and *"Florida"* (1864) incidents, both involving the arrest of individuals on board ships (Moore, *Digest*, vol. VII, pp. 768 and 1090–1091), and the *United States Diplomatic and Consular Staff in Tehran* case in which ICJ ordered Iran to immediately release every detained United States national (see footnote 59 above), pp. 44–45.

[498] See, e.g., the *"Giaffarieh"* incident (1886) which originated in the capture in the Red Sea by an Egyptian warship of four merchant ships from Massawa under Italian registry, Società Italiana per l'Organizzazione Internazionale–Consiglio Nazionale delle Ricerche, *La prassi italiana di diritto internazionale*, 1st series (Dobbs Ferry, NY., Oceana, 1970), vol. II, pp. 901–902.

[499] For example, *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at pp. 36–37, where ICJ decided in favour of a Cambodian claim which included restitution of certain objects removed from the area and the temple by Thai authorities. See also the *Hôtel Métropole* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 219 (1950); the *Ottoz* case, *ibid*., p. 240 (1950); and the *Hénon* case, *ibid*., p. 248 (1951).

[500] In the *Bužau-Nehoiaşi Railway* case, an arbitral tribunal provided for the restitution to a German company of shares in a Romanian railway company, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1839 (1939).

[501] For cases where the existence of a law itself amounts to a breach of an international obligation, see paragraph (12) of the commentary to article 12.

[502] For example, the *Martini* case, UNRIAA, vol. II (Sales No. 1949. V.1), p. 975 (1930).

[503] In the *Bryan-Chamorro Treaty* case (*Costa Rica* v. *Nicaragua*), the Central American Court of Justice decided that "the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action" (*Anales de la Corte de Justicia Centroamericana* (San José, Costa Rica), vol. VI, Nos. 16–18 (December 1916–May 1917), p. 7); and AJIL, vol. 11, No. 3 (1917), p. 674, at p. 696; see also page 683.

[504] Thus, PCIJ held that Czechoslovakia was "bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question" (*Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (see footnote 481 above)).

[505] In the *Legal Status of Eastern Greenland* case, PCIJ decided that "the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid" (*Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22, at p. 75). In the case of the *Free Zones of Upper Savoy and the District of Gex* (see footnote 79 above), the Court decided that France "must withdraw its customs line in accordance with

(*Continued on next page.*)

has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.

(6) What may be required in terms of restitution will often depend on the content of the primary obligation which has been breached. Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.[506] Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.

(7) The obligation to make restitution is not unlimited. In particular, under article 35 restitution is required "provided and to the extent that" it is neither materially impossible nor wholly disproportionate. The phrase "provided and to the extent that" makes it clear that restitution may be only partially excluded, in which case the responsible State will be obliged to make restitution to the extent that this is neither impossible nor disproportionate.

(8) Under article 35, *subparagraph* (a), restitution is not required if it is "materially impossible". This would apply where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. On the other hand, restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility.

(9) Material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations. In the *Forests of Central Rhodopia* case, the claimant was entitled to only a share in the forestry operations and no claims had been brought by the other participants. The forests were not in the same condition as at the time of their wrongful taking, and detailed inquiries would be necessary to determine their condition. Since the taking, third parties had acquired rights to them. For a combination of these reasons, restitution was denied.[507] The case supports a broad understanding of the impossibility of granting restitution, but it concerned questions of property rights within the legal system of the responsible State.[508] The position may be different where the rights and obligations in issue arise directly on the international plane. In that context restitution plays a particularly important role.

(10) In certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially possible. This was true in the *Forests of Central Rhodopia* case. But whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.

(11) A second exception, dealt with in article 35, *subparagraph* (b), involves those cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the responsible State. Specifically, restitution may not be required if it would "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation". This applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach. It is thus based on considerations of equity and reasonableness,[509] although with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution. The balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability.

### *Article 36. Compensation*

**1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.**

**2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.**

*Commentary*

(1) Article 36 deals with compensation for damage caused by an internationally wrongful act, to the extent that such damage is not made good by restitution. The notion of "damage" is defined inclusively in article 31, paragraph 2, as any damage whether material or moral.[510] Article 36, paragraph 2, develops this definition by specifying that compensation shall cover any financially

(*Footnote 505 continued.*)

the provisions of the said treaties and instruments; and that this régime must continue in force so long as it has not been modified by agreement between the Parties" (p. 172). See also F. A. Mann, "The consequences of an international wrong in international and municipal law", BYBIL, *1976–1977*, vol. 48, p. 1, at pp. 5–8.

[506] See above, paragraph (8) of the commentary to article 30.

[507] *Forests of Central Rhodopia* (see footnote 382 above), p. 1432.

[508] For questions of restitution in the context of State contract arbitration, see *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic* (1977), ILR, vol. 53, p. 389, at pp. 507–508, para. 109; *BP Exploration Company (Libya) Limited* v. *Government of the Libyan Arab Republic*, *ibid*., p. 297, at p. 354 (1974); and *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic ibid*., vol. 62, p. 141, at p. 200 (1977).

[509] See, e.g., J. H. W. Verzijl, *International Law in Historical Perspective* (Leiden, Sijthoff, 1973), part VI, p. 744, and the position taken by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in *Yearbook ... 1969*, vol. II, p. 149.

[510] See paragraphs (5) to (6) and (8) of the commentary to article 31.

assessable damage including loss of profits so far as this is established in the given case. The qualification "financially assessable" is intended to exclude compensation for what is sometimes referred to as "moral damage" to a State, i.e. the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37.

(2) Of the various forms of reparation, compensation is perhaps the most commonly sought in international practice. In the *Gabčíkovo-Nagymaros Project* case, ICJ declared: "It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it."[511] It is equally well established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.[512]

(3) The relationship with restitution is clarified by the final phrase of article 36, paragraph 1 ("insofar as such damage is not made good by restitution"). Restitution, despite its primacy as a matter of legal principle, is frequently unavailable or inadequate. It may be partially or entirely ruled out either on the basis of the exceptions expressed in article 35, or because the injured State prefers compensation or for other reasons. Even where restitution is made, it may be insufficient to ensure full reparation. The role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered.[513] As the Umpire said in the *"Lusitania"* case:

> The fundamental concept of "damages" is ... reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.[514]

Likewise, the role of compensation was articulated by PCIJ in the following terms:

> Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[515]

Entitlement to compensation for such losses is supported by extensive case law, State practice and the writings of jurists.

(4) As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.[516] Thus, compensation generally consists of a monetary payment, though it may sometimes take the form, as agreed, of other forms of value. It is true that monetary payments may be called for by way of satisfaction under article 37, but they perform a function distinct from that of compensation. Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach. Satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly approximate and notional way.[517]

(5) Consistently with other provisions of Part Two, article 36 is expressed as an obligation of the responsible State to provide reparation for the consequences flowing from the commission of an internationally wrongful act.[518] The scope of this obligation is delimited by the phrase "any financially assessable damage", that is, any damage which is capable of being evaluated in financial terms. Financially assessable damage encompasses both damage suffered by the State itself (to its property or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act) as well as damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection.

(6) In addition to ICJ, international tribunals dealing with issues of compensation include the International Tribunal for the Law of the Sea,[519] the Iran-United States Claims Tribunal,[520] human rights courts and other

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[511] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 81, para. 152. See also the statement by PCIJ in *Factory at Chorzów*, *Merits* (footnote 34 above), declaring that "[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity" (p. 27).

[512] *Factory at Chorzów, Jurisdiction* (see footnote 34 above); *Fisheries Jurisdiction* (see footnote 432 above), pp. 203–205, paras. 71–76; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 142.

[513] *Factory at Chorzów, Merits* (see footnote 34 above), pp. 47–48.

[514] UNRIAA, vol. VII (Sales No. 1956.V.5), p. 32, at p. 39 (1923).

[515] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47, cited and applied, *inter alia*, by ITLOS in the case of the *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, *Judgment, ITLOS Reports 1999* , p. 65, para. 170 (1999). See also *Papamichalopoulos and Others* v. *Greece (article 50), Eur. Court H.R., Series A, No. 330–B*, para. 36 (1995); *Velásquez Rodríguez* (footnote 63 above), pp. 26–27 and 30–31; and *Tippetts, Abbett, McCarthy, Stratton* v. *TAMS-AFFA Consulting Engineers of Iran*, Iran-U.S. C.T.R., vol. 6, p. 219, at p. 225 (1984).

[516] In the *Velásquez Rodriguez*, Compensatory Damages case, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989)). See also *Letelier and Moffitt*, ILR, vol. 88, p. 727 (1992), concerning the assassination in Washington, D.C., by Chilean agents of a former Chilean minister; the *compromis* excluded any award of punitive damages, despite their availability under United States law. On punitive damages, see also N. Jørgensen, "A reappraisal of punitive damages in international law", BYBIL, *1997*, vol. 68, pp. 247–266; and S. Wittich, "Awe of the gods and fear of the priests: punitive damages in the law of State responsibility", *Austrian Review of International and European Law*, vol. 3, No. 1 (1998), p. 101.

[517] See paragraph (3) of the commentary to article 37.

[518] For the requirement of a sufficient causal link between the internationally wrongful act and the damage, see paragraphs (11) to (13) of the commentary to article 31.

[519] For example, the *M/V "Saiga"* case (see footnote 515 above), paras. 170–177.

[520] The Iran-United States Claims Tribunal has developed a substantial jurisprudence on questions of assessment of damage and the valuation of expropriated property. For reviews of the tribunal's juris-

(*Continued on next page.*)

bodies,[521] and ICSID tribunals under the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[522] Other compensation claims have been settled by agreement, normally on a without prejudice basis, with the payment of substantial compensation a term of the agreement.[523] The rules and principles developed by these bodies in assessing compensation can be seen as manifestations of the general principle stated in article 36.

(7) As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a concern to reach an equitable and acceptable outcome.[524] The following examples illustrate the types of damage that may be compensable and the methods of quantification that may be employed.

(8) Damage to the State as such might arise out of the shooting down of its aircraft or the sinking of its ships, attacks on its diplomatic premises and personnel, damage caused to other public property, the costs incurred in responding to pollution damage, or incidental damage arising, for example, out of the need to pay pensions and medical expenses for officials injured as the result of a wrongful act. Such a list cannot be comprehensive and the categories of compensable injuries suffered by States are not closed.

(9) In the *Corfu Channel* case, the United Kingdom sought compensation in respect of three heads of damage: replacement of the destroyer *Saumarez*, which became a total loss, the damage sustained by the destroyer *"Volage"*, and the damage resulting from the deaths and injuries of naval personnel. ICJ entrusted the assessment to expert inquiry. In respect of the destroyer *Saumarez*, the Court found that "the true measure of compensation" was "the replacement cost of the [destroyer] at the time of its loss" and held that the amount of compensation claimed by the British Government (£ 700,087) was justified. For the damage to the destroyer *"Volage"*, the experts had reached a slightly lower figure than the £ 93,812 claimed by the United Kingdom, "explained by the necessarily approximate nature of the valuation, especially as regards stores and equipment". In addition to the amounts awarded for the damage to the two destroyers, the Court upheld the United Kingdom's claim for £ 50,048 representing "the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, etc".[525]

(10) In the *M/V "Saiga" (No. 2)* case, Saint Vincent and the Grenadines sought compensation from Guinea following the wrongful arrest and detention of a vessel registered in Saint Vincent and the Grenadines, the *"Saiga"*, and its crew. ITLOS awarded compensation of US$ 2,123,357 with interest. The heads of damage compensated included, *inter alia*, damage to the vessel, including costs of repair, losses suffered with respect to charter hire of the vessel, costs related to the detention of the vessel, and damages for the detention of the captain, members of the crew and others on board the vessel. Saint Vincent and the Grenadines had claimed compensation for the violation of its rights in respect of ships flying its flag occasioned by the arrest and detention of the *"Saiga"*; however, the tribunal considered that its declaration that Guinea acted wrongfully in arresting the vessel in the circumstances, and in using excessive force, constituted adequate reparation.[526] Claims regarding the loss of registration revenue due to the illegal arrest of the vessel and for the expenses resulting from the time lost by officials in dealing with the arrest and detention of the ship and its crew were also unsuccessful. In respect of the former, the tribunal held that Saint Vincent and the Grenadines failed to produce supporting evidence. In respect of the latter, the tribunal considered that such expenses were not recoverable since they were incurred in the exercise of the normal functions of a flag State.[527]

(11) In a number of cases, payments have been directly negotiated between injured and injuring States following wrongful attacks on ships causing damage or sinking of the vessel, and in some cases, loss of life and injury among the crew.[528] Similar payments have been negotiated where damage is caused to aircraft of a State, such as

(*Footnote 520 continued.*)

prudence on these subjects, see, *inter alia*, Aldrich, *op. cit.* (footnote 357 above), chaps. 5–6 and 12; C. N. Brower and J. D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Martinus Nijhoff, 1998), chaps. 14–18; M. Pellonpää, "Compensable claims before the Tribunal: expropriation claims", *The Iran-United States Claims Tribunal*: *Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. MaGraw, eds. (Irvington-on-Hudson, Transnational, 1998), pp. 185–266; and D. P. Stewart, "Compensation and valuation issues", *ibid*., pp. 325–385.

[521] For a review of the practice of such bodies in awarding compensation, see D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999), pp. 214–279.

[522] ICSID tribunals have jurisdiction to award damages or other remedies in cases concerning investments arising between States parties and nationals. Some of these claims involve direct recourse to international law as a basis of claim. See, e.g., *Asian Agricultural Products Limited* v. *Republic of Sri Lanka*, *ICSID Reports* (Cambridge University Press, 1997), vol. 4, p. 245 (1990).

[523] See, e.g., *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote 230 above), and for the Court's order of discontinuance following the settlement, *ibid., Order* (footnote 232 above); *Passage through the Great Belt (Finland* v. *Denmark)*, *Order of 10 September 1992, I.C.J. Reports 1992*, p. 348 (order of discontinuance following settlement); and *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America), Order of 22 February 1996, I.C.J. Reports 1996,* p. 9 (order of discontinuance following settlement).

[524] See Aldrich, *op. cit.* (footnote 357 above), p. 242. See also Graefrath, "Responsibility and damages caused: relationship between responsibility and damages" (footnote 454 above), p. 101; L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938); Gray, *op. cit.* (footnote 432 above), pp. 33–34; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, 1939); and M. Iovane, *La riparazione nella teoria e nella prassi dell'illecito internazionale* (Milan, Giuffrè, 1990).

[525] *Corfu Channel, Assessment of Amount of Compensation* (see footnote 473 above), p. 249.

[526] The *M/V "Saiga"* case (see footnote 515 above), para. 176.

[527] *Ibid*., para. 177.

[528] See the payment by Cuba to the Bahamas for the sinking by Cuban aircraft on the high seas of a Bahamian vessel, with loss of life among the crew (RGDIP, vol. 85 (1981), p. 540), the payment of compensation by Israel for an attack in 1967 on the USS *Liberty*, with loss of life and injury among the crew (*ibid.*, p. 562), and the payment by Iraq of US$ 27 million for the 37 deaths which occurred in May 1987 when Iraqi aircraft severely damaged the USS *Stark* (AJIL, vol. 83, No. 3 (July 1989), p. 561).

the "full and final settlement" agreed between the Islamic Republic of Iran and the United States following a dispute over the destruction of an Iranian aircraft and the killing of its 290 passengers and crew.[529]

(12) Agreements for the payment of compensation are also frequently negotiated by States following attacks on diplomatic premises, whether in relation to damage to the embassy itself[530] or injury to its personnel.[531] Damage caused to other public property, such as roads and infrastructure, has also been the subject of compensation claims.[532] In many cases, these payments have been made on an *ex gratia* or a without prejudice basis, without any admission of responsibility.[533]

(13) Another situation in which States may seek compensation for damage suffered by the State as such is where costs are incurred in responding to pollution damage. Following the crash of the Soviet *Cosmos 954* satellite on Canadian territory in January 1978, Canada's claim for compensation for expenses incurred in locating, recovering, removing and testing radioactive debris and cleaning up affected areas was based "jointly and separately on (a) the relevant international agreements … and (b) general principles of international law".[534] Canada asserted that it was applying "the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty".[535] The claim was eventually settled in April 1981 when the parties agreed on an *ex gratia* payment of Can$ 3 million (about 50 per cent of the amount claimed).[536]

(14) Compensation claims for pollution costs have been dealt with by UNCC in the context of assessing Iraq's liability under international law "for any direct loss, damage—including environmental damage and the depletion of natural resources … as a result of its unlawful invasion and occupation of Kuwait".[537] The UNCC Governing Council decision 7 specifies various heads of damage encompassed by "environmental damage and the depletion of natural resources".[538]

(15) In cases where compensation has been awarded or agreed following an internationally wrongful act that causes or threatens environmental damage, payments have been directed to reimbursing the injured State for expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in the value of polluted property.[539] However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc.—sometimes referred to as "non-use values") is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.

(16) Within the field of diplomatic protection, a good deal of guidance is available as to appropriate compensation standards and methods of valuation, especially as concerns personal injury and takings of, or damage to, tangible property. It is well established that a State may seek compensation in respect of personal injuries suffered by its officials or nationals, over and above any direct injury it may itself have suffered in relation to the same event. Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as "moral damage" in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life. No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the *"Lusitania"* case.[540] The umpire considered that international law provides compensation for mental

[529] *Aerial Incident of 3 July 1988* (see footnote 523 above) (order of discontinuance following settlement). For the settlement agreement itself, see the General Agreement on the Settlement of Certain International Court of Justice and Tribunal Cases (1996), attached to the Joint Request for Arbitral Award on Agreed Terms, Iran-U.S. C.T.R., vol. 32, pp. 213–216 (1996).

[530] See, e.g., the Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia concerning the losses incurred by the Government of the United Kingdom and by British nationals as a result of the disturbances in Indonesia in September 1963 (1 December 1966) for the payment by Indonesia of compensation for, *inter alia*, damage to the British Embassy during mob violence (*Treaty Series No. 34 (1967)*) (London, HM Stationery Office) and the payment by Pakistan to the United States of compensation for the sacking of the United States Embassy in Islamabad in 1979 (RGDIP, vol. 85 (1981), p. 880).

[531] See, e.g., Claim of Consul *Henry R. Myers (United States* v. *Salvador)* (1890), *Papers relating to the Foreign Relations of the United States*, pp. 64–65; (1892), pp. 24–44 and 49–51; (1893), pp. 174–179, 181–182 and 184; and Whiteman, *Damages in International Law* (footnote 347 above), pp. 80–81.

[532] For examples, see Whiteman, *Damages in International Law* (footnote 347 above), p. 81.

[533] See, e.g., the United States-China agreement providing for an *ex gratia* payment of US$ 4.5 million, to be given to the families of those killed and to those injured in the bombing of the Chinese Embassy in Belgrade on 7 May 1999, AJIL, vol. 94, No. 1 (January 2000), p. 127.

[534] The claim of Canada against the Union of Soviet Socialist Republics for damage caused by *Cosmos 954*, 23 January 1979 (see footnote 459 above), pp. 899 and 905.

[535] *Ibid*., p. 907.

[536] Protocol between Canada and the Union of Soviet Socialist Republics in respect of the claim for damages caused by the Satellite "Cosmos 954" (Moscow, 2 April 1981), United Nations, *Treaty Series*, vol. 1470, No. 24934, p. 269. See also ILM, vol. 20, No. 3 (May 1981), p. 689.

[537] Security Council resolution 687 (1991), para. 16 (see footnote 461 above).

[538] Decision 7 of 16 March 1992, Criteria for additional categories of claims (S/AC.26/1991/7/Rev.1), para 35.

[539] See the decision of the arbitral tribunal in the *Trail Smelter* case (footnote 253 above), p. 1911, which provided compensation to the United States for damage to land and property caused by sulphur dioxide emissions from a smelter across the border in Canada. Compensation was assessed on the basis of the reduction in value of the affected land.

[540] See footnote 514 above. International tribunals have frequently granted pecuniary compensation for moral injury to private parties. For example, the *Chevreau* case (see footnote 133 above) (English translation in AJIL, vol. 27, No. 1 (January 1933), p. 153); the *Gage* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 226 (1903); the *Di Caro* case, *ibid*., vol. X (Sales No. 60.V.4), p. 597 (1903); and the *Heirs of Jean Maninat* case, *ibid*., p. 55 (1903).

suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation, such injuries being "very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated …".[541]

(17) International courts and tribunals have undertaken the assessment of compensation for personal injury on numerous occasions. For example, in the *M/V "Saiga"* case, [542] the tribunal held that Saint Vincent and the Grenadines' entitlement to compensation included damages for injury to the crew, their unlawful arrest, detention and other forms of ill-treatment.

(18) Historically, compensation for personal injury suffered by nationals or officials of a State arose mainly in the context of mixed claims commissions dealing with State responsibility for injury to aliens. Claims commissions awarded compensation for personal injury both in cases of wrongful death and deprivation of liberty. Where claims were made in respect of wrongful death, damages were generally based on an evaluation of the losses of the surviving heirs or successors, calculated in accordance with the well-known formula of Umpire Parker in the *"Lusitania"* case:

> Estimate the amounts (*a*) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (*b*) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (*c*) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.[543]

In cases of deprivation of liberty, arbitrators sometimes awarded a set amount for each day spent in detention.[544] Awards were often increased when abusive conditions of confinement accompanied the wrongful arrest and imprisonment, resulting in particularly serious physical or psychological injury.[545]

(19) Compensation for personal injury has also been dealt with by human rights bodies, in particular the European Court of Human Rights and the Inter-American Court of Human Rights. Awards of compensation encompass material losses (loss of earnings, pensions, medical expenses, etc.) and non-material damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment. Hitherto, amounts of compensation or damages awarded or recommended by these bodies have been modest.[546] Nonetheless, the decisions of human rights bodies on compensation draw on principles of reparation under general international law.[547]

(20) In addition to a large number of lump-sum compensation agreements covering multiple claims,[548] property claims of nationals arising out of an internationally wrongful act have been adjudicated by a wide range of *ad hoc* and standing tribunals and commissions, with reported cases spanning two centuries. Given the diversity of adjudicating bodies, the awards exhibit considerable variability.[549] Nevertheless, they provide useful principles to guide the determination of compensation under this head of damage.

(21) The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses.

(22) Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the "fair market value" of the property lost.[550] The method used to

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[541] *"Lusitania"* (see footnote 514 above), p. 40.

[542] See footnote 515 above.

[543] *"Lusitania"* (see footnote 514 above), p. 35.

[544] For example, the *"Topaze"* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 387, at p. 389 (1903); and the *Faulkner* case, *ibid*., vol. IV (Sales No. 1951.V.1), p. 67, at p. 71 (1926).

[545] For example, the *William McNeil* case, *ibid*., vol. V (Sales No. 1952.V.3), p. 164, at p. 168 (1931).

[546] See the review by Shelton, *op. cit.* (footnote 521 above), chaps. 8–9; A. Randelzhofer and C. Tomuschat, eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague, Martinus Nijhoff, 1999); and R. Pisillo Mazzeschi, "La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione europea", *La Comunità internazionale*, vol. 53, No. 2 (1998), p. 215.

[547] See, e.g., the decision of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case (footnote 63 above), pp. 26–27 and 30–31. Cf. *Papamichalopoulos* (footnote 515 above).

[548] See, e.g., R. B. Lillich and B. H. Weston, *International Claims*: *Their Settlement by Lump Sum Agreements* (Charlottesville, University Press of Virginia, 1975); and B. H. Weston, R. B. Lillich and D. J. Bederman, *International Claims*: *Their Settlement by Lump Sum Agreements, 1975–1995* (Ardsley, N.Y., Transnational, 1999).

[549] Controversy has persisted in relation to expropriation cases, particularly over standards of compensation applicable in the light of the distinction between lawful expropriation of property by the State on the one hand, and unlawful takings on the other, a distinction clearly drawn by PCIJ in *Factory at Chorzów, Merits* (footnote 34 above), p. 47. In a number of cases, tribunals have employed the distinction to rule in favour of compensation for lost profits in cases of unlawful takings (see, e.g., the observations of the arbitrator in *Libyan American Oil Company (LIAMCO)* (footnote 508 above), pp. 202–203; and also the *Aminoil* arbitration (footnote 496 above), p. 600, para. 138; and *Amoco International Finance Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 15, p. 189, at p. 246, para. 192 (1987)). Not all cases, however, have drawn a distinction between the applicable compensation principles based on the lawfulness or unlawfulness of the taking. See, e.g., the decision of the Iran-United States Claims Tribunal in *Phillips Petroleum* (footnote 164 above), p. 122, para. 110. See also *Starrett Housing Corporation* v. *Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 16, p. 112 (1987), where the tribunal made no distinction in terms of the lawfulness of the taking and its award included compensation for lost profits.

[550] See *American International Group, Inc*. v. *The Islamic Republic of Iran*, which stated that, under general international law, "the valuation should be made on the basis of the fair market value of the shares", Iran-U.S. C.T.R., vol. 4, p. 96, at p. 106 (1983). In *Starrett Housing Corporation* (see footnote 549 above), the tribunal accepted its expert's concept of fair market value "as the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat" (p. 201). See also the Guidelines on the Treatment of Foreign Direct Investment, which state in paragraph 3 of part IV that compensation "will be deemed 'adequate' if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known", World Bank, *Legal Framework*

assess "fair market value", however, depends on the nature of the asset concerned. Where the property in question or comparable property is freely traded on an open market, value is more readily determined. In such cases, the choice and application of asset-based valuation methods based on market data and the physical properties of the assets is relatively unproblematic, apart from evidentiary difficulties associated with long outstanding claims.[551] Where the property interests in question are unique or unusual, for example, art works or other cultural property,[552] or are not the subject of frequent or recent market transactions, the determination of value is more difficult. This may be true, for example, in respect of certain business entities in the nature of a going concern, especially if shares are not regularly traded.[553]

(23) Decisions of various *ad hoc* tribunals since 1945 have been dominated by claims in respect of nationalized business entities. The preferred approach in these cases has been to examine the assets of the business, making allowance for goodwill and profitability, as appropriate. This method has the advantage of grounding compensation as much as possible in some objective assessment of value linked to the tangible asset backing of the business. The value of goodwill and other indicators of profitability may be uncertain, unless derived from information provided by a recent sale or acceptable arms-length offer. Yet, for profitable business entities where the whole is greater than the sum of the parts, compensation would be incomplete without paying due regard to such factors.[554]

(24) An alternative valuation method for capital loss is the determination of net book value, i.e. the difference between the total assets of the business and total liabilities as shown on its books. Its advantages are that the figures can be determined by reference to market costs, they are normally drawn from a contemporaneous record, and they are based on data generated for some other purpose than supporting the claim. Accordingly, net book value (or some variant of this method) has been employed to assess the value of businesses. The limitations of the method lie in the reliance on historical figures, the use of accounting principles which tend to undervalue assets, especially in periods of inflation, and the fact that the purpose for which the figures were produced does not take account of the compensation context and any rules specific to it. The balance sheet may contain an entry for goodwill, but the reliability of such figures depends upon their proximity to the moment of an actual sale.

(25) In cases where a business is not a going concern,[555] so-called "break-up", "liquidation" or "dissolution" value is generally employed. In such cases, no provision is made for value over and above the market value of the individual assets. Techniques have been developed to construct, in the absence of actual transactions, hypothetical values representing what a willing buyer and willing seller might agree.[556]

(26) Since 1945, valuation techniques have been developed to factor in different elements of risk and probability.[557] The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets. Although developed as a tool for assessing commercial value, it can also be useful in the context of calculating value for compensation purposes.[558] But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a

*for the Treatment of Foreign Investment* (Washington, D.C., 1992), vol. II, p. 41. Likewise, according to article 13, paragraph 1, of the Energy Charter Treaty, compensation for expropriation "shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation".

[551] Particularly in the case of lump-sum settlements, agreements have been concluded decades after the claims arose. See, e.g., the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics concerning the Settlement of Mutual Financial and Property Claims arising before 1939 of 15 July 1986 (*Treaty Series*, No. 65 (1986)) (London, HM Stationery Office) concerning claims dating back to 1917 and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China concerning the Settlement of Mutual Historical Property Claims of 5 June 1987 (*Treaty Series*, No. 37 (1987), *ibid*.) in respect of claims arising in 1949. In such cases, the choice of valuation method was sometimes determined by availability of evidence.

[552] See Report and recommendations made by the panel of Commissioners concerning part two of the first instalment of individual claims for damages above US$ 100 000 (category "D" claims), 12 March 1998 (S/AC.26/1998/3), paras. 48–49, where UNCC considered a compensation claim in relation to the taking of the claimant's Islamic art collection by Iraqi military personnel.

[553] Where share prices provide good evidence of value, they may be utilized, as in *INA Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 8, p. 373 (1985).

[554] Early claims recognized that even where a taking of property was lawful, compensation for a going concern called for something more than the value of the property elements of the business. The American-Mexican Claims Commission, in rejecting a claim for lost profits in the case of a lawful taking, stated that payment for property elements would be "augmented by the existence of those elements which constitute a going concern": *Wells Fargo and Company (Decision No. 22–B)* (1926), American-Mexican Claims Commission (Washington, D.C., United States Government Printing Office, 1948), p. 153 (1926). See also decision No. 9 of the UNCC Governing Council in "Propositions and conclusions on compensation for business losses: types of damages and their valuation" (S/AC.26/1992/9), para. 16.

[555] For an example of a business found not to be a going concern, see *Phelps Dodge Corp.* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 10, p. 121 (1986), where the enterprise had not been established long enough to demonstrate its viability. In *SEDCO, Inc.* v. *National Iranian Oil Co.*, the claimant sought dissolution value only, *ibid*., p. 180 (1986).

[556] The hypothetical nature of the result is discussed in *Amoco International Finance Corporation* (see footnote 549 above), at pp. 256–257, paras. 220–223.

[557] See, for example, the detailed methodology developed by UNCC for assessing Kuwaiti corporate claims (report and recommendations made by the panel of Commissioners concerning the first instalment of "E4" claims, 19 March 1999 (S/AC.26/1999/4), paras. 32–62) and claims filed on behalf of non-Kuwaiti corporations and other business entities, excluding oil sector, construction/engineering and export guarantee claims (report and recommendations made by the panel of Commissioners concerning the third instalment of "E2" claims, 9 December 1999 (S/AC.26/1999/22)).

[558] The use of the discounted cash flow method to assess capital value was analysed in some detail in *Amoco International Finance Corporation* (see footnote 549 above); *Starrett Housing Corporation* (*ibid.*); *Phillips Petroleum Company Iran* (see footnote 164 above); and *Ebrahimi (Shahin Shaine)* v. *Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 30, p. 170 (1994).

cautious approach to the use of the method. Hence, although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.[559] A particular concern is the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits.[560]

(27) *Paragraph 2* of article 36 recognizes that in certain cases compensation for loss of profits may be appropriate. International tribunals have included an award for loss of profits in assessing compensation: for example, the decisions in the *Cape Horn Pigeon* case[561] and *Sapphire International Petroleums Ltd.* v. *National Iranian Oil Company*.[562] Loss of profits played a role in the *Factory at Chorzów* case itself, PCIJ deciding that the injured party should receive the value of property by way of damages not as it stood at the time of expropriation but at the time of indemnification.[563] Awards for loss of profits have also been made in respect of contract-based lost profits in *Libyan American Oil Company (LIAMCO)*[564] and in some ICSID arbitrations.[565] Nevertheless, lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.[566] When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future projections are made. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.[567] This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.[568]

(28) Three categories of loss of profits may be distinguished: first, lost profits from income-producing property during a period when there has been no interference with title as distinct from temporary loss of use; secondly, lost profits from income-producing property between the date of taking of title and adjudication;[569] and thirdly, lost future profits in which profits anticipated after the date of adjudication are awarded.[570]

(29) The first category involves claims for loss of profits due to the temporary loss of use and enjoyment of the income-producing asset.[571] In these cases there is no interference with title and hence in the relevant period the loss compensated is the income to which the claimant was entitled by virtue of undisturbed ownership.

(30) The second category of claims relates to the unlawful taking of income-producing property. In such cases

[559] See, e.g., *Amoco* (footnote 549 above); *Starrett Housing Corporation* (*ibid.*); and *Phillips Petroleum Company Iran* (footnote 164 above). In the context of claims for lost profits, there is a corresponding preference for claims to be based on past performance rather than forecasts. For example, the UNCC guidelines on valuation of business losses in decision 9 (see footnote 554 above) state: "The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future" (para. 19).

[560] See, e.g., *Ebrahimi* (footnote 558 above), p. 227, para. 159.

[561] *Navires* (see footnote 222 above) (*Cape Horn Pigeon* case), p. 63 (1902) (including compensation for lost profits resulting from the seizure of an American whaler). Similar conclusions were reached in the *Delagoa Bay Railway* case, Martens, *op. cit.* (footnote 441 above), vol. XXX, p. 329 (1900); Moore, *History and Digest*, vol. II, p. 1865 (1900); the *William Lee* case (footnote 139 above), pp. 3405–3407; and the *Yuille Shortridge and Co.* case *(Great Britain* v. *Portugal)*, Lapradelle–Politis, *op. cit.* (*ibid*.), vol. II, p. 78 (1861). Contrast the decisions in the *Canada* case *(United States of America* v. *Brazil)*, Moore, *History and Digest*, vol. II, p. 1733 (1870) and the *Lacaze* case (footnote 139 above).

[562] ILR, vol. 35, p. 136, at pp. 187 and 189 (1963).

[563] *Factory at Chorzów, Merits* (see footnote 34 above), pp. 47–48 and 53.

[564] *Libyan American Oil Company (LIAMCO)* (see footnote 508 above), p. 140.

[565] See, e.g., *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, *First Arbitration* (1984); *Annulment* (1986); *Resubmitted case* (1990), *ICSID Reports* (Cambridge, Grotius, 1993), vol. 1, p. 377; and *AGIP SpA* v. *the Government of the People's Republic of the Congo*, *ibid*., p. 306 (1979).

[566] According to the arbitrator in the *Shufeldt* case (see footnote 87 above), "the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative" (p. 1099). See also *Amco Asia Corporation and Others* (footnote 565 above), where it was stated that "non-speculative profits" were recoverable (p. 612, para. 178). UNCC has also stressed the requirement for claimants to provide "clear and convincing evidence of ongoing and expected profitability" (see report and recommendations made by the panel of Commissioners concerning the first instalment of "E3" claims, 17 December 1998 (S/AC.26/1998/13), para. 147). In assessing claims for lost profits on construction contracts, Panels have generally required that the claimant's calculation take into account the risk inherent in the project (*ibid*., para. 157; report and recommendations made by the panel of Commissioners concerning the fourth instalment of "E3" claims, 30 September 1999 (S/AC.26/1999/14), para. 126).

[567] In considering claims for future profits, the UNCC panel dealing with the fourth instalment of "E3" claims expressed the view that in order for such claims to warrant a recommendation, "it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e. profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded" (S/AC.26/1999/14), para. 140 (see footnote 566 above).

[568] According to Whiteman, "in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible" (*Damages in International Law* (Washington, D.C., United States Government Printing Office, 1943), vol. III, p. 1837).

[569] This is most commonly associated with the deprivation of property, as opposed to wrongful termination of a contract or concession. If restitution were awarded, the award of lost profits would be analogous to cases of temporary dispossession. If restitution is not awarded, as in the *Factory at Chorzów, Merits* (see footnote 34 above) and *Norwegian Shipowners' Claims* (footnote 87 above), lost profits may be awarded up to the time when compensation is made available as a substitute for restitution.

[570] Awards of lost future profits have been made in the context of a contractually protected income stream, as in *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, *First Arbitration*; *Annulment; Resubmitted case* (see footnote 565 above), rather than on the basis of the taking of income-producing property. In the UNCC report and recommendations on the second instalment of "E2" claims, dealing with reduced profits, the panel found that losses arising from a decline in business were compensable even though tangible property was not affected and the businesses continued to operate throughout the relevant period (S/AC.26/1999/6, para. 76).

[571] Many of the early cases concern vessels seized and detained. In the *"Montijo"*, an American vessel seized in Panama, the Umpire allowed a sum of money per day for loss of the use of the vessel (see footnote 117 above). In the *"Betsey"*, compensation was awarded not only for the value of the cargo seized and detained, but also for demurrage for the period representing loss of use: Moore, *International Adjudications* (New York, Oxford University Press, 1933) vol. V, p. 47, at p. 113.

lost profits have been awarded for the period up to the time of adjudication. In the *Factory at Chorzów* case,[572] this took the form of re-invested income, representing profits from the time of taking to the time of adjudication. In the *Norwegian Shipowners' Claims* case,[573] lost profits were similarly not awarded for any period beyond the date of adjudication. Once the capital value of income-producing property has been restored through the mechanism of compensation, funds paid by way of compensation can once again be invested to re-establish an income stream. Although the rationale for the award of lost profits in these cases is less clearly articulated, it may be attributed to a recognition of the claimant's continuing beneficial interest in the property up to the moment when potential restitution is converted to a compensation payment.[574]

(31) The third category of claims for loss of profits arises in the context of concessions and other contractually protected interests. Again, in such cases, lost future income has sometimes been awarded.[575] In the case of contracts, it is the future income stream which is compensated, up to the time when the legal recognition of entitlement ends. In some contracts this is immediate, e.g. where the contract is determinable at the instance of the State,[576] or where some other basis for contractual termination exists. Or it may arise from some future date dictated by the terms of the contract itself.

(32) In other cases, lost profits have been excluded on the basis that they were not sufficiently established as a legally protected interest. In the *Oscar Chinn* case[577] a monopoly was not accorded the status of an acquired right. In the *Asian Agricultural Products* case,[578] a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings. Claims for lost profits are also subject to the usual range of limitations on the recovery of damages, such as causation, remoteness, evidentiary requirements and accounting principles, which seek to discount speculative elements from projected figures.

(33) If loss of profits are to be awarded, it is inappropriate to award interest under article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation.

(34) It is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach.[579] Such expenses may be associated, for example, with the displacement of staff or the need to store or sell undelivered products at a loss.

### *Article 37. Satisfaction*

**1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.**

**2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.**

**3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.**

*Commentary*

(1) Satisfaction is the third form of reparation which the responsible State may have to provide in discharge of its obligation to make full reparation for the injury caused by an internationally wrongful act. It is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation. The rather exceptional character of the remedy of satisfaction, and its relationship to the principle of full reparation, are emphasized by the phrase "insofar as [the injury] cannot be made good by restitution or compensation". It is only in those cases where those two forms have not provided full reparation that satisfaction may be required.

(2) Article 37 is divided into three paragraphs, each dealing with a separate aspect of satisfaction. Paragraph 1 addresses the legal character of satisfaction and the types of injury for which it may be granted. Paragraph 2 describes, in a non-exhaustive fashion, some modalities of satisfaction. Paragraph 3 places limitations on the obliga-

[572] *Factory at Chorzów, Merits* (see footnote 34 above).

[573] *Norwegian Shipowners' Claims* (see footnote 87 above).

[574] For the approach of UNCC in dealing with loss of profits claims associated with the destruction of businesses following the Iraqi invasion of Kuwait, see S/AC.26/1999/4 (footnote 557 above), paras. 184–187.

[575] In some cases, lost profits were not awarded beyond the date of adjudication, though for reasons unrelated to the nature of the income-producing property. See, e.g., *Robert H. May (United States* v. *Guatemala)*, 1900 For. Rel. 648; and Whiteman, *Damages in International Law*, vol. III (footnote 568 above), pp. 1704 and 1860, where the concession had expired. In other cases, circumstances giving rise to *force majeure* had the effect of suspending contractual obligations: see, e.g., *Gould Marketing, Inc.* v. *Ministry of Defence of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 6, p. 272 (1984); and *Sylvania Technical Systems, Inc.* v. *The Government of the Islamic Republic of Iran, ibid*., vol. 8, p. 298 (1985). In the *Delagoa Bay Railway* case (footnote 561 above), and in *Shufeldt* (see footnote 87 above), lost profits were awarded in respect of a concession which had been terminated. In *Sapphire International Petroleums Ltd.* (see footnote 562 above), p. 136; *Libyan American Oil Company (LIAMCO)* (see footnote 508 above), p. 140; and *Amco Asia Corporation and Others* v. *The Republic of Indonesia, First Arbitration; Annulment; Resubmitted case* (see footnote 565 above), awards of lost profits were also sustained on the basis of contractual relationships.

[576] As in *Sylvania Technical Systems, Inc.* (see the footnote above).

[577] See footnote 385 above.

[578] See footnote 522 above.

[579] Compensation for incidental expenses has been awarded by UNCC (report and recommendations on the first instalment of "E2" claims (S/AC.26/1998/7) where compensation was awarded for evacuation and relief costs (paras. 133, 153 and 249), repatriation (para. 228), termination costs (para. 214), renovation costs (para. 225) and expenses in mitigation (para. 183)), and by the Iran-United States Claims Tribunal (see *General Electric Company* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 26, p. 148, at pp. 165–169, paras. 56–60 and 67–69 (1991), awarding compensation for items resold at a loss and for storage costs).

tion to give satisfaction, having regard to former practices in cases where unreasonable forms of satisfaction were sometimes demanded.

(3) In accordance with paragraph 2 of article 31, the injury for which a responsible State is obliged to make full reparation embraces "any damage, whether material or moral, caused by the internationally wrongful act of a State". Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.

(4) The availability of the remedy of satisfaction for injury of this kind, sometimes described as "non-material injury",[580] is well established in international law. The point was made, for example, by the tribunal in the *"Rainbow Warrior"* arbitration:

> There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities.[581]

State practice also provides many instances of claims for satisfaction in circumstances where the internationally wrongful act of a State causes non-material injury to another State. Examples include situations of insults to the symbols of the State, such as the national flag,[582] violations of sovereignty or territorial integrity,[583] attacks on ships or aircraft,[584] ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons[585] and violations of the premises of embassies or consulates or of the residences of members of the mission.[586]

(5) *Paragraph 2* of article 37 provides that satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. The forms of satisfaction listed in the article are no more than examples. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.[587] Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or injury,[588] a trust fund to manage compensation payments in the interests of the beneficiaries, disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act[589] or the award of symbolic damages for non-pecuniary injury.[590] Assurances or guarantees of non-repetition, which are dealt with in the articles in the context of cessation, may also amount to a form of satisfaction.[591] Paragraph 2 does not attempt to list all the possibilities, but neither is it intended to exclude them. Moreover, the order of the modalities of satisfaction in paragraph 2 is not intended to reflect any hierarchy or preference. Paragraph 2 simply gives examples which are not listed in order of appropriateness or seriousness. The appropriate mode, if any, will be determined having regard to the circumstances of each case.

(6) One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal. The utility of declaratory relief as a form of satisfaction in the case of non-material injury to a State was affirmed by ICJ in the *Corfu Channel* case, where the Court, after finding unlawful a minesweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:

> [T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.

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[580] See C. Dominicé, "De la réparation constructive du préjudice immatériel souffert par un État", *L'ordre juridique international entre tradition et innovation: recueil d'études* (Paris, Presses Universitaires de France, 1997), p. 349, at p. 354.

[581] *"Rainbow Warrior"* (see footnote 46 above), pp. 272–273, para. 122.

[582] Examples are the *Magee* case (Whiteman, *Damages in International Law*, vol. I (see footnote 347 above), p. 64 (1874)), the *Petit Vaisseau* case (*La prassi italiana di diritto internazionale*, 2nd series (see footnote 498 above), vol. III, No. 2564 (1863)) and the case that arose from the insult to the French flag in Berlin in 1920 (C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), pp. 186–187).

[583] As occurred in the *"Rainbow Warrior"* arbitration (see footnote 46 above).

[584] Examples include the attack carried out in 1961 against a Soviet aircraft transporting President Brezhnev by French fighter planes over the international waters of the Mediterranean (RGDIP, vol. 65 (1961), p. 603); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (*ibid*., vol. 84 (1980), pp. 1078–1079).

[585] See F. Przetacznik, "La responsabilité internationale de l'État à raison des préjudices de caractère moral et politique causés à un autre État", RGDIP, vol. 78 (1974), p. 919, at p. 951.

[586] Examples include the attack by demonstrators in 1851 on the Spanish Consulate in New Orleans (Moore, *Digest*, vol. VI, p. 811, at p. 812), and the failed attempt of two Egyptian policemen, in 1888, to intrude upon the premises of the Italian Consulate at Alexandria (*La prassi italiana di diritto internazionale*, 2nd series (see footnote 498 above), vol. III, No. 2558). Also see cases of apologies and expressions of regret following demonstrations in front of the French Embassy in Belgrade in 1961 (RGDIP, vol. 65 (1961), p. 610), and the fires in the libraries of the United States Information Services in Cairo in 1964 (*ibid*., vol. 69 (1965), pp. 130–131) and in Karachi in 1965 (*ibid*., vol. 70 (1966), pp. 165–166).

[587] In the *"Rainbow Warrior"* arbitration the tribunal, while rejecting New Zealand's claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation "to assist [the parties] in putting an end to the present unhappy affair". Specifically, it recommended that France contribute US$ 2 million to a fund to be established "to promote close and friendly relations between the citizens of the two countries" (see footnote 46 above), p. 274, paras. 126–127. See also L. Migliorino, "Sur la déclaration d'illicéité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du Rainbow Warrior", RGDIP, vol. 96 (1992), p. 61.

[588] For example, the United States naval inquiry into the causes of the collision between an American submarine and the Japanese fishing vessel, the *Ehime Maru*, in waters off Honolulu, *The New York Times*, 8 February 2001, sect. 1, p. 1.

[589] Action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest of International Law*, vol. 8, pp. 742–743) and in the case of the killing of two United States officers in Tehran (RGDIP, vol. 80 (1976, p. 257).

[590] See, e.g., the cases *"I'm Alone"*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1609 (1935); and "*Rainbow Warrior"* (footnote 46 above).

[591] See paragraph (11) of the commentary to article 30.

This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.[592]

This has been followed in many subsequent cases.[593] However, while the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought. What the Court did in the *Corfu Channel* case was to use a declaration as a form of satisfaction in a case where Albania had sought no other form. Moreover, such a declaration has further advantages: it should be clear and self-contained and will by definition not exceed the scope or limits of satisfaction referred to in paragraph 3 of article 37. A judicial declaration is not listed in paragraph 2 only because it must emanate from a competent third party with jurisdiction over a dispute, and the articles are not concerned to specify such a party or to deal with issues of judicial jurisdiction. Instead, article 37 specifies the acknowledgement of the breach by the responsible State as a modality of satisfaction.

(7) Another common form of satisfaction is an apology, which may be given verbally or in writing by an appropriate official or even the Head of State. Expressions of regret or apologies were required in the *"I'm Alone"*,[594] *Kellett*[595] and *"Rainbow Warrior"*[596] cases, and were offered by the responsible State in the *Consular Relations*[597] and *LaGrand*[598] cases. Requests for, or offers of, an apology are a quite frequent feature of diplomatic practice and the tender of a timely apology, where the circumstances justify it, can do much to resolve a dispute. In other circumstances an apology may not be called for, e.g. where a case is settled on an *ex gratia* basis, or it may be insufficient. In the *LaGrand* case the Court considered that "an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties".[599]

(8) Excessive demands made under the guise of "satisfaction" in the past[600] suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of States.[601] In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. *Paragraph 3* of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; and secondly, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term "humiliating" is imprecise, but there are certainly historical examples of demands of this kind.

### *Article 38. Interest*

**1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.**

**2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.**

*Commentary*

(1) Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case. For this reason the term "principal sum" is used in article 38 rather than "compensation". Nevertheless, an award of interest may be required in some cases in order to provide full reparation for the injury caused by an internationally wrongful act, and it is normally the subject of separate treatment in claims for reparation and in the awards of tribunals.

(2) As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgement or award concerning, the claim and to the extent that it is necessary to ensure full reparation.[602] Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence.[603] In the *S.S. "Wimbledon"*, PCIJ awarded simple interest at 6 per cent as from the date of judgment, on the basis that interest was only payable "from the moment when the amount of the sum due

[592] *Corfu Channel, Merits* (see footnote 35 above), p. 35, repeated in the operative part (p. 36).

[593] For example, *"Rainbow Warrior"* (see footnote 46 above), p. 273, para. 123.

[594] See footnote 590 above.

[595] Moore, *Digest*, vol. V, p. 44 (1897).

[596] See footnote 46 above.

[597] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248. For the text of the United States' apology, see United States Department of State, Text of Statement Released in Asunción, Paraguay; Press statement by James P. Rubin, Spokesman, 4 November 1998. For the order discontinuing proceedings of 10 November 1998, see *I.C.J. Reports 1998*, p. 426.

[598] See footnote 119 above.

[599] *LaGrand*, *Merits* (*ibid.*), para. 123.

[600] For example, the joint note presented to the Chinese Government in 1900 following the Boxer uprising and the demand by the Conference of Ambassadors against Greece in the *Tellini* affair in 1923: see C. Eagleton, *op. cit.* (footnote 582 above), pp. 187–188.

[601] The need to prevent the abuse of satisfaction was stressed by early writers such as J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt*, 3rd ed. (Nördlingen, Beck, 1878); French translation by M. C. Lardy, *Le droit international codifié*, 5th rev. ed. (Paris, Félix Alcan, 1895), pp. 268–269.

[602] Thus, interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses* arbitration (footnote 182 above), pp. 252–253.

[603] See, e.g., the awards of interest made in the *Illinois Central Railroad Co. (U.S.A.)* v. *United Mexican States* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 134 (1926); and the *Lucas* case, ILR, vol. 30, p. 220 (1966); see also administrative decision No. III of the United States-Germany Mixed Claims Commission, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 66 (1923).

has been fixed and the obligation to pay has been established".[604]

(3) Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and where the injury was to the State itself.[605] The experience of the Iran-United States Claims Tribunal is worth noting. In *The Islamic Republic of Iran* v. *The United States of America (Case A–19)*, the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related "to the exercise … of the discretion accorded to them in deciding each particular case".[606] On the issue of principle the tribunal said:

> Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by [a]rticle V of the Claims Settlement Declaration to decide claims "on the basis of respect for law". In doing so, it has regularly treated interest, where sought, as forming an integral part of the "claim" which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as "compensation for damages suffered due to delay in payment". … Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*. Given that the power to award interest is inherent in the Tribunal's authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered.[607]

The tribunal has awarded interest at a different and slightly lower rate in respect of intergovernmental claims.[608] It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.[609]

(4) Decision 16 of the Governing Council of the United Nations Compensation Commission deals with the question of interest. It provides:

> 1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.
>
> 2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.
>
> 3. Interest will be paid after the principal amount of awards.[610]

This provision combines a decision in principle in favour of interest where necessary to compensate a claimant with flexibility in terms of the application of that principle. At the same time, interest, while a form of compensation, is regarded as a secondary element, subordinated to the principal amount of the claim.

(5) Awards of interest have also been envisaged by human rights courts and tribunals, even though the compensation practice of these bodies is relatively cautious and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time.[611]

(6) In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.[612] Some national court decisions have also dealt with issues of interest under international law,[613] although more often questions of interest are dealt with as part of the law of the forum.

(7) Although the trend of international decisions and practice is towards greater availability of interest as an aspect of full reparation, an injured State has no automatic entitlement to the payment of interest. The awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation. This approach is compatible with the tradition of various legal systems as well as the practice of international tribunals.

(8) An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example, the Iran-United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In *R.J. Reynolds Tobacco Co.* v. *The Government of the Islamic Republic of Iran*, the tribunal failed to find:

> any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, "[t]here are few rules within the scope of the

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[604] See footnote 34 above. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to "the present financial situation of the world and … the conditions prevailing for public loans".

[605] In the *M/V "Saiga"* case (see footnote 515 above), ITLOS awarded interest at different rates in respect of different categories of loss (para. 173).

[606] *The Islamic Republic of Iran* v. *The United States of America*, Iran-U.S. C.T.R., vol. 16, p. 285, at p. 290 (1987). Aldrich, *op. cit.* (see footnote 357 above), pp. 475–476, points out that the practice of the three Chambers has not been entirely uniform.

[607] *The Islamic Republic of Iran* v. *The United States of America* (see footnote 606 above), pp. 289–290.

[608] See C. N. Brower and J. D. Brueschke, *op. cit*. (footnote 520 above), pp. 626–627, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

[609] See the detailed analysis of Chamber Three in *McCollough and Company, Inc.* v. *Ministry of Post, Telegraph and Telephone*, Iran-U.S. C.T.R., vol. 11, p. 3, at pp. 26–31 (1986).

[610] Awards of interest, decision of 18 December 1992 (S/AC.26/1992/16).

[611] See, e.g., the *Velásquez Rodríguez*, Compensatory Damages case (footnote 516 above), para. 57. See also *Papamichalopoulos* (footnote 515 above), para. 39, where interest was payable only in respect of the pecuniary damage awarded. See further D. Shelton, *op. cit.* (footnote 521 above), pp. 270–272.

[612] See, e.g., the Foreign Compensation (People's Republic of China), Order, Statutory Instrument No. 2201 (1987) (London, HM Stationery Office), para. 10, giving effect to the settlement Agreement between the United Kingdom and China (footnote 551 above).

[613] See, e.g., *McKesson Corporation* v. *The Islamic Republic of Iran*, United States District Court for the District of Columbia, 116 F, Supp. 2d 13 (2000).

subject of damages in international law that are better settled than the one that compound interest is not allowable" … Even though the term "all sums" could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest. [614]

Consistent with this approach, the tribunal has gone behind contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit "wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts due at its disposal".[615] The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the *British Claims in the Spanish Zone of Morocco* case:

the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other … is unanimous … in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest.[616]

The same is true for compound interest in respect of State-to-State claims.

(9) Nonetheless, several authors have argued for a reconsideration of this principle, on the ground that "compound interest reasonably incurred by the injured party should be recoverable as an item of damage".[617] This view has also been supported by arbitral tribunals in some cases.[618] But given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.

(10) The actual calculation of interest on any principal sum payable by way of reparation raises a complex of issues concerning the starting date (date of breach,[619] date on which payment should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). There is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable.[620] In practice, the circumstances of each case and the conduct of the parties strongly affect the outcome. There is wisdom in the Iran-United States Claims Tribunal's observation that such matters, if the parties cannot resolve them, must be left "to the exercise … of the discretion accorded to [individual tribunals] in deciding each particular case".[621] On the other hand, the present unsettled state of practice makes a general provision on the calculation of interest useful. Accordingly, article 38 indicates that the date from which interest is to be calculated is the date when the principal sum should have been paid. Interest runs from that date until the date the obligation to pay is fulfilled. The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.

(11) Where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery. A capital sum cannot be earning interest *and* notionally employed in earning profits at one and the same time. However, interest may be due on the profits which would have been earned but which have been withheld from the original owner.

(12) Article 38 does not deal with post-judgement or moratory interest. It is only concerned with interest that goes to make up the amount that a court or tribunal should award, i.e. compensatory interest. The power of a court or tribunal to award post-judgement interest is a matter of its procedure.

### *Article 39. Contribution to the injury*

**In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought**.

#### *Commentary*

(1) Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially

[614] Iran-U.S. C.T.R., vol. 7, p. 181, at pp. 191–192 (1984), citing Whiteman, *Damages in International Law*, vol. III (see footnote 568 above), p. 1997.

[615] *Anaconda-Iran, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 13, p. 199, at p. 235 (1986). See also Aldrich, *op. cit.* (footnote 357 above), pp. 477–478.

[616] *British Claims in the Spanish Zone of Morocco* (see footnote 44 above), p. 650. Cf. the *Aminoil* arbitration (footnote 496 above), where the interest awarded was compounded for a period without any reason being given. This accounted for more than half of the total final award (p. 613, para. 178 (5)).

[617] F. A. Mann, "Compound interest as an item of damage in international law", *Further Studies in International Law* (Oxford, Clarendon Press, 1990), p. 377, at p. 383.

[618] See, e.g., *Compañía del Desarrollo de Santa Elena, S.A.* v. *Republic of Costa Rica*, case No. ARB/96/1, *ICSID Reports* (Cambridge, Grotius, 2002), vol. 5, final award (17 February 2000), paras. 103–105.

[619] Using the date of the breach as the starting date for calculation of the interest term is problematic as there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run. The date of formal demand was taken as the relevant date in the *Russian Indemnity* case (see footnote 354 above), p. 442, by analogy from the general position in European legal systems. In any event, failure to make a timely claim for payment is relevant in deciding whether to allow interest.

[620] See, e.g., J. Y. Gotanda, *Supplemental Damages in Private International Law* (The Hague, Kluwer, 1998), p. 13. It should be noted that a number of Islamic countries, influenced by the sharia, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example, payment of interest is prohibited by the Iranian Constitution, articles 43 and 49, but the Guardian Council has held that this injunction does not apply to "foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited" (*ibid*., pp. 38–40, with references).

[621] *The Islamic Republic of Iran* v. *The United States of America (Case No. A-19)* (see footnote 606 above).

contributed to the damage by some wilful or negligent act or omission. Its focus is on situations which in national law systems are referred to as "contributory negligence", "comparative fault", "faute de la victime", etc.[622]

(2) Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury—but nothing more—arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach.

(3) In the *LaGrand* case, ICJ recognized that the conduct of the claimant State could be relevant in determining the form and amount of reparation. There, Germany had delayed in asserting that there had been a breach and in instituting proceedings. The Court noted that "Germany may be criticized for the manner in which these proceedings were filed and for their timing", and stated that it would have taken this factor, among others, into account "had Germany's submission included a claim for indemnification".[623]

(4) The relevance of the injured State's contribution to the damage in determining the appropriate reparation is widely recognized in the literature[624] and in State practice.[625] While questions of an injured State's contribution to the damage arise most frequently in the context of compensation, the principle may also be relevant to other forms of reparation. For example, if a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition.

(5) Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights.[626] While the notion of a negligent action or omission is not qualified, e.g. by a requirement that the negligence should have reached the level of being "serious" or "gross", the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case.[627] The phrase "account shall be taken" indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.

(6) The wilful or negligent action or omission which contributes to the damage may be that of the injured State or "any person or entity in relation to whom reparation is sought". This phrase is intended to cover not only the situation where a State claims on behalf of one of its nationals in the field of diplomatic protection, but also any other situation in which one State invokes the responsibility of another State in relation to conduct primarily affecting some third party. Under articles 42 and 48, a number of different situations can arise where this may be so. The underlying idea is that the position of the State seeking reparation should not be more favourable, so far as reparation in the interests of another is concerned, than it would be if the person or entity in relation to whom reparation is sought were to bring a claim individually.

## CHAPTER III

## SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

### *Commentary*

(1) Chapter III of Part Two is entitled "Serious breaches of obligations under peremptory norms of general international law". It sets out certain consequences of specific types of breaches of international law, identified by reference to two criteria: first, they involve breaches of obligations under peremptory norms of general international law; and secondly, the breaches concerned are in themselves serious, having regard to their scale or character. Chapter III contains two articles, the first defining its scope of application (art. 40), the second spelling out the legal consequences entailed by the breaches coming within the scope of the chapter (art. 41).

(2) Whether a qualitative distinction should be recognized between different breaches of international law has been the subject of a major debate.[628] The issue was underscored by ICJ in the *Barcelona Traction* case, when it said that:

[622] See C. von Bar, *op. cit*. (footnote 315 above), pp. 544–569.

[623] *LaGrand, Judgment* (see footnote 119 above), at p. 487, para. 57, and p. 508, para. 116. For the relevance of delay in terms of loss of the right to invoke responsibility, see article 45, subparagraph (*b*), and commentary.

[624] See, e.g., B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages" (footnote 454 above) and B. Bollecker-Stern, *op. cit.* (footnote 454 above), pp. 265–300.

[625] In the *Delagoa Bay Railway* case (see footnote 561 above), the arbitrators noted that: "[a]ll the circumstances that can be adduced against the concessionaire company and for the Portuguese Government mitigate the latter's liability and warrant ... a reduction in reparation." In *S.S. "Wimbledon"* (see footnote 34 above), p. 31, a question arose as to whether there had been any contribution to the injury suffered as a result of the ship harbouring at Kiel for some time, following refusal of passage through the Kiel Canal, before taking an alternative course. PCIJ implicitly acknowledged that the captain's conduct could affect the amount of compensation payable, although it held that the captain had acted reasonably in the circumstances. For other examples, see Gray, *op. cit.* (footnote 432 above), p. 23.

[626] This terminology is drawn from article VI, paragraph 1, of the Convention on International Liability for Damage Caused by Space Objects.

[627] It is possible to envisage situations where the injury in question is entirely attributable to the conduct of the victim and not at all to that of the "responsible" State. Such situations are covered by the general requirement of proximate cause referred to in article 31, rather than by article 39. On questions of mitigation of damage, see paragraph (11) of the commentary to article 31.

[628] For full bibliographies, see M. Spinedi, "Crimes of State: bibliography", *International Crimes of State*, J. H. H. Weiler, A. Cassese and M. Spinedi, eds. (Berlin, De Gruyter, 1989), pp. 339–353; and N. H. B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford University Press, 2000) pp. 299–314.

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.[629]

The Court was there concerned to contrast the position of an injured State in the context of diplomatic protection with the position of all States in respect of the breach of an obligation towards the international community as a whole. Although no such obligation was at stake in that case, the Court's statement clearly indicates that for the purposes of State responsibility certain obligations are owed to the international community as a whole, and that by reason of "the importance of the rights involved" all States have a legal interest in their protection.

(3) On a number of subsequent occasions the Court has taken the opportunity to affirm the notion of obligations to the international community as a whole, although it has been cautious in applying it. In the *East Timor* case, the Court said that "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable".[630] At the preliminary objections stage of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, it stated that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*":[631] this finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound by the Convention.

(4) A closely related development is the recognition of the concept of peremptory norms of international law in articles 53 and 64 of the 1969 Vienna Convention. These provisions recognize the existence of substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty.[632]

(5) From the first it was recognized that these developments had implications for the secondary rules of State responsibility which would need to be reflected in some way in the articles. Initially, it was thought this could be done by reference to a category of "international crimes of State", which would be contrasted with all other cases of internationally wrongful acts ("international delicts").[633] There has been, however, no development of penal consequences for States of breaches of these fundamental norms. For example, the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms. In accordance with article 34, the function of damages is essentially compensatory.[634] Overall, it remains the case, as the International Military Tribunal said in 1946, that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[635]

(6) In line with this approach, despite the trial and conviction by the Nuremberg and Tokyo Military Tribunals of individual government officials for criminal acts committed in their official capacity, neither Germany nor Japan were treated as "criminal" by the instruments creating these tribunals.[636] As to more recent international practice, a similar approach underlies the establishment of the *ad hoc* tribunals for Yugoslavia and Rwanda by the Security Council. Both tribunals are concerned only with the prosecution of individuals.[637] In its decision relating to a *subpoena duces tecum* in the *Blaskić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia stated that "[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems".[638] The Rome Statute of the International Criminal Court likewise establishes jurisdiction over the "most serious crimes of concern to the international community as a whole" (preamble), but limits this jurisdiction to "natural persons" (art. 25, para. 1). The same article specifies that no provision of the Statute "relating to individual criminal responsibility shall affect the responsibility of States under international law" (para. 4).[639]

(7) Accordingly, the present articles do not recognize the existence of any distinction between State "crimes" and "delicts" for the purposes of Part One. On the other hand, it is necessary for the articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which ICJ has given of

[629] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33. See M. Ragazzi, *The Concept of International Obligations* Erga Omnes (Oxford, Clarendon Press, 1997).

[630] See footnote 54 above.

[631] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (see footnote 54 above), p. 616, para. 31.

[632] See article 26 and commentary.

[633] See *Yearbook … 1976*, vol. II (Part Two), pp. 95–122, especially paras. (6)–(34). See also paragraph (5) of the commentary to article 12.

[634] See paragraph (4) of the commentary to article 36.

[635] International Military Tribunal (Nuremberg), judgement of 1 October 1946, reprinted in AJIL (see footnote 321 above), p. 221.

[636] This despite the fact that the London Charter of 1945 specifically provided for the condemnation of a "group or organization" as "criminal"; see Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, annex, United Nations, Treaty Series, vol. 82, No. 251, p. 279, arts. 9 and 10.

[637] See, respectively, articles 1 and 6 of the statute of the International Tribunal for the Former Yugoslavia; and articles 1 and 7 of the statute of the International Tribunal for Rwanda (footnote 257 above).

[638] *Prosecutor* v. *Blaskić*, International Tribunal for the Former Yugoslavia, Case IT-95-14-AR 108 *bis*, ILR, vol. 110, p. 688, at p. 698, para. 25 (1997). Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (footnote 54 above), in which neither of the parties treated the proceedings as being criminal in character. See also paragraph (6) of the commentary to article 12.

[639] See also article 10: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

obligations towards the international community as a whole[640] all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the 1969 Vienna Convention[641] involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance—i.e. in terms of the present articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole. The first of these propositions is the concern of the present chapter; the second is dealt with in article 48.

### *Article 40. Application of this chapter*

**1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.**

**2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.**

#### *Commentary*

(1) Article 40 serves to define the scope of the breaches covered by the chapter. It establishes two criteria in order to distinguish "serious breaches of obligations under peremptory norms of general international law" from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfil both criteria.

(2) The first criterion relates to the character of the obligation breached. In order to give rise to the application of this chapter, a breach must concern an obligation arising under a peremptory norm of general international law. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is:

> 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.

The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.[642]

(3) It is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the 1969 Vienna Convention. The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.

(4) Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory. This is supported, for example, by the Commission's commentary to what was to become article 53,[643] uncontradicted statements by Governments in the course of the Vienna Conference on the Law of Treaties,[644] the submissions of both parties in the *Military and Paramilitary Activities in and against Nicaragua* case and the Court's own position in that case.[645] There also seems to be widespread agreement with other examples listed in the Commission's commentary to article 53: viz. the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among Governments as to the peremptory character of these prohibitions at the Vienna Conference. As to the peremptory character of the prohibition against

[640] According to ICJ, obligations *erga omnes* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination": *Barcelona Traction* (see footnote 25 above), at p. 32, para. 34. See also *East Timor* (footnote 54 above); *Legality of the Threat or Use of Nuclear Weapons* (*ibid.*); and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (*ibid.*).

[641] The Commission gave the following examples of treaties which would violate the article due to conflict with a peremptory norm of general international law, or a rule of *jus cogens*: "(*a*) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (*b*) a treaty contemplating the performance of any other act criminal under international law, and (*c*) a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate … treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples", *Yearbook … 1966*, vol. II, p. 248.

[642] For further discussion of the requirements for identification of a norm as peremptory, see paragraph (5) of the commentary to article 26, with selected references to the case law and literature.

[643] *Yearbook … 1966*, vol. II, pp. 247–249.

[644] In the course of the conference, a number of Governments characterized as peremptory the prohibitions against aggression and the illegal use of force: see *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March to 24 May 1968, summary records of the plenary meeting and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 52nd meeting, paras. 3, 31 and 43; 53rd meeting, paras. 4, 9, 15, 16, 35, 48, 59 and 69; 54th meeting, paras. 9, 41, 46 and 55; 55th meeting, paras. 31 and 42; and 56th meeting, paras. 6, 20, 29 and 51.

[645] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), pp. 100–101, para. 190; see also the separate opinion of magistrate Nagendra Singh (president), p. 153.

genocide, this is supported by a number of decisions by national and international courts.[646]

(5) Although not specifically listed in the Commission's commentary to article 53 of the 1969 Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The peremptory character of this prohibition has been confirmed by decisions of international and national bodies.[647] In the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory.[648] Finally, the obligation to respect the right of self-determination deserves to be mentioned. As the Court noted in the *East Timor* case, "[t]he principle of self-determination ... is one of the essential principles of contemporary international law", which gives rise to an obligation to the international community as a whole to permit and respect its exercise.[649]

(6) It should be stressed that the examples given above may not be exhaustive. In addition, article 64 of the 1969 Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole, as referred to in article 53. The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53.

(7) Apart from its limited scope in terms of the comparatively small number of norms which qualify as peremptory, article 40 applies a further limitation for the purposes of the chapter, viz. that the breach should itself have been "serious". A "serious" breach is defined in paragraph 2 as one which involves "a gross or systematic failure by the responsible State to fulfil the obligation" in question. The word "serious" signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach and it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable. But relatively less serious cases of breach of peremptory norms can be envisaged, and it is necessary to limit the scope of this chapter to the more serious or systematic breaches. Some such limitation is supported by State practice. For example, when reacting against breaches of international law, States have often stressed their systematic, gross or egregious nature. Similarly, international complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, e.g. in terms of the non-applicability of the rule of exhaustion of local remedies.[650]

(8) To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.[651]

(9) Article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the articles to establish new institutional procedures for dealing with individual cases, whether they arise under chapter III of Part Two or otherwise. Moreover, the serious breaches dealt with in this chapter are likely to be addressed by the competent international organizations, including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter of the United Nations.

### *Article 41. Particular consequences of a serious breach of an obligation under this chapter*

**1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.**

[646] See, for example, ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures* (footnote 412 above), pp. 439–440; *Counter-Claims* (footnote 413 above), p. 243; and the District Court of Jerusalem in the *Attorney-General of the Government of Israel* v. *Adolf Eichmann* case, ILR, vol. 36, p. 5 (1961).

[647] Cf. the United States Court of Appeals, Ninth Circuit, in *Siderman de Blake and Others* v. *The Republic of Argentina and Others*, ILR, vol. 103, p. 455, at p. 471 (1992); the United Kingdom Court of Appeal in *Al Adsani* v. *Government of Kuwait and Others*, ILR, vol. 107, p. 536, at pp. 540–541 (1996); and the United Kingdom House of Lords in *Pinochet* (footnote 415 above), pp. 841 and 881. Cf. the United States Court of Appeals, Second Circuit, in *Filartiga* v. *Pena-Irala*, ILR, vol. 77, p. 169, at pp. 177–179 (1980).

[648] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79.

[649] *East Timor* (*ibid.*). See Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex, fifth principle.

[650] See the *Ireland* v. *the United Kingdom* case (footnote 236 above), para. 159; cf., e.g., the procedure established under Economic and Social Council resolution 1503 (XLVIII), which requires a "consistent pattern of gross and reliably attested violations of human rights".

[651] At its twenty-second session, the Commission proposed the following examples as cases denominated as "international crimes":

"(*a*) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

"(*b*) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

"(*c*) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

"(*d*) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."

*Yearbook … 1976*, vol. II (Part Two), pp. 95–96.

**2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.**

**3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.**

*Commentary*

(1) Article 41 sets out the particular consequences of breaches of the kind and gravity referred to in article 40. It consists of three paragraphs. The first two prescribe special legal obligations of States faced with the commission of "serious breaches" in the sense of article 40, the third takes the form of a saving clause.

(2) Pursuant to *paragraph 1* of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.

(3) Neither does paragraph 1 prescribe what measures States should take in order to bring to an end serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation. It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40.

(4) Pursuant to *paragraph 2* of article 41, States are under a duty of abstention, which comprises two obligations, first, not to recognize as lawful situations created by serious breaches in the sense of article 40 and, secondly, not to render aid or assistance in maintaining that situation.

(5) The first of these two obligations refers to the obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches in the sense of article 40.[652] The obligation applies to "situations" created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.

(6) The existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in decisions of ICJ. The principle that territorial acquisitions brought about by the use of force are not valid and must not be recognized found a clear expression during the Manchurian crisis of 1931–1932, when the Secretary of State, Henry Stimson, declared that the United States of America—joined by a large majority of members of the League of Nations—would not:

> admit the legality of any situation de facto nor ... recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the ... sovereignty, the independence or the territorial and administrative integrity of the Republic of China, ... [nor] recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928.[653]

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations affirms this principle by stating unequivocally that States shall not recognize as legal any acquisition of territory brought about by the use of force.[654] As ICJ held in *Military and Paramilitary Activities in and against Nicaragua*, the unanimous consent of States to this declaration "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves".[655]

(7) An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990. Following the Iraqi declaration of a "comprehensive and eternal merger" with Kuwait, the Security Council, in resolution 662 (1990) of 9 August 1990, decided that the annexation had "no legal validity, and is considered null and void", and called upon all States, international organizations and specialized agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as a recognition of it, whether direct or indirect. In fact, no State recognized the

[652] This has been described as "an essential legal weapon in the fight against grave breaches of the basic rules of international law" (C. Tomuschat, "International crimes by States: an endangered species?", *International Law: Theory and Practice — Essays in Honour of Eric Suy*, K. Wellens, ed. (The Hague, Martinus Nijhoff, 1998), p. 253, at p. 259.

[653] Secretary of State's note to the Chinese and Japanese Governments, in Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1940), vol. I, p. 334; endorsed by Assembly resolutions of 11 March 1932, *League of Nations Official Journal*, March 1932, Special Supplement No. 101, p. 87. For a review of earlier practice relating to collective non-recognition, see J. Dugard, *Recognition and the United Nations* (Cambridge, Grotius, 1987), pp. 24–27.

[654] General Assembly resolution 2625 (XXV), annex, first principle.

[655] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 100, para. 188.

legality of the purported annexation, the effects of which were subsequently reversed.

(8) As regards the denial by a State of the right of self-determination of peoples, the advisory opinion of ICJ in the *Namibia* case is similarly clear in calling for a non-recognition of the situation.[656] The same obligations are reflected in the resolutions of the Security Council and General Assembly concerning the situation in Rhodesia[657] and the Bantustans in South Africa.[658] These examples reflect the principle that where a serious breach in the sense of article 40 has resulted in a situation that might otherwise call for recognition, this has nonetheless to be withheld. Collective non-recognition would seem to be a prerequisite for any concerted community response against such breaches and marks the minimum necessary response by States to the serious breaches referred to in article 40.

(9) Under article 41, paragraph 2, no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State. There have been cases where the responsible State has sought to consolidate the situation it has created by its own "recognition". Evidently, the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement. These conclusions are consistent with article 30 on cessation and are reinforced by the peremptory character of the norms in question.[659]

(10) The consequences of the obligation of non-recognition are, however, not unqualified. In the *Namibia* advisory opinion the Court, despite holding that the illegality of the situation was opposable *erga omnes* and could not be recognized as lawful even by States not members of the United Nations, said that:

> the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[660]

Both the principle of non-recognition and this qualification to it have been applied, for example, by the European Court of Human Rights.[661]

(11) The second obligation contained in paragraph 2 prohibits States from rendering aid or assistance in maintaining the situation created by a serious breach in the sense of article 40. This goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act, which are covered by article 16. It deals with conduct "after the fact" which assists the responsible State in maintaining a situation "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law".[662] It extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one. As to the elements of "aid or assistance", article 41 is to be read in connection with article 16. In particular, the concept of aid or assistance in article 16 presupposes that the State has "knowledge of the circumstances of the internationally wrongful act". There is no need to mention such a requirement in article 41, paragraph 2, as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.

(12) In some respects, the prohibition contained in paragraph 2 may be seen as a logical extension of the duty of non-recognition. However, it has a separate scope of application insofar as actions are concerned which would not imply recognition of the situation created by serious breaches in the sense of article 40. This separate existence is confirmed, for example, in the resolutions of the Security Council prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa or Portuguese colonial rule.[663] Just as in the case of the duty of non-recognition, these resolutions would seem to express a general idea applicable to all situations created by serious breaches in the sense of article 40.

(13) Pursuant to *paragraph 3*, article 41 is without prejudice to the other consequences elaborated in Part Two and to possible further consequences that a serious breach in the sense of article 40 may entail. The purpose of this paragraph is twofold. First, it makes it clear that a serious breach in the sense of article 40 entails the legal consequences stipulated for all breaches in chapters I and II of Part Two. Consequently, a serious breach in the sense of article 40 gives rise to an obligation, on behalf of the responsible State, to cease the wrongful act, to continue performance and, if appropriate, to give guarantees and assurances of non-repetition. By the same token, it entails a duty to make reparation in conformity with the rules set out in chapter II of this Part. The incidence of these obligations will no doubt be affected by the gravity of the breach in question, but this is allowed for in the actual language of the relevant articles.

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[656] *Namibia* case (see footnote 176 above), where the Court held that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law" (p. 56, para. 126).

[657] Cf. Security Council resolution 216 (1965) of 12 November 1965.

[658] See, e.g., General Assembly resolution 31/6 A of 26 October 1976, endorsed by the Security Council in its resolution 402 (1976) of 22 December 1976; Assembly resolutions 32/105 N of 14 December 1977 and 34/93 G of 12 December 1979; see also the statements of 21 September 1979 and 15 December 1981 issued by the respective presidents of the Security Council in reaction to the "creation" of Venda and Ciskei (S/13549 and S/14794).

[659] See also paragraph (7) of the commentary to article 20 and paragraph (4) of the commentary to article 45.

[660] *Namibia* case (see footnote 176 above), p. 56, para. 125.

[661] *Loizidou, Merits* (see footnote 160 above), p. 2216; *Cyprus* v. *Turkey* (see footnote 247 above), paras. 89–98.

[662] *Namibia* case (see footnote 176 above), p. 56, para. 126.

[663] See, e.g., Security Council resolutions 218 (1965) of 23 November 1965 on the Portuguese colonies, and 418 (1977) of 4 November 1977 and 569 (1985) of 26 July 1985 on South Africa.

(14) Secondly, paragraph 3 allows for such further consequences of a serious breach as may be provided for by international law. This may be done by the individual primary rule, as in the case of the prohibition of aggression. Paragraph 3 accordingly allows that international law may recognize additional legal consequences flowing from the commission of a serious breach in the sense of article 40. The fact that such further consequences are not expressly referred to in chapter III does not prejudice their recognition in present-day international law, or their further development. In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.

## Part Three

## THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Part Three deals with the implementation of State responsibility, i.e. with giving effect to the obligations of cessation and reparation which arise for a responsible State under Part Two by virtue of its commission of an internationally wrongful act. Although State responsibility arises under international law independently of its invocation by another State, it is still necessary to specify what other States faced with a breach of an international obligation may do, what action they may take in order to secure the performance of the obligations of cessation and reparation on the part of the responsible State. This, sometimes referred to as the *mise-en-oeuvre* of State responsibility, is the subject matter of Part Three. Part Three consists of two chapters. Chapter I deals with the invocation of State responsibility by other States and with certain associated questions. Chapter II deals with countermeasures taken in order to induce the responsible State to cease the conduct in question and to provide reparation.

## Chapter I

## INVOCATION OF THE RESPONSIBILITY OF A STATE

### *Commentary*

(1) Part One of the articles identifies the internationally wrongful act of a State generally in terms of the breach of any international obligation of that State. Part Two defines the consequences of internationally wrongful acts in the field of responsibility as obligations of the responsible State, not as rights of any other State, person or entity. Part Three is concerned with the implementation of State responsibility, i.e. with the entitlement of other States to invoke the international responsibility of the responsible State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33, paragraph 2.

(2) Central to the invocation of responsibility is the concept of the injured State. This is the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act. This concept is introduced in article 42 and various consequences are drawn from it in other articles of this chapter. In keeping with the broad range of international obligations covered by the articles, it is necessary to recognize that a broader range of States may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question. Indeed, in certain situations, all States may have such an interest, even though none of them is individually or specially affected by the breach.[664] This possibility is recognized in article 48. Articles 42 and 48 are couched in terms of the entitlement of States to invoke the responsibility of another State. They seek to avoid problems arising from the use of possibly misleading terms such as "direct" versus "indirect" injury or "objective" versus "subjective" rights.

(3) Although article 42 is drafted in the singular ("an injured State"), more than one State may be injured by an internationally wrongful act and be entitled to invoke responsibility as an injured State. This is made clear by article 46. Nor are articles 42 and 48 mutually exclusive. Situations may well arise in which one State is "injured" in the sense of article 42, and other States are entitled to invoke responsibility under article 48.

(4) Chapter I also deals with a number of related questions: the requirement of notice if a State wishes to invoke the responsibility of another (art. 43), certain aspects of the admissibility of claims (art. 44), loss of the right to invoke responsibility (art. 45), and cases where the responsibility of more than one State may be invoked in relation to the same internationally wrongful act (art. 47).

(5) Reference must also be made to article 55, which makes clear the residual character of the articles. In addition to giving rise to international obligations for States, special rules may also determine which other State or States are entitled to invoke the international responsibility arising from their breach, and what remedies they may seek. This was true, for example, of article 396 of the Treaty of Versailles, which was the subject of the decision in the *S.S. "Wimbledon"* case.[665] It is also true of article 33 of the European Convention on Human Rights. It will be a matter of interpretation in each case whether such provisions are intended to be exclusive, i.e. to apply as a *lex specialis*.

[664] Cf. the statement by ICJ that "all States can be held to have a legal interest" as concerns breaches of obligations *erga omnes*, *Barcelona Traction* (footnote 25 above), p. 32, para. 33, cited in paragraph (2) of the commentary to chapter III of Part Two.

[665] Four States there invoked the responsibility of Germany, at least one of which, Japan, had no specific interest in the voyage of the *S.S. "Wimbledon"* (see footnote 34 above).

### *Article 42. Invocation of responsibility by an injured State*

**A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:**

**(*a*) that State individually; or**

**(*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:**

**(i) specially affects that State; or**

**(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.**

*Commentary*

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the "injured State". It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal,[666] or even the taking of countermeasures. In order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred by a treaty,[667] or it must be considered an injured State. The purpose of article 42 is to define this latter category.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also—as is clear from the opening phrase of article 49—resort to countermeasures in accordance with the rules laid down in chapter II of this Part. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, e.g. under article 48 which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, "A State is entitled as an injured State to invoke the responsibility".

(4) The definition in article 42 is closely modelled on article 60 of the 1969 Vienna Convention, although the scope and purpose of the two provisions are different. Article 42 is concerned with any breach of an international obligation of whatever character, whereas article 60 is concerned with breach of treaties. Moreover, article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty.[668] This is why article 60 is restricted to "material" breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the analogy with article 60 is justified. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty, the right can only be that of the other State party, but in the case of a multilateral treaty article 60, paragraph 2, does not allow every other State to terminate or suspend the treaty for material breach. The other State must be specially affected by the breach, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the 1969 Vienna Convention, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has *vis-à-vis* the other State party (subparagraph (*a*)). Secondly, a State may be specially affected by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (subparagraph (*b*) (i)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by all the other States (subparagraph (*b*) (ii)); this is the so-called "integral" or "inter-

[666] An analogous distinction is drawn by article 27, paragraph 2, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which distinguishes between the bringing of an international claim in the field of diplomatic protection and "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute".

[667] In relation to article 42, such a treaty right could be considered a *lex specialis*: see article 55 and commentary.

[668] Cf. the 1969 Vienna Convention, art. 73.

dependent" obligation.[669] In each of these cases, the possible suspension or termination of the obligation or of its performance by the injured State may be of little value to it as a remedy. Its primary interest may be in the restoration of the legal relationship by cessation and reparation.

(6) Pursuant to *subparagraph* (a) of article 42, a State is "injured" if the obligation breached was owed to it individually. The expression "individually" indicates that in the circumstances, performance of the obligation was owed to that State. This will necessarily be true of an obligation arising under a bilateral treaty between the two States parties to it, but it will also be true in other cases, e.g. of a unilateral commitment made by one State to another. It may be the case under a rule of general international law: thus, for example, rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian State and another. Or it may be true under a multilateral treaty where particular performance is incumbent under the treaty as between one State party and another. For example, the obligation of the receiving State under article 22 of the Vienna Convention on Diplomatic Relations to protect the premises of a mission is owed to the sending State. Such cases are to be contrasted with situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized. It will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of subparagraph (*a*) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an "injured State" in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation *vis-à-vis* another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.[670] If it is established that the beneficiaries of the promise or the stipulation in favour of a third State were intended to acquire actual rights to performance of the obligation in question, they will be injured by its breach. Another example is a binding judgement of an international court or tribunal imposing obligations on one State party to the litigation for the benefit of the other party.[671]

(8) In addition, subparagraph (*a*) is intended to cover cases where the performance of an obligation under a multilateral treaty or customary international law is owed to one particular State. The scope of subparagraph (*a*) in this respect is different from that of article 60, paragraph 1, of the 1969 Vienna Convention, which relies on the formal criterion of bilateral as compared with multilateral treaties. But although a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to " 'bundles' of bilateral relations".[672]

(9) The identification of one particular State as injured by a breach of an obligation under the Vienna Convention on Diplomatic Relations does not exclude that all States parties may have an interest of a general character in compliance with international law and in the continuation of international institutions and arrangements which have been built up over the years. In the *United States Diplomatic and Consular Staff in Tehran* case, after referring to the "fundamentally unlawful character" of the Islamic Republic of Iran's conduct in participating in the detention of the diplomatic and consular personnel, the Court drew:

> the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.[673]

(10) Although discussion of multilateral obligations has generally focused on those arising under multilateral treaties, similar considerations apply to obligations under rules of customary international law. For example, the rules of general international law governing the diplomatic or consular relations between States establish bilateral relations between particular receiving and sending States, and violations of these obligations by a particular receiving State injure the sending State to which performance was owed in the specific case.

(11) *Subparagraph* (b) deals with injury arising from violations of collective obligations, i.e. obligations that apply between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole. The violation of these obligations only injures any particular State if additional requirements are met. In using the expression "group of States", article 42, subparagraph (*b*), does not imply that the group has any separate existence or that it has separate legal personality. Rather, the term is intended to refer to a group of States, consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be

[669] The notion of "integral" obligations was developed by Fitzmaurice as Special Rapporteur on the Law of Treaties: see *Yearbook … 1957*, vol. II, p. 54. The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an "all or nothing" basis. The term "interdependent obligations" may be more appropriate.

[670] Cf. the 1969 Vienna Convention, art. 36.

[671] See, e.g., Article 59 of the Statute of ICJ.

[672] See, e.g., K. Sachariew, "State responsibility for multilateral treaty violations: identifying the 'injured State' and its legal status", *Netherlands International Law Review*, vol. 35, No. 3 (1988), p. 273, at pp. 277–278; B. Simma, "Bilateralism and community interest in the law of State responsibility", *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Y. Dinstein, ed. (Dordrecht, Martinus Nijhoff, 1989), p. 821, at p. 823; C. Annacker, "The legal régime of *erga omnes* obligations in international law", *Austrian Journal of Public and International Law*, vol. 46, No. 2 (1994), p. 131, at p. 136; and D. N. Hutchinson, "Solidarity and breaches of multilateral treaties", BYBIL, *1988*, vol. 59, p. 151, at pp. 154–155.

[673] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 41–43, paras. 89 and 92.

considered for that purpose as making up a community of States of a functional character.

(12) *Subparagraph* (b) (i) stipulates that a State is injured if it is "specially affected" by the violation of a collective obligation. The term "specially affected" is taken from article 60, paragraph (2) (*b*), of the 1969 Vienna Convention. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach. Like article 60, paragraph (2) (*b*), of the 1969 Vienna Convention, subparagraph (*b*) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered "injured". This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, *subparagraph* (b) (ii) deals with a special category of obligations, the breach of which must be considered as affecting *per se* every other State to which the obligation is owed. Article 60, paragraph 2 (*c*), of the 1969 Vienna Convention recognizes an analogous category of treaties, viz. those "of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations". Examples include a disarmament treaty,[674] a nuclear-free zone treaty, or any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others. Under article 60, paragraph 2 (*c*), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially, the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in the termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Antarctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

(15) The articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice, interdependent obligations covered by subparagraph (*b*) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this subparagraph be narrow in its scope. Accordingly, a State is only considered injured under subparagraph (*b*) (ii) if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

### *Article 43. Notice of claim by an injured State*

**1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.**

**2. The injured State may specify in particular:**

**(*a*) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;**

**(*b*) what form reparation should take in accordance with the provisions of Part Two.**

*Commentary*

(1) Article 43 concerns the modalities to be observed by an injured State in invoking the responsibility of another State. The article applies to the injured State as defined in article 42, but States invoking responsibility under article 48 must also comply with its requirements.[675]

(2) Although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, etc. Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence: this is dealt with in article 45.

(3) Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State. It is analogous to article 65 of the 1969 Vienna Convention. Notice under article 43 need not

[674] The example given in the commentary of the Commission to what became article 60: *Yearbook … 1966*, vol. II, p. 255, document A/6309/Rev.1, para. (8).

[675] See article 48, paragraph (3), and commentary.

be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless, an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the articles to specify in detail the form which an invocation of responsibility should take. In practice, claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In the *Certain Phosphate Lands in Nauru* case, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".[676] The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However, the Court also noted that:

> It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position". [677]

The Court summarized the communications between the parties as follows:

> The Court … takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time. [678]

In the circumstances, it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus, *paragraph 2* (a) provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would satisfy the injured State; this may facilitate the resolution of the dispute.

(6) *Paragraph 2* (b) deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,[679] or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.[680] Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, insofar as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In the light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead, it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

### *Article 44. Admissibility of claims*

**The responsibility of a State may not be invoked if:**

**(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;**

**(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.**

*Commentary*

(1) The present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather, they define the conditions for establishing the international responsibility of a State and for the invocation of

[676] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 253, para. 31.

[677] *Ibid*., p. 254, para. 35.

[678] *Ibid*., pp. 254–255, para. 36.

[679] As PCIJ noted in the *Factory at Chorzów, Jurisdiction* (see footnote 34 above), by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents (p. 17).

[680] In the *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 12, ICJ did not accept Denmark's argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark's international obligations. For the terms of the eventual settlement, see M. Koskenniemi, "L'affaire du passage par le Grand-Belt", *Annuaire français de droit international*, vol. 38 (1992), p. 905, at p. 940.

that responsibility by another State or States. Thus, it is not the function of the articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispendence or election as they may affect the jurisdiction of one international tribunal *vis-à-vis* another.[681] By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.

(2) *Subparagraph* (a) provides that the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims. As PCIJ said in the *Mavrommatis Palestine Concessions* case:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.[682]

Subparagraph (*a*) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.[683]

(3) *Subparagraph* (b) provides that when the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.

(4) The local remedies rule was described by a Chamber of the Court in the *ELSI* case as "an important principle of customary international law".[684] In the context of a claim brought on behalf of a corporation of the claimant State, the Chamber defined the rule succinctly in the following terms:

> for 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.[685]

The Chamber thus treated the exhaustion of local remedies as being distinct, in principle, from "the merits of the case".[686]

(5) Only those local remedies which are "available and effective" have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular, there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal. Beyond this, article 44, subparagraph (*b*), does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international law.[687]

### *Article 45. Loss of the right to invoke responsibility*

**The responsibility of a State may not be invoked if:**

**(*a*) the injured State has validly waived the claim;**

**(*b*) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.**

*Commentary*

(1) Article 45 is analogous to article 45 of the 1969 Vienna Convention concerning loss of the right to invoke a ground for invalidating or terminating a treaty. The article deals with two situations in which the right of an injured State or other States concerned to invoke the responsibility of a wrongdoing State may be lost: waiver and acquiescence in the lapse of the claim. In this regard, the position of an injured State as referred to in article 42 and other States concerned with a breach needs to be distinguished. A valid waiver or settlement of the responsibility dispute

[681] For discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), vol. 2, pp. 427–575; and S. Rosenne, *The Law and Practice of the International Court, 1920–1996*, 3rd ed. (The Hague, Martinus Nijhoff, 1997), vol. II, *Jurisdiction*.

[682] *Mavrommatis* (see footnote 236 above), p. 12.

[683] Questions of nationality of claims will be dealt with in detail in the work of the Commission on diplomatic protection. See first report of the Special Rapporteur for the topic "Diplomatic protection" in *Yearbook … 2000*, vol. II (Part One), document A/CN.4/506 and Add.1.

[684] *ELSI* (see footnote 85 above), p. 42, para. 50. See also *Interhandel, Preliminary Objections, I.C.J. Reports 1959*, p. 6, at p. 27. On the exhaustion of local remedies rule generally, see, e.g., C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990); J. Chappez, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doehring, "Local remedies, exhaustion of", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (footnote 409 above), vol. 3, pp. 238–242; and G. Perrin, "La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la Commission du droit international", *Festschrift für Rudolf Bindschedler* (Bern, Stämpfli, 1980), p. 271. On the exhaustion of local remedies rule in relation to violations of human rights obligations, see, e.g., A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press, 1983); and E. Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65–89.

[685] *ELSI* (see footnote 85 above), p. 46, para. 59.

[686] *Ibid*., p. 48, para. 63.

[687] The topic will be dealt with in detail in the work of the Commission on diplomatic protection. See second report of the Special Rapporteur on diplomatic protection in *Yearbook … 2001*, vol. II (Part One), document A/CN.4/514.

between the responsible State and the injured State, or, if there is more than one, all the injured States, may preclude any claim for reparation. Positions taken by individual States referred to in article 48 will not have such an effect.

(2) *Subparagraph* (a) deals with the case where an injured State has waived either the breach itself, or its consequences in terms of responsibility. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State.

(3) In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum corresponding to the capital amount of a loan, without any reference to interest or damages for delay. Turkey having paid the sum demanded, the tribunal held that this conduct amounted to the abandonment of any other claim arising from the loan.[688]

(4) A waiver is only effective if it is validly given. As with other manifestations of State consent, questions of validity can arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter, arising perhaps from a misrepresentation of those facts by the responsible State. The use of the term "valid waiver" is intended to leave to the general law the question of what amounts to a valid waiver in the circumstances.[689] Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.

(5) Although it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal. In the *Certain Phosphate Lands in Nauru* case, it was argued that the Nauruan authorities before independence had waived the rehabilitation claim by concluding an agreement relating to the future of the phosphate industry as well as by statements made at the time of independence. As to the former, the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements were unclear and equivocal. The Court held there had been no waiver, since the conduct in question "did not at any time effect a clear and unequivocal waiver of their claims".[690] In particular, the statements relied on "[n]otwithstanding some ambiguity in the wording … did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations".[691]

(6) Just as it may explicitly waive the right to invoke responsibility, so an injured State may acquiesce in the loss of that right. *Subparagraph* (b) deals with the case where an injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim. The article emphasizes *conduct* of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.

(7) The principle that a State may by acquiescence lose its right to invoke responsibility was endorsed by ICJ in the *Certain Phosphate Lands in Nauru* case, in the following passage:

> The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.[692]

In the *LaGrand* case, the Court held the German application admissible even though Germany had taken legal action some years after the breach had become known to it.[693]

(8) One concern of the rules relating to delay is that additional difficulties may be caused to the respondent State due to the lapse of time, e.g. as concerns the collection and presentation of evidence. Thus, in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness to the respondent State were advanced.[694] In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not establish the existence of any prejudice on its part, as where it has always had notice of the claim and was in a position to collect and preserve evidence relating to it.[695]

(9) Moreover, contrary to what may be suggested by the expression "delay", international courts have not engaged simply in measuring the lapse of time and applying clear-cut time limits. No generally accepted time limit,

[688] *Russian Indemnity* (see footnote 354 above), p. 446.

[689] Cf. the position with respect to valid consent under article 20: see paragraphs (4) to (8) of the commentary to article 20.

[690] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 247, para. 13.

[691] *Ibid*., p. 250, para. 20.

[692] *Ibid*., pp. 253–254, para. 32. The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru's application was not inadmissible on this ground (para. 36). It reserved for the merits any question of prejudice to the respondent State by reason of the delay. See further paragraph (8) of the commentary to article 13.

[693] *LaGrand*, *Provisional Measures* (see footnote 91 above) and *LaGrand, Judgment* (see footnote 119 above), at pp. 486–487, paras. 53–57.

[694] See *Stevenson*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 385 (1903); and *Gentini, ibid.*, vol. X (Sales No. 60.V.4), p. 551 (1903).

[695] See, e.g., *Tagliaferro*, UNRIAA, vol. X (Sales No. 60.V.4), p. 592, at p. 593 (1903); see also the actual decision in *Stevenson* (footnote 694 above), pp. 386–387.

expressed in terms of years, has been laid down.[696] The Swiss Federal Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.[697] Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.[698] None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.[699] It would be very difficult to establish any single limit, given the variety of situations, obligations and conduct that may be involved.

(10) Once a claim has been notified to the respondent State, delay in its prosecution (e.g. before an international tribunal) will not usually be regarded as rendering it inadmissible.[700] Thus, in the *Certain Phosphate Lands in Nauru* case, ICJ held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.[701] In the *Tagliaferro* case, Umpire Ralston likewise held that, despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred.[702]

(11) To summarize, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged. International courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.[703]

[696] In some cases time limits are laid down for specific categories of claims arising under specific treaties (e.g. the six-month time limit for individual applications under article 35, paragraph 1, of the European Convention on Human Rights) notably in the area of private law (e.g. in the field of commercial transactions and international transport). See the Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol to the Convention. By contrast, it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limits.

[697] Communiqué of 29 December 1970, in *Annuaire suisse de droit international*, vol. 32 (1976), p. 153.

[698] C.-A. Fleischhauer, "Prescription", *Encyclopedia of Public International Law* (see footnote 409 above), vol. 3, p. 1105, at p. 1107.

[699] A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather, the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides *Certain Phosphate Lands in Nauru* (footnotes 230 and 232 above), see, e.g. *Gentini* (footnote 694 above), p. 561; and the *Ambatielos* arbitration, ILR, vol. 23, p. 306, at pp. 314–317 (1956).

[700] For statements of the distinction between notice of claim and commencement of proceedings, see, e.g. R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed. (Harlow, Longman, 1992), vol. I, *Peace*, p. 527; and C. Rousseau, *Droit international public* (Paris, Sirey, 1983), vol. V, p. 182.

[701] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 250, para. 20.

[702] *Tagliaferro* (see footnote 695 above), p. 593.

[703] See article 39 and commentary.

### *Article 46. Plurality of injured States*

**Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.**

*Commentary*

(1) Article 46 deals with the situation of a plurality of injured States, in the sense defined in article 42. It states the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account.

(2) Several States may qualify as "injured" States under article 42. For example, all the States to which an interdependent obligation is owed within the meaning of article 42, subparagraph (*b*) (ii), are injured by its breach. In a situation of a plurality of injured States, each may seek cessation of the wrongful act if it is continuing, and claim reparation in respect of the injury to itself. This conclusion has never been doubted, and is implicit in the terms of article 42 itself.

(3) It is by no means unusual for claims arising from the same internationally wrongful act to be brought by several States. For example, in the *S.S. "Wimbledon"* case, four States brought proceedings before PCIJ under article 386, paragraph 1, of the Treaty of Versailles, which allowed "any interested Power" to apply in the event of a violation of the provisions of the Treaty concerning transit through the Kiel Canal. The Court noted that "each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags". It held they were each covered by article 386, paragraph 1, "even though they may be unable to adduce a prejudice to any pecuniary interest".[704] In fact, only France, representing the operator of the vessel, claimed and was awarded compensation. In the cases concerning the *Aerial Incident of 27 July 1955*, proceedings were commenced by the United States, the United Kingdom and Israel against Bulgaria concerning the destruction of an Israeli civil aircraft and the loss of lives involved.[705] In the *Nuclear Tests* cases, Australia and New Zealand each claimed to be injured in various ways by the French conduct of atmospheric nuclear tests at Mururoa Atoll.[706]

(4) Where the States concerned do not claim compensation on their own account as distinct from a declaration

[704] *S.S.* "*Wimbledon"* (see footnote 34 above), p. 20.

[705] ICJ held that it lacked jurisdiction over the Israeli claim: *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, p. 131, after which the United Kingdom and United States claims were withdrawn. In its Memorial, Israel noted that there had been active coordination of the claims between the various claimant Governments, and added: "One of the primary reasons for establishing coordination of this character from the earliest stages was to prevent, so far as was possible, the Bulgarian Government being faced with double claims leading to the possibility of double damages" (see footnote 363 above), p. 106.

[706] See *Nuclear Tests (Australia* v. *France)* and *(New Zealand* v. *France)* (footnote 196 above), pp. 256 and 460, respectively.

of the legal situation, it may not be clear whether they are claiming as injured States or as States invoking responsibility in the common or general interest under article 48. Indeed, in such cases it may not be necessary to decide into which category they fall, provided it is clear that they fall into one or the other. Where there is more than one injured State claiming compensation on its own account or on account of its nationals, evidently each State will be limited to the damage actually suffered. Circumstances might also arise in which several States injured by the same act made incompatible claims. For example, one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.[707] In any event, two injured States each claiming in respect of the same wrongful act would be expected to coordinate their claims so as to avoid double recovery. As ICJ pointed out in its advisory opinion on *Reparation for Injuries*, "International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case".[708]

### *Article 47. Plurality of responsible States*

**1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.**

**2. Paragraph 1:**

**(*a*) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;**

**(*b*) is without prejudice to any right of recourse against the other responsible States.**

*Commentary*

(1) Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.

(2) Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example, two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. In that case the injured State can hold each responsible State to account for the wrongful conduct as a whole. Or two States may act through a common organ which carries out the conduct in question, e.g. a joint authority responsible for the management of a boundary river. Or one State may direct and control another State in the commission of the same internationally wrongful act by the latter, such that both are responsible for the act.[709]

(3) It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as "joint", "joint and several" and "solidary" responsibility derive from different legal traditions[710] and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.[711] In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed.

(4) In the *Certain Phosphate Lands in Nauru* case,[712] Australia, the sole respondent, had administered Nauru as a trust territory under the Trusteeship Agreement on behalf of the three States concerned. Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. Australia argued that the two States were necessary parties to the case and that in accordance with the principle formulated in *Monetary Gold*,[713] the claim against Australia alone was inadmissible. It also argued that the responsibility of the three States making up the Administering Authority was "solidary" and that a claim could not be made against only one of them. The Court rejected both arguments. On the question of "solidary" responsibility it said:

> Australia has raised the question whether the liability of the three States would be "joint and several" (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This … is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.[714]

The Court was careful to add that its decision on jurisdiction "does not settle the question whether reparation

[707] Cf. *Forests of Central Rhodopia*, where the arbitrator declined to award restitution, *inter alia*, on the ground that not all the persons or entities interested in restitution had claimed (see footnote 382 above), p. 1432.

[708] *Reparation for Injuries* (see footnote 38 above), p. 186.

[709] See article 17 and commentary.

[710] For a comparative survey of internal laws on solidary or joint liability, see T. Weir, *loc. cit.* (footnote 471 above), vol. XI, especially pp. 43–44, sects. 79–81.

[711] See paragraphs (1) to (5) of the introductory commentary to chapter IV of Part One.

[712] See footnote 230 above.

[713] See footnote 286 above. See also paragraph (11) of the commentary to article 16.

[714] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), pp. 258–259, para. 48.

would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems … and, in particular, the special role played by Australia in the administration of the Territory".[715]

(5) The extent of responsibility for conduct carried on by a number of States is sometimes addressed in treaties.[716] A well-known example is the Convention on International Liability for Damage Caused by Space Objects. Article IV, paragraph 1, provides expressly for "joint and several liability" where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Article IV, paragraph 2, provides:

> In all cases of joint and several liability referred to in paragraph 1 … the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.[717]

This is clearly a *lex specialis*, and it concerns liability for lawful conduct rather than responsibility in the sense of the present articles.[718] At the same time, it indicates what a regime of "joint and several" liability might amount to so far as an injured State is concerned.

(6) According to *paragraph 1* of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.

(7) Under paragraph 1 of article 47, where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State in the sense of article 42. The consequences that flow from the wrongful act, for example in terms of reparation, will be those which flow from the provisions of Part Two in relation to that State.

(8) Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. In the *Corfu Channel* incident, it appears that Yugoslavia actually laid the mines and would have been responsible for the damage they caused. ICJ held that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.[719] Yet, it was not suggested that Albania's responsibility for failure to warn was reduced, let alone precluded, by reason of the concurrent responsibility of a third State. In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

(9) The general principle set out in paragraph 1 of article 47 is subject to the two provisos set out in *paragraph 2*. *Subparagraph* (a) addresses the question of double recovery by the injured State. It provides that the injured State may not recover, by way of compensation, more than the damage suffered.[720] This provision is designed to protect the responsible States, whose obligation to compensate is limited by the damage suffered. The principle is only concerned to ensure against the actual recovery of more than the amount of the damage. It would not exclude simultaneous awards against two or more responsible States, but the award would be satisfied so far as the injured State is concerned by payment in full made by any one of them.

(10) The second proviso, in *subparagraph* (b), recognizes that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. This is specifically envisaged, for example, in articles IV, paragraph 2, and V, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects. On the other hand, there may be cases where recourse by one responsible State against another should not be allowed. Subparagraph (*b*) does not address the question of contribution among several States which are responsible for the same wrongful act; it merely provides that the general principle stated in paragraph 1 is without prejudice to any right of recourse which one responsible State may have against any other responsible State.

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[715] *Ibid*., p. 262, para. 56. The case was subsequently withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru's claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement. See *Certain Phosphate Lands in Nauru, Order* (footnote 232 above) and the settlement agreement (*ibid.*).

[716] A special case is the responsibility of the European Union and its member States under "mixed agreements", where the Union and all or some members are parties in their own name. See, e.g., annex IX to the United Nations Convention on the Law of the Sea. Generally on mixed agreements, see, e.g., A. Rosas, "Mixed Union mixed agreements", *International Law Aspects of the European Union*, M. Koskenniemi, ed. (The Hague, Kluwer, 1998), p. 125.

[717] See also article V, paragraph 2, which provides for indemnification between States which are jointly and severally liable.

[718] See paragraph 4 of the general commentary for the distinction between international responsibility for wrongful acts and international liability arising from lawful conduct.

[719] *Corfu Channel, Merits* (see footnote 35 above), pp. 22–23.

[720] Such a principle was affirmed, for example, by PCIJ in the *Factory at Chorzów, Merits* case (see footnote 34 above), when it held that a remedy sought by Germany could not be granted "or the same compensation would be awarded twice over" (p. 59); see also pp. 45 and 49.

### *Article 48. Invocation of responsibility by a State other than an injured State*

**1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:**

**(*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or**

**(*b*) the obligation breached is owed to the international community as a whole.**

**2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:**

**(*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and**

**(*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.**

**3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.**

*Commentary*

(1) Article 48 complements the rule contained in article 42. It deals with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole. The distinction is underlined by the phrase "[a]ny State other than an injured State" in paragraph 1 of article 48.

(2) Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42. Indeed, in respect of obligations to the international community as a whole, ICJ specifically said as much in its judgment in the *Barcelona Traction* case.[721] Although the Court noted that "all States can be held to have a legal interest in" the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as "interested States". The term "legal interest" would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.

(3) As to the structure of article 48, paragraph 1 defines the categories of obligations which give rise to the wider right to invoke responsibility. Paragraph 2 stipulates which forms of responsibility States other than injured States may claim. Paragraph 3 applies the requirements of invocation contained in articles 43, 44 and 45 to cases where responsibility is invoked under article 48, paragraph 1.

(4) *Paragraph 1* refers to "[a]ny State other than an injured State". In the nature of things, all or many States will be entitled to invoke responsibility under article 48, and the term "[a]ny State" is intended to avoid any implication that these States have to act together or in unison. Moreover, their entitlement will coincide with that of any injured State in relation to the same internationally wrongful act in those cases where a State suffers individual injury from a breach of an obligation to which article 48 applies.

(5) Paragraph 1 defines the categories of obligations, the breach of which may entitle States other than the injured State to invoke State responsibility. A distinction is drawn between obligations owed to a group of States and established to protect a collective interest of the group (paragraph 1 (*a*)), and obligations owed to the international community as a whole (paragraph 1 (*b*)).[722]

(6) Under *paragraph 1* (a), States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and secondly, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as "obligations *erga omnes partes*".

(7) Obligations coming within the scope of paragraph 1 (*a*) have to be "collective obligations", i.e. they must apply between a group of States and have been established in some collective interest.[723] They might concern, for example, the environment or security of a region (e.g. a regional nuclear-free-zone treaty or a regional system for the protection of human rights). They are not limited to arrangements established only in the interest of the member States but would extend to agreements established by a group of States in some wider common interest.[724] But in any event the arrangement must transcend the sphere of bilateral relations of the States parties. As to the requirement that the obligation in question protect a collective interest, it is not the function of the articles to provide an enumeration of such interests. If they fall within paragraph 1 (*a*), their principal purpose will be to foster a common interest, over and above any interests of the States concerned individually. This would include situations in

[721] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[722] For the extent of responsibility for serious breaches of obligations to the international community as a whole, see Part Two, chap. III and commentary.

[723] See also paragraph (11) of the commentary to article 42.

[724] In the *S.S. "Wimbledon"* (see footnote 34 above), the Court noted "[t]he intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind" (p. 23).

which States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities.[725]

(8) Under *paragraph 1* (b), States other than the injured State may invoke responsibility if the obligation in question was owed "to the international community as a whole".[726] The provision intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew "an essential distinction" between obligations owed to particular States and those owed "towards the international community as a whole".[727] With regard to the latter, the Court went on to state that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".

(9) While taking up the essence of this statement, the articles avoid use of the term "obligations *erga omnes*", which conveys less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to "the outlawing of acts of aggression, and of genocide" and to "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[728] In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.[729]

(10) Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. Whereas the category of collective obligations covered by paragraph 1 (*a*) needs to be further qualified by the insertion of additional criteria, no such qualifications are necessary in the case of paragraph 1 (*b*). All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such. Of course, such obligations may at the same time protect the individual interests of States, as the prohibition of acts of aggression protects the survival of each State and the security of its people. Similarly, individual States may be specially affected by the breach of such an obligation, for example a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(11) *Paragraph 2* specifies the categories of claim which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and invocation of responsibility under article 48 gives rise to a more limited range of rights as compared to those of injured States under article 42. In particular, the focus of action by a State under article 48—such State not being injured in its own right and therefore not claiming compensation on its own account—is likely to be on the very question whether a State is in breach and on cessation if the breach is a continuing one. For example, in the *S.S. "Wimbledon"* case, Japan, which had no economic interest in the particular voyage, sought only a declaration, whereas France, whose national had to bear the loss, sought and was awarded damages.[730] In the *South West Africa* cases, Ethiopia and Liberia sought only declarations of the legal position.[731] In that case, as the Court itself pointed out in 1971, "the injured entity" was a people, viz. the people of South West Africa.[732]

(12) Under *paragraph 2* (a), any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require, assurances and guarantees of non-repetition under article 30. In addition, *paragraph 2* (b) allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with paragraph 2 (*b*), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48, paragraph 2, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party. In those cases where they have been resorted to, a clear distinction has been drawn between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation.[733] Thus, a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its Government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present articles

[725] Article 22 of the Covenant of the League of Nations, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it. Cf., however, the much-criticized decision of ICJ in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, from which article 48 is a deliberate departure.

[726] For the terminology "international community as a whole", see paragraph (18) of the commentary to article 25.

[727] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33, and see paragraphs (2) to (6) of the commentary to chapter III of Part Two.

[728] *Barcelona Traction* (*ibid.*), p. 32, para. 34.

[729] See footnote 54 above.

[730] *S.S. "Wimbledon"* (see footnote 34 above), p. 30.

[731] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319; *South West Africa, Second Phase, Judgment* (see footnote 725 above).

[732] *Namibia* case (see footnote 176 above), p. 56, para. 127.

[733] See, e.g., the observations of the European Court of Human Rights in *Denmark* v. *Turkey* (friendly settlement), judgment of 5 April 2000, Reports of Judgments and Decisions 2000-IV, pp. 7, 10 and 11, paras. 20 and 23.

cannot solve.[734] Paragraph 2 (*b*) can do no more than set out the general principle.

(13) Paragraph 2 (*b*) refers to the State claiming "[p]erformance of the obligation of reparation in accordance with the preceding articles". This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example, a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) *Paragraph 3* subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

## Chapter II

## COUNTERMEASURES

### *Commentary*

(1) This chapter deals with the conditions for and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures that would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.[735] This is reflected in article 22 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an operational system, taking into account the exceptional character of countermeasures as a response to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term "reprisals" was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.[736] More recently, the term "reprisals" has been limited to action taken in time of international armed conflict; i.e. it has been taken as equivalent to belligerent reprisals. The term "countermeasures" covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.[737] Countermeasures are to be contrasted with retorsion, i.e. "unfriendly" conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present articles. The term "sanction" is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the Charter of the United Nations refers only to "measures", even though these can encompass a very wide range of acts, including the use of armed force (Articles 39, 41 and 42). Questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand, the articles are concerned with countermeasures as referred to in article 22. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the 1969 Vienna Convention. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.[738] Countermeasures involve conduct taken in derogation from a subsisting treaty

[734] See also paragraphs (3) to (4) of the commentary to article 33.

[735] For the substantial literature, see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational, 1984), pp. 179–189; O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 227–241; L.-A. Sicilianos, *Les réactions décentralisées à l'illicite: Des contre-mesures à la légitime défense* (Paris, Librairie générale de droit et de jurisprudence, 1990), pp. 501–525; and D. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures en droit international public* (Paris, Pedone, 1994).

[736] See, e.g., E. de Vattel, *The Law of Nations, or the Principles of Natural Law* (footnote 394 above), vol. II, chap. XVIII, p. 342.

[737] *Air Service Agreement* (see footnote 28 above), p. 443, para. 80; *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 106, para. 201; and *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 82.

[738] On the respective scope of the codified law of treaties and the law of State responsibility, see paragraphs (3) to (7) of the introductory commentary to chapter V of Part One.

obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.

(5) This chapter does not draw any distinction between what are sometimes called "reciprocal countermeasures" and other measures. That term refers to countermeasures which involve suspension of performance of obligations towards the responsible State "if such obligations correspond to, or are directly connected with, the obligation breached".[739] There is no requirement that States taking countermeasures should be limited to suspension of performance of the same or a closely related obligation.[740] A number of considerations support this conclusion. First, for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have a non-reciprocal character and are not only due to other States but to the individuals themselves.[741] Secondly, a limitation to reciprocal countermeasures assumes that the injured State will be in a position to impose the same or related measures as the responsible State, which may not be so. The obligation may be a unilateral one or the injured State may already have performed its side of the bargain. Above all, considerations of good order and humanity preclude many measures of a reciprocal nature. This conclusion does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as in the *Air Service Agreement* arbitration.[742]

(6) This conclusion reinforces the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse. Chapter II seeks to do this in a variety of ways. First, as already noted, it concerns only non-forcible countermeasures (art. 50, para. 1 (*a*)). Secondly, countermeasures are limited by the requirement that they be directed at the responsible State and not at third parties (art. 49, paras. 1 and 2). Thirdly, since countermeasures are intended as instrumental—in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment—they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (arts. 49, paras. 2 and 3, and 53). Fourthly, countermeasures must be proportionate (art. 51). Fifthly, they must not involve any departure from certain basic obligations (art. 50, para. 1), in particular those under peremptory norms of general international law.

(7) This chapter also deals to some extent with the conditions of the implementation of countermeasures. In particular, countermeasures cannot affect any dispute settlement procedure which is in force between the two States and applicable to the dispute (art. 50, para. 2 (*a*)). Nor can they be taken in such a way as to impair diplomatic or consular inviolability (art. 50, para. 2 (*b*)). Countermeasures must be preceded by a demand by the injured State that the responsible State comply with its obligations under Part Two, must be accompanied by an offer to negotiate, and must be suspended if the internationally wrongful act has ceased and the dispute is submitted in good faith to a court or tribunal with the authority to make decisions binding on the parties (art. 52, para. 3).

(8) The focus of the chapter is on countermeasures taken by injured States as defined in article 42. Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic. This chapter does not purport to regulate the taking of countermeasures by States other than the injured State. It is, however, without prejudice to the right of any State identified in article 48, paragraph 1, to take lawful measures against a responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached (art. 54).

(9) In common with other chapters of these articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus, a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. Likewise, a regime for dispute resolution to which States must resort in the event of a dispute, especially if (as with the WTO dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.[743]

### *Article 49. Object and limits of countermeasures*

**1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.**

**2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.**

**3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.**

[739] See the sixth report of the Special Rapporteur on State responsibility, William Riphagen, article 8 of Part Two of the draft articles, *Yearbook … 1985*, vol. II (Part One), p. 10, document A/CN.4/389.

[740] Contrast the exception of non-performance in the law of treaties, which is so limited: see paragraph (9) of the introductory commentary to chapter V of Part One.

[741] Cf. *Ireland* v. *the United Kingdom* (footnote 236 above).

[742] See footnote 28 above.

[743] See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 1, 3, para. 7, and 22.

*Commentary*

(1) Article 49 describes the permissible object of countermeasures taken by an injured State against the responsible State and places certain limits on their scope. Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two, namely, to cease the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured State.[744] Countermeasures are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible State under Part Two. The limited object and exceptional nature of countermeasures are indicated by the use of the word "only" in paragraph 1 of article 49.

(2) A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure. This point was clearly made by ICJ in the *Gabčíkovo Nagymaros Project* case, in the following passage:

> 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.[745]

(3) *Paragraph 1* of article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.[746] In this respect, there is no difference between countermeasures and other circumstances precluding wrongfulness.[747]

(4) A second essential element of countermeasures is that they "must be directed against"[748] a State which has committed an internationally wrongful act, and which has not complied with its obligations of cessation and reparation under Part Two of the present articles.[749] The word "only" in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State.[750]

(5) This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.

(6) In taking countermeasures, the injured State effectively withholds performance for the time being of one or more international obligations owed by it to the responsible State, and *paragraph 2* of article 49 reflects this element. Although countermeasures will normally take the form of the non-performance of a single obligation, it is possible that a particular measure may affect the performance of several obligations simultaneously. For this reason, paragraph 2 refers to "obligations" in the plural. For example, freezing of the assets of a State might involve what would otherwise be the breach of several obligations to that State under different agreements or arrangements. Different and coexisting obligations might be affected by the same act. The test is always that of proportionality, and a State which has committed an internationally wrongful act does not thereby make itself the target for any form or combination of countermeasures, irrespective of their severity or consequences.[751]

(7) The phrase "for the time being" in paragraph 2 indicates the temporary or provisional character of countermeasures. Their aim is the restoration of a condition of legality as between the injured State and the responsible

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[744] For these obligations, see articles 30 and 31 and commentaries.

[745] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83. See also *"Naulilaa"* (footnote 337 above), p. 1027; *"Cysne"* (footnote 338 above), p. 1057. At the 1930 Hague Conference, all States which responded on this point took the view that a prior wrongful act was an indispensable prerequisite for the adoption of reprisals; see League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote 88 above), p. 128.

[746] The tribunal's remark in the *Air Service Agreement* case (see footnote 28 above), to the effect that "each State establishes for itself its legal situation vis-à-vis other States" (p. 443, para. 81) should not be interpreted in the sense that the United States would have been justified in taking countermeasures whether or not France was in breach of the Agreement. In that case the tribunal went on to hold that the United States was actually responding to a breach of the Agreement by France, and that its response met the requirements for countermeasures under international law, in particular in terms of purpose and proportionality. The tribunal did not decide that an unjustified belief by the United States as to the existence of a breach would have been sufficient.

[747] See paragraph (8) of the introductory commentary to chapter V of Part One.

[748] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 55–56, para. 83.

[749] In the *Gabčíkovo-Nagymaros Project* case ICJ held that the requirement had been satisfied, in that Hungary was in continuing breach of its obligations under a bilateral treaty, and Czechoslovakia's response was directed against it on that ground.

[750] On the specific question of human rights obligations, see article 50, paragraph (1) (*b*), and commentary.

[751] See article 51 and commentary. In addition, the performance of certain obligations may not be withheld by way of countermeasures in any circumstances: see article 50 and commentary.

State, and not the creation of new situations which cannot be rectified whatever the response of the latter State to the claims against it.[752] Countermeasures are taken as a form of inducement, not punishment: if they are effective in inducing the responsible State to comply with its obligations of cessation and reparation, they should be discontinued and performance of the obligation resumed.

(8) Paragraph 1 of article 49 refers to the obligations of the responsible State "under Part Two". It is to ensuring the performance of these obligations that countermeasures are directed. In many cases the main focus of countermeasures will be to ensure cessation of a continuing wrongful act, but they may also be taken to ensure reparation, provided the other conditions laid down in chapter II are satisfied. Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased, irrespective of the seriousness of the breach or its consequences, or of the State's refusal to make reparation for it. In this context an issue arises whether countermeasures should be available where there is a failure to provide satisfaction as demanded by the injured State, given the subsidiary role this remedy plays in the spectrum of reparation.[753] In normal situations, satisfaction will be symbolic or supplementary and it would be highly unlikely that a State which had ceased the wrongful act and tendered compensation to the injured State could properly be made the target of countermeasures for failing to provide satisfaction as well. This concern may be adequately addressed by the application of the notion of proportionality set out in article 51.[754]

(9) *Paragraph 3* of article 49 is inspired by article 72, paragraph 2, of the 1969 Vienna Convention, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible. In the *Gabčíkovo-Nagymaros Project* case, the existence of this condition was recognized by the Court, although it found that it was not necessary to pronounce on the matter. After concluding that "the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate", the Court said:

> 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 obligations under international law, and that the measure must therefore be reversible.[755]

However, the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. For example, a requirement of notification of some activity is of no value after the activity has been undertaken. By contrast, inflicting irreparable damage on the responsible State could amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the articles. The phrase "as far as possible" in paragraph 3 indicates that if the injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.

### *Article 50. Obligations not affected by countermeasures*

**1. Countermeasures shall not affect:**

**(*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;**

**(*b*) obligations for the protection of fundamental human rights;**

**(*c*) obligations of a humanitarian character prohibiting reprisals;**

**(*d*) other obligations under peremptory norms of general international law.**

**2. A State taking countermeasures is not relieved from fulfilling its obligations:**

**(*a*) under any dispute settlement procedure applicable between it and the responsible State;**

**(*b*) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.**

*Commentary*

(1) Article 50 specifies certain obligations the performance of which may not be impaired by countermeasures. An injured State is required to continue to respect these obligations in its relations with the responsible State, and may not rely on a breach by the responsible State of its obligations under Part Two to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.

(2) The obligations dealt with in article 50 fall into two basic categories. Paragraph 1 deals with certain obligations which, by reason of their character, must not be the subject of countermeasures at all. Paragraph 2 deals with certain obligations relating in particular to the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes.

(3) *Paragraph 1* of article 50 identifies four categories of fundamental substantive obligations which may not be affected by countermeasures: (*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (*b*) obligations for the protection of fundamental human rights; (*c*) obligations of a humanitarian character prohibiting reprisals; and (*d*) other obligations under peremptory norms of general international law.

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[752] This notion is further emphasized by articles 49, paragraph 3, and 53 (termination of countermeasures).

[753] See paragraph (1) of the commentary to article 37.

[754] Similar considerations apply to assurances and guarantees of non-repetition. See article 30, subparagraph (*b*), and commentary.

[755] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 56–57, para. 87.

(4) *Paragraph 1* (a) deals with the prohibition of the threat or use of force as embodied in the Charter of the United Nations, including the express prohibition of the use of force in Article 2, paragraph 4. It excludes forcible measures from the ambit of permissible countermeasures under chapter II.

(5) The prohibition of forcible countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly proclaimed that "States have a duty to refrain from acts of reprisal involving the use of force".[756] The prohibition is also consistent with the prevailing doctrine as well as a number of authoritative pronouncements of international judicial[757] and other bodies.[758]

(6) *Paragraph 1* (b) provides that countermeasures may not affect obligations for the protection of fundamental human rights. In the *"Naulilaa"* arbitration, the tribunal stated that a lawful countermeasure must be "limited by the requirements of humanity and the rules of good faith applicable in relations between States".[759] The Institut de droit international in its 1934 resolution stated that in taking countermeasures a State must "abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience".[760] This has been taken further as a result of the development since 1945 of international human rights. In particular, the relevant human rights treaties identify certain human rights which may not be derogated from even in time of war or other public emergency.[761]

(7) In its general comment No. 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present articles,[762] as well as with countermeasures imposed by individual States or groups of States. It stressed that "whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights",[763] and went on to state that:

> it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.[764]

Analogies can be drawn from other elements of general international law. For example, paragraph 1 of article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) stipulates unconditionally that "[s]tarvation of civilians as a method of warfare is prohibited".[765] Likewise, the final sentence of paragraph 2 of article 1 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights states that "In no case may a people be deprived of its own means of subsistence".

(8) *Paragraph 1* (c) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60, paragraph 5, of the 1969 Vienna Convention.[766] The paragraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the Geneva Convention relative to the Treatment of Prisoners of War of 1929, the Geneva Conventions of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.[767]

(9) *Paragraph 1* (d) prohibits countermeasures affecting obligations under peremptory norms of general international law. Evidently, a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Subparagraph (*d*) reiterates for the purposes of the present chapter the recognition in article 26 that the circumstances precluding wrongfulness elaborated in chapter V of Part One do not affect the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. The reference to "other" obligations under

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[756] General Assembly resolution 2625 (XXV), annex, first principle. The Final Act of the Conference on Security and Co-operation in Europe also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration on Principles Guiding Relations between Participating States embodied in the first "Basket" of that Final Act reads: "Likewise [the participating States] will also refrain in their mutual relations from any act of reprisal by force."

[757] See especially *Corfu Channel*, *Merits* (footnote 35 above), p. 35; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 127, para. 249.

[758] See, e.g., Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962, 188 (1964) of 9 April 1964, 316 (1972) of 26 June 1972, 332 (1973) of 21 April 1973, 573 (1985) of 4 October 1985 and 1322 (2000) of 7 October 2000. See also General Assembly resolution 41/38 of 20 November 1986.

[759] *"Naulilaa"* (see footnote 337 above), p. 1026.

[760] *Annuaire de l'Institut de droit international*, vol. 38 (1934), p. 710.

[761] See article 4 of the International Covenant on Civil and Political Rights; article 15 of the European Convention on Human Rights; and article 27 of the American Convention on Human Rights.

[762] See below, article 59 and commentary.

[763] E/C.12/1997/8, para. 1.

[764] *Ibid*., para. 4.

[765] See also paragraph 2 of article 54 ("objects indispensable to the survival of the civilian population") and article 75. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II).

[766] Paragraph 5 of article 60 of the 1969 Vienna Convention precludes a State from suspending or terminating for material breach any treaty provision "relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties". This paragraph was added at the Vienna Conference on the Law of Treaties on a vote of 88 votes in favour, none against and 7 abstentions.

[767] See K. J. Partsch, "Reprisals", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 2000), vol. 4, p. 200, at pp. 203–204; and S. Oeter, "Methods and means of combat", D. Fleck, ed., *op. cit.* (footnote 409 above) p. 105, at pp. 204–207, paras. 476–479, with references to relevant provisions.

peremptory norms makes it clear that subparagraph (*d*) does not qualify the preceding subparagraphs, some of which also encompass norms of a peremptory character. In particular, subparagraphs (*b*) and (*c*) stand on their own. Subparagraph (*d*) allows for the recognition of further peremptory norms creating obligations which may not be the subject of countermeasures by an injured State.[768]

(10) States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50, paragraph 1 (*d*). In particular, a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.[769] Under the dispute settlement system of WTO, the prior authorization of the Dispute Settlement Body is required before a member can suspend concessions or other obligations under the WTO agreements in response to a failure of another member to comply with recommendations and rulings of a WTO panel or the Appellate Body.[770] Pursuant to article 23 of the WTO Dispute Settlement Understanding (DSU), members seeking "the redress of a violation of obligations or other nullification or impairment of benefits" under the WTO agreements, "shall have recourse to, and abide by" the DSU rules and procedures. This has been construed both as an "exclusive dispute resolution clause" and as a clause "preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations".[771] To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are "intransgressible",[772] they may entail the exclusion of countermeasures.

(11) In addition to the substantive limitations on the taking of countermeasures in paragraph 1 of article 50, *paragraph 2* provides that countermeasures may not be taken with respect to two categories of obligations, viz. certain obligations under dispute settlement procedures applicable between it and the responsible State, and obligations with respect to diplomatic and consular inviolability. The justification in each case concerns not so much the substantive character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.

(12) The first of these, contained in *paragraph 2* (a), applies to "any dispute settlement procedure applicable" between the injured State and the responsible State. This phrase refers only to dispute settlement procedures that are related to the dispute in question and not to other unrelated issues between the States concerned. For this purpose the dispute should be considered as encompassing both the initial dispute over the internationally wrongful act and the question of the legitimacy of the countermeasure(s) taken in response.

(13) It is a well-established principle that dispute settlement provisions must be upheld notwithstanding that they are contained in a treaty which is at the heart of the dispute and the continued validity or effect of which is challenged. As ICJ said in *Appeal Relating to the Jurisdiction of the ICAO Council:*

> Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.[773]

Similar reasoning underlies the principle that dispute settlement provisions between the injured and the responsible State and applicable to their dispute may not be suspended by way of countermeasures. Otherwise, unilateral action would replace an agreed provision capable of resolving the dispute giving rise to the countermeasures. The point was affirmed by the Court in the *United States Diplomatic and Consular Staff in Tehran* case:

> In any event, any alleged violation of the Treaty [of Amity] by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.[774]

(14) The second exception in *paragraph 2* (b) limits the extent to which an injured State may resort, by way of countermeasures, to conduct inconsistent with its obligations in the field of diplomatic or consular relations. An injured State could envisage action at a number of levels. To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors in situations provided for in the Vienna Convention on Diplomatic Relations—such acts do not amount to countermeasures in the sense of this chapter. At a second level, measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met. On the other hand, the scope of prohibited countermeasures under article 50, paragraph 2 (*b*), is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in

[768] See paragraphs (4) to (6) of the commentary to article 40.

[769] On the exclusion of unilateral countermeasures in European Union law, see, for example, joined cases 90 and 91-63 (*Commission of the European Economic Community* v. *Grand Duchy of Luxembourg and Kingdom of Belgium*), *Reports of cases before the Court*, p. 625, at p. 631 (1964); case 52/75 (*Commission of the European Communities* v. *Italian Republic*), *ibid*., p. 277, at p. 284 (1976); case 232/78 (*Commission of the European Economic Communities* v. *French Republic*), *ibid*., p. 2729 (1979); and case C-5/94 (*The Queen.* v. *Ministry of Agriculture, Fisheries and Food,* ex parte *Hedley Lomas (Ireland) Ltd.*), *Reports of cases before the Court of Justice and the Court of First Instance*, p. I–2553 (1996).

[770] See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 3, para. 7 and 22.

[771] See WTO, Report of the Panel, United States–Sections 301–310 of the Trade Act of 1974 (footnote 73 above), paras. 7.35–7.46.

[772] To use the synonym adopted by ICJ in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79.

[773] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 46, at p. 53. See also S. M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), pp. 13–59.

[774] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 28, para. 53.

all circumstances, including armed conflict.[775] The same applies, *mutatis mutandis*, to consular officials.

(15) In the *United States Diplomatic and Consular Staff in Tehran* case, ICJ stressed that "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions",[776] and it concluded that violations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State. As the Court said:

> The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.[777]

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds. It does not affect the various avenues for redress available to the receiving State under the terms of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.[778] On the other hand, no reference need be made in article 50, paragraph 2 (*b*), to multilateral diplomacy. The representatives of States to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations themselves, no retaliatory step taken by a host State to their detriment could qualify as a countermeasure since it would involve non-compliance not with an obligation owed to the responsible State but with an obligation owed to a third party, i.e. the international organization concerned.

### *Article 51. Proportionality*

**Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.**

*Commentary*

(1) Article 51 establishes an essential limit on the taking of countermeasures by an injured State in any given case, based on considerations of proportionality. It is relevant in determining what countermeasures may be applied and their degree of intensity. Proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.

(2) Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence. According to the award in the *"Naulilaa"* case:

> even if one were to admit that the law of nations does not require that the reprisal should be approximately in keeping with the offence, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them.[779]

(3) In the *Air Service Agreement* arbitration,[780] the issue of proportionality was examined in some detail. In that case there was no exact equivalence between France's refusal to allow a change of gauge in London on flights from the west coast of the United States and the United States' countermeasure which suspended Air France flights to Los Angeles altogether. The tribunal nonetheless held the United States measures to be in conformity with the principle of proportionality because they "do not appear to be clearly disproportionate when compared to those taken by France". In particular, the majority said:

> It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule … It has been observed, generally, that judging the "proportionality" of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation. [781]

In that case the countermeasures taken were in the same field as the initial measures and concerned the same routes, even if they were rather more severe in terms of their economic effect on the French carriers than the initial French action.

(4) The question of proportionality was again central to the appreciation of the legality of possible countermeasures taken by Czechoslovakia in the *Gabčíkovo-Nagymaros Project* case.[782] ICJ, having accepted that

[775] See, e.g., Vienna Convention on Diplomatic Relations, arts. 22, 24, 29, 44 and 45.

[776] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 38, para. 83.

[777] *Ibid*., p. 40, para. 86. Cf. article 45, subparagraph (*a*), of the Vienna Convention on Diplomatic Relations; article 27, paragraph 1 (*a*), of the Vienna Convention on Consular Relations (premises, property and archives to be protected "even in case of armed conflict").

[778] See articles 9, 11, 26, 36, paragraph 2, 43 (*b*) and 47, paragraph 2 (*a*), of the Vienna Convention on Diplomatic Relations; and articles 10, paragraph 2, 12, 23, 25 (*b*) and (*c*) and article 35, paragraph (3), of the Vienna Convention on Consular Relations.

[779] *"Naulilaa"* (see footnote 337 above), p. 1028.

[780] *Air Service Agreement* (see footnote 28 above), para. 83.

[781] *Ibid*.; Reuter, dissenting, accepted the tribunal's legal analysis of proportionality but suggested that there were "serious doubts on the proportionality of the counter-measures taken by the United States, which the tribunal has been unable to assess definitely" (p. 448).

[782] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 56, paras. 85 and 87, citing *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27.

Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 1977, went on to say:

> 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.
>
> In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:
>
> "[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user [sic] of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others"...
>
> Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well ...
>
> 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.

Thus, the Court took into account the quality or character of the rights in question as a matter of principle and (like the tribunal in the *Air Service Agreement* case) did not assess the question of proportionality only in quantitative terms.

(5) In other areas of the law where proportionality is relevant (e.g. self-defence), it is normal to express the requirement in positive terms, even though, in those areas as well, what is proportionate is not a matter which can be determined precisely.[783] The positive formulation of the proportionality requirement is adopted in article 51. A negative formulation might allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.

(6) Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely "quantitative" element of the injury suffered, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but "taking into account" two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to "the rights in question" has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration.

(7) Proportionality is concerned with the relationship between the internationally wrongful act and the countermeasure. In some respects proportionality is linked to the requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49. Proportionality is, however, a limitation even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.

[783] E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Milan, Giuffrè, 2000).

### *Article 52. Conditions relating to resort to countermeasures*

**1. Before taking countermeasures, an injured State shall:**

**(*a*) call upon the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;**

**(*b*) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.**

**2. Notwithstanding paragraph 1 (*b*), the injured State may take such urgent countermeasures as are necessary to preserve its rights.**

**3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:**

**(*a*) the internationally wrongful act has ceased; and**

**(*b*) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.**

**4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.**

*Commentary*

(1) Article 52 lays down certain procedural conditions relating to the resort to countermeasures by the injured State. Before taking countermeasures an injured State is required to call on the responsible State in accordance with article 43 to comply with its obligations under Part Two. The injured State is also required to notify the responsible State that it intends to take countermeasures and to offer to negotiate with that State. Notwithstanding this second requirement, the injured State may take certain urgent countermeasures to preserve its rights. If the responsible State has ceased the internationally wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken; if already taken, they must be suspended. However, this requirement does not apply if the responsible State fails to implement dispute settlement procedures in good faith. In such a case countermeasures do not have to be suspended and may be resumed.

(2) Overall, article 52 seeks to establish reasonable procedural conditions for the taking of countermeasures in a context where compulsory third party settlement of disputes may not be available, immediately or at all.[784] At the same time, it needs to take into account the possibility that there may be an international court or tribunal with authority to make decisions binding on the parties in relation to the dispute. Countermeasures are a form of self-help, which responds to the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that the responsible State is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives.

(3) The system of article 52 builds upon the observations of the tribunal in the *Air Service Agreement* arbitration.[785] The first requirement, set out in *paragraph 1* (a), is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. This requirement (sometimes referred to as "*sommation*") was stressed both by the tribunal in the *Air Service Agreement* arbitration[786] and by ICJ in the *Gabčíkovo-Nagymaros Project* case.[787] It also appears to reflect a general practice.[788]

(4) The principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the other State is given notice of a claim and some opportunity to present a response. In practice, however, there are usually quite extensive and detailed negotiations over a dispute before the point is reached where some countermeasures are contemplated. In such cases the injured State will already have notified the responsible State of its claim in accordance with article 43, and it will not have to do it again in order to comply with paragraph 1 (*a*).

(5) *Paragraph 1* (b) requires that the injured State which decides to take countermeasures should notify the responsible State of that decision to take countermeasures and offer to negotiate with that State. Countermeasures can have serious consequences for the target State, which should have the opportunity to reconsider its position faced with the proposed countermeasures. The temporal relationship between the operation of subparagraphs (*a*) and (*b*) of paragraph 1 is not strict. Notifications could be made close to each other or even at the same time.

(6) Under *paragraph 2*, however, the injured State may take "such urgent countermeasures as are necessary to preserve its rights" even before any notification of the intention to do so. Under modern conditions of communications, a State which is responsible for an internationally wrongful act and which refuses to cease that act or provide any redress therefore may also seek to immunize itself from countermeasures, for example by withdrawing assets from banks in the injured State. Such steps can be taken within a very short time, so that the notification required by paragraph 1 (*b*) might frustrate its own purpose. Hence, paragraph 2 allows for urgent countermeasures which are necessary to preserve the rights of the injured State: this phrase includes both its rights in the subject matter of the dispute and its right to take countermeasures. Temporary stay orders, the temporary freezing of assets and similar measures could fall within paragraph 2, depending on the circumstances.

(7) *Paragraph 3* deals with the case in which the wrongful act has ceased and the dispute is submitted to a court or tribunal which has the authority to decide it with binding effect for the parties. In such a case, and for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified. Once the conditions in paragraph 3 are met, the injured State may not take countermeasures; if already taken, they must be suspended "without undue delay". The phrase "without undue delay" allows a limited tolerance for the arrangements required to suspend the measures in question.

(8) A dispute is not "pending before a court or tribunal" for the purposes of paragraph 3 (*b*) unless the court or tribunal exists and is in a position to deal with the case. For these purposes a dispute is not pending before an *ad hoc* tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which will take some time even if both parties are cooperating in the appointment of the members of the tribunal.[789] Paragraph 3 is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international courts and tribunals.[790] The rationale behind paragraph 3 is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will

[784] See above, paragraph (7) of the commentary to the present chapter.

[785] *Air Service Agreement* (see footnote 28 above), pp. 445–446, paras. 91 and 94–96.

[786] *Ibid*., p. 444, paras. 85–87.

[787] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 56, para. 84.

[788] A. Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (Milan, Giuffrè, 1997).

[789] Hence, paragraph 5 of article 290 of the United Nations Convention on the Law of the Sea provides for ITLOS to deal with provisional measures requests "[p]ending the constitution of an arbitral tribunal to which the dispute is being submitted".

[790] The binding effect of provisional measures orders under Part XI of the United Nations Convention on the Law of the Sea is assured by paragraph 6 of article 290. For the binding effect of provisional measures orders under Article 41 of the Statute of ICJ, see the decision in *LaGrand, Judgment* (footnote 119 above), pp. 501–504, paras. 99–104.

make countermeasures unnecessary pending the decision of the tribunal. The reference to a "court or tribunal" is intended to refer to any third party dispute settlement procedure, whatever its designation. It does not, however, refer to political organs such as the Security Council. Nor does it refer to a tribunal with jurisdiction between a private party and the responsible State, even if the dispute between them has given rise to the controversy between the injured State and the responsible State. In such cases, however, the fact that the underlying dispute has been submitted to arbitration will be relevant for the purposes of articles 49 and 51, and only in exceptional cases will countermeasures be justified.[791]

(9) *Paragraph 4* of article 52 provides a further condition for the suspension of countermeasures under paragraph 3. It comprehends various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order, whether or not it is formally binding, through to refusal to accept the final decision of the court or tribunal. This paragraph also applies to situations where a State party fails to cooperate in the establishment of the relevant tribunal or fails to appear before the tribunal once it is established. Under the circumstances of paragraph 4, the limitations to the taking of countermeasures under paragraph 3 do not apply.

### *Article 53. Termination of countermeasures*

**Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.**

*Commentary*

(1) Article 53 deals with the situation where the responsible State has complied with its obligations of cessation and reparation under Part Two in response to countermeasures taken by the injured State. Once the responsible State has complied with its obligations under Part Two, no ground is left for maintaining countermeasures, and they must be terminated forthwith.

(2) The notion that countermeasures must be terminated as soon as the conditions which justified them have ceased is implicit in the other articles in this chapter. In view of its importance, however, article 53 makes this clear. It underlines the specific character of countermeasures under article 49.

[791] Under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, the State of nationality may not bring an international claim on behalf of a claimant individual or company "in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute" (art. 27, para. 1); see C. H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) pp. 397–414. This excludes all forms of invocation of responsibility by the State of nationality, including the taking of countermeasures. See paragraph (2) of the commentary to article 42.

### *Article 54. Measures taken by States other than an injured State*

**This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.**

*Commentary*

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. However, "injured" States, as defined in article 42, are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group. By virtue of article 48, paragraph 2, such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus, with respect to the obligations referred to in article 48, such States are recognized as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches.[792]

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organizations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the Charter of the United Nations, is not covered by the articles.[793] More generally, the articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.[794]

(3) Practice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (e.g. breaking off air links or other contacts). Examples include the following:

[792] See, e.g., M. Akehurst, "Reprisals by third States", BYBIL, *1970*, vol. 44, p. 1; J. I. Charney, "Third State remedies in international law", *Michigan Journal of International Law*, vol. 10, No. 1 (1989), p. 57; Hutchinson, *loc. cit*. (footnote 672 above); Sicilianos, *op. cit.* (footnote 735 above), pp. 110–175; B. Simma, "From bilateralism to community interest in international law", *Collected Courses ..., 1994–VI* (The Hague, Martinus Nijhoff, 1997), vol. 250, p. 217; and J. A. Frowein, "Reactions by not directly affected States to breaches of public international law", *Collected Courses ..., 1994–IV* (Dordrecht, Martinus Nijhoff, 1995), vol. 248, p. 345.

[793] See article 59 and commentary.

[794] See article 57 and commentary.

• *United States-Uganda (1978).* In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.[795] The legislation recited that "[t]he Government of Uganda … has committed genocide against Ugandans" and that the "United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide".[796]

• *Certain Western countries-Poland and the Soviet Union (1981).* On 13 December 1981, the Polish Government imposed martial law and subsequently suppressed demonstrations and detained many dissidents.[797] The United States and other Western countries took action against both Poland and the Soviet Union. The measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, Great Britain, France, the Netherlands, Switzerland and Austria.[798] The suspension procedures provided for in the respective treaties were disregarded.[799]

• *Collective measures against Argentina (1982).* In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.[800] Following a request by the United Kingdom, European Community members, Australia, Canada and New Zealand adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to article XI:1 and possibly article III of the General Agreement on Tariffs and Trade. It was disputed whether the measures could be justified under the national security exception provided for in article XXI (*b*) (iii) of the Agreement.[801] The embargo adopted by the European countries also constituted a suspension of Argentina's rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,[802] for which security exceptions of the Agreement did not apply.

• *United States-South Africa (1986).* When in 1985, the Government of South Africa declared a state of emergency in large parts of the country, the Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.[803] Subsequently, some countries introduced measures which went beyond those recommended by the Security Council. The United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended landing rights of South African Airlines on United States territory.[804] This immediate suspension was contrary to the terms of the 1947 United States of America and Union of South Africa Agreement relating to air services between their respective territories[805] and was justified as a measure which should encourage the Government of South Africa "to adopt reforms leading to the establishment of a non-racial democracy".[806]

• *Collective measures against Iraq (1990).* On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion. European Community member States and the United States adopted trade embargoes and decided to freeze Iraqi assets.[807] This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait.

• C*ollective measures against the Federal Republic of Yugoslavia (1998).* In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.[808] For a number of countries, such as France, Germany and the United Kingdom, the latter measure implied the non-performance of bilateral aviation agreements.[809] Because of doubts about the legitimacy of the action, the British Government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that "President Milosevic's ... worsening record on human rights means that, on moral and political grounds, he has forfeited the right of his Government to insist upon the 12 months notice which would normally ap-

[795] Uganda Embargo Act, Public Law 95-435 of 10 October 1978, *United States Statutes at Large 1978*, vol. 92, part 1 (Washington, D.C., United States Government Printing Office, 1980), pp. 1051–1053.

[796] *Ibid*., sects. 5(*a*) and (*b*).

[797] RGDIP, vol. 86 (1982), pp. 603–604.

[798] *Ibid*., p. 606.

[799] See, e.g., article 15 of the Air Transport Agreement between the Government of the United States of America and the Government of the Polish People's Republic of 1972 (*United States Treaties and Other International Agreements*, vol. 23, part 4 (1972), p. 4269); and article 17 of the United States-Union of Soviet Socialist Republics Civil Air Transport Agreement of 1966, ILM, vol. 6, No. 1 (January 1967), p. 82 and vol. 7, No. 3 (May 1968), p. 571.

[800] Security Council resolution 502 (1982) of 3 April 1982.

[801] Western States' reliance on this provision was disputed by other GATT members; cf. communiqué of Western countries, GATT document L. 5319/Rev.1 and the statements by Spain and Brazil, GATT document C/M/157, pp. 5–6. For an analysis, see M. J. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Unilateral Suspension of GATT Obligations as Reprisal (English summary)) (Berlin, Springer, 1996), pp. 328–334.

[802] The treaties are reproduced in *Official Journal of the European Communities*, No. L 298 of 26 November 1979, p. 2; and No. L 275 of 18 October 1980, p. 14.

[803] Security Council resolution 569 (1985) of 26 July 1985. For further references, see Sicilianos, *op. cit.* (footnote 735 above), p. 165.

[804] For the text of this provision, see ILM, vol. 26, No. 1 (January 1987), p. 79 (sect. 306).

[805] United Nations, *Treaty Series*, vol. 66, p. 239 (art. VI).

[806] For the implementation order, see ILM (footnote 804 above), p. 105.

[807] See, e.g., President Bush's Executive Orders of 2 August 1990, reproduced in AJIL, vol. 84, No. 4 (October 1990), pp. 903–905.

[808] Common positions of 7 May and 29 June 1998, *Official Journal of the European Communities*, No. L 143 of 14 May 1998, p. 1 and No. L 190 of 4 July 1998, p. 3; implemented through Council Regulations 1295/98, *ibid*., No. L 178 of 23 June 1998, p. 33 and 1901/98, *ibid.*, No. L 248 of 8 September 1998, p. 1.

[809] See, e.g., United Kingdom, *Treaty Series* No. 10 (1960) (London, HM Stationery Office, 1960); and *Recueil des Traités et Accords de la France*, 1967, No. 69.

ply".[810] The Federal Republic of Yugoslavia protested these measures as "unlawful, unilateral and an example of the policy of discrimination".[811]

(4) In some other cases, certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures, but asserted a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

• *Netherlands-Suriname (1982).* In 1980, a military Government seized power in Suriname. In response to a crackdown by the new Government on opposition movements in December 1982, the Dutch Government suspended a bilateral treaty on development assistance under which Suriname was entitled to financial subsidies.[812] While the treaty itself did not contain any suspension or termination clauses, the Dutch Government stated that the human rights violations in Suriname constituted a fundamental change of circumstances which gave rise to a right of suspension.[813]

• *European Community member States-the Federal Republic of Yugoslavia (1991).* In the autumn of 1991, in response to resumption of fighting within the Federal Republic of Yugoslavia, European Community members suspended and later denounced the 1983 Cooperation Agreement with Yugoslavia.[814] This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in resolution 713 (1991) of 25 September 1991. The reaction was incompatible with the terms of the Cooperation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice. Justifying the suspension, European Community member States explicitly mentioned the threat to peace and security in the region. But as in the case of Suriname, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.[815]

(5) In some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those States could not be considered "injured States" in the sense of article 42. It should be noted that in those cases where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State.[816]

(6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently, it is not appropriate to include in the present articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead, chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.

(7) Article 54 accordingly provides that the chapter on countermeasures does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached. The article speaks of "lawful measures" rather than "countermeasures" so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.

## Part Four

## GENERAL PROVISIONS

This Part contains a number of general provisions applicable to the articles as a whole, specifying either their scope or certain matters not dealt with. First, article 55 makes it clear by reference to the *lex specialis* principle that the articles have a residual character. Where some matter otherwise dealt with in the articles is governed by a special rule of international law, the latter will prevail to the extent of any inconsistency. Correlatively, article 56 makes it clear that the articles are not exhaustive, and that they do not affect other applicable rules of international law on matters not dealt with. There follow three saving clauses. Article 57 excludes from the scope of the articles questions concerning the responsibility of international organizations and of States for the acts of international organizations. The articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State, and this is made clear by article 58. Finally, article 59 reserves the effects of the Charter of the United Nations itself.

[810] BYBIL, *1998*, vol. 69, p. 581; see also BYBIL, *1999*, vol. 70, pp. 555–556.

[811] Statement of the Government of the Federal Republic of Yugoslavia on the suspension of flights of Yugoslav Airlines of 10 October 1998. See M. Weller, *The Crisis in Kosovo 1989-1999* (Cambridge, Documents & Analysis Publishing, 1999), p. 227.

[812] *Tractatenblad van het Koninkrijk der Nederlanden*, No. 140 (1975). See H.-H. Lindemann, "The repercussions resulting from the violation of human rights in Surinam on the contractual relations between the Netherlands and Surinam", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 44 (1984), p. 64, at pp. 68–69.

[813] R. C. R. Siekmann, "Netherlands State practice for the parliamentary year 1982–1983", NYIL, 1984, vol. 15, p. 321.

[814] *Official Journal of the European Communities*, No. L 41 of 14 February 1983, p. 1; No. L 315 of 15 November 1991, p. 1, for the suspension; and No. L 325 of 27 November 1991, p. 23, for the denunciation.

[815] See also the decision of the European Court of Justice in *A. Racke GmbH and Co.* v. *Hauptzollamt Mainz*, case C-162/96, *Reports of cases before the Court of Justice and the Court of First Instance*, 1998-6, p. I–3655, at pp. 3706–3708, paras. 53–59.

[816] Cf. *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above) where ICJ noted that action by way of collective self-defence could not be taken by a third State except at the request of the State subjected to the armed attack (p. 105, para. 199).

### *Article 55.* Lex specialis

**These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.**

*Commentary*

(1) When defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach. The question then is whether those provisions are exclusive, i.e. whether the consequences which would otherwise apply under general international law, or the rules that might otherwise have applied for determining a breach, are thereby excluded. A treaty may expressly provide for its relationship with other rules. Often, however, it will not do so and the question will then arise whether the specific provision is to coexist with or exclude the general rule that would otherwise apply.

(2) Article 55 provides that the articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. It reflects the maxim *lex specialis derogat legi generali*. Although it may provide an important indication, this is only one of a number of possible approaches towards determining which of several rules potentially applicable is to prevail or whether the rules simply coexist. Another gives priority, as between the parties, to the rule which is later in time.[817] In certain cases the consequences that follow from a breach of some overriding rule may themselves have a peremptory character. For example, States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law. Thus, the assumption of article 55 is that the special rules in question have at least the same legal rank as those expressed in the articles. On that basis, article 55 makes it clear that the present articles operate in a residual way.

(3) It will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases, it will be clear from the language of a treaty or other text that only the consequences specified are to flow. Where that is so, the consequence will be "determined" by the special rule and the principle embodied in article 55 will apply. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example of the former is the WTO Understanding on Rules and Procedures governing the Settlement of Disputes as it relates to certain remedies.[818] An example of the latter is article 41 of Protocol No. 11 to the European Convention on Human Rights.[819] Both concern matters dealt with in Part Two of the articles. The same considerations apply to Part One. Thus, a particular treaty might impose obligations on a State but define the "State" for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II.[820] Or a treaty might exclude a State from relying on *force majeure* or necessity.

(4) For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus, the question is essentially one of interpretation. For example, in the *Neumeister* case, the European Court of Human Rights held that the specific obligation in article 5, paragraph 5, of the European Convention on Human Rights for compensation for unlawful arrest or detention did not prevail over the more general provision for compensation in article 50. In the Court's view, to have applied the *lex specialis* principle to article 5, paragraph 5, would have led to "consequences incompatible with the aim and object of the Convention".[821] It was sufficient, in applying article 50, to take account of the specific provision.[822]

(5) Article 55 is designed to cover both "strong" forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as "weaker" forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution. PCIJ referred to the notion of a self-contained regime in the *S.S. "Wimbledon"* case with respect to the transit provisions concerning the Kiel Canal in the Treaty of Versailles,[823]

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[817] See paragraph 3 of article 30 of the 1969 Vienna Convention.

[818] See Marrakesh Agreement establishing the World Trade Organization, annex 2, especially art. 3, para. 7, which provides for compensation "only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". For WTO purposes, "compensation" refers to the future conduct, not past conduct, and involves a form of countermeasure. See article 22 of the Understanding. On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, Australia–Subsidies Provided to Producers and Exporters of Automotive Leather (footnote 431 above).

[819] See paragraph (2) of the commentary to article 32.

[820] Thus, article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment only applies to torture committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". This is probably narrower than the bases for attribution of conduct to the State in Part One, chapter II. Cf. "federal" clauses, allowing certain component units of the State to be excluded from the scope of a treaty or limiting obligations of the federal State with respect to such units (e.g. article 34 of the Convention for the Protection of the World Cultural and Natural Heritage).

[821] *Neumeister* v. *Austria, Eur. Court H.R., Series A, No. 17* (1974), paras. 28–31, especially para. 30.

[822] See also *Mavrommatis* (footnote 236 above), pp. 29–33; *Marcu Colleanu* v. *German State*, *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (Paris, Sirey, 1930), vol. IX, p. 216 (1929); WTO, Report of the Panel, Turkey–Restrictions on Imports of Textile and Clothing Products (footnote 130 above), paras. 9.87–9.95; *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI (Sales No. E/F. 95.V.2), p. 53, at p. 100, para. 39 (1977). See further C. W. Jenks, "The conflict of law-making treaties", BYBIL, *1953*, vol. 30, p. 401; M. McDougal, H. D. Lasswell and J. C. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven Press, 1994), pp. 200–206; and P. Reuter, *Introduction to the Law of Treaties* (footnote 300 above), para. 201.

[823] *S.S.* "*Wimbledon"* (see footnote 34 above), pp. 23–24.

as did ICJ in the *United States Diplomatic and Consular Staff in Tehran* case with respect to remedies for abuse of diplomatic and consular privileges.[824]

(6) The principle stated in article 55 applies to the articles as a whole. This point is made clear by the use of language ("the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State") which reflects the content of each of Parts One, Two and Three.

### *Article 56. Questions of State responsibility not regulated by these articles*

**The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.**

*Commentary*

(1) The present articles set out by way of codification and progressive development the general secondary rules of State responsibility. In that context, article 56 has two functions. First, it preserves the application of the rules of customary international law concerning State responsibility on matters not covered by the articles. Secondly, it preserves other rules concerning the effects of a breach of an international obligation which do not involve issues of State responsibility but stem from the law of treaties or other areas of international law. It complements the *lex specialis* principle stated in article 55. Like article 55, it is not limited to the legal consequences of wrongful acts but applies to the whole regime of State responsibility set out in the articles.

(2) As to the first of these functions, the articles do not purport to state all the consequences of an internationally wrongful act even under existing international law and there is no intention of precluding the further development of the law on State responsibility. For example, the principle of law expressed in the maxim *ex injuria jus non oritur* may generate new legal consequences in the field of responsibility.[825] In this respect, article 56 mirrors the preambular paragraph of the 1969 Vienna Convention which affirms that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". However, matters of State responsibility are not only regulated by customary international law but also by some treaties; hence article 56 refers to the "applicable rules of international law".

(3) A second function served by article 56 is to make it clear that the present articles are not concerned with any legal effects of a breach of an international obligation which do not flow from the rules of State responsibility, but stem from the law of treaties or other areas of law. Examples include the invalidity of a treaty procured by an unlawful use of force,[826] the exclusion of reliance on a fundamental change of circumstances where the change in question results from a breach of an international obligation of the invoking State to any other State party,[827] or the termination of the international obligation violated in the case of a material breach of a bilateral treaty.[828]

### *Article 57. Responsibility of an international organization*

**These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.**

*Commentary*

(1) Article 57 is a saving clause which reserves two related issues from the scope of the articles. These concern, first, any question involving the responsibility of international organizations, and secondly, any question concerning the responsibility of any State for the conduct of an international organization.

(2) In accordance with the articles prepared by the Commission on other topics, the expression "international organization" means an "intergovernmental organization".[829] Such an organization possesses separate legal personality under international law,[830] and is responsible for its own acts, i.e. for acts which are carried out by the organization through its own organs or officials.[831] By contrast, where a number of States act together through their own organs as distinct from those of an international organization, the conduct in question is that of the States concerned, in accordance with the principles set out in chapter II of Part One. In such cases, as article 47 confirms, each State remains responsible for its own conduct.

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[824] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), at p. 40, para. 86. See paragraph (15) of the commentary to article 50 and also B. Simma, "Self-contained regimes", NYIL, 1985, vol. 16, p. 111.

[825] Another possible example, related to the determination whether there has been a breach of an international obligation, is the so-called principle of "approximate application", formulated by Sir Hersch Lauterpacht in *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23, at p. 46. In the *Gabčíkovo-Nagymaros Project* case (see footnote 27 above), the Court said that "even if such a principle existed, it could by definition only be employed within the limits of the treaty in question" (p. 53, para. 76). See also S. Rosenne, *Breach of Treaty* (footnote 411 above), pp. 96–101.

[826] 1969 Vienna Convention, art. 52.

[827] *Ibid*., art. 62, para. 2 (*b*).

[828] *Ibid*., art. 60, para 1.

[829] See article 2, paragraph 1 (*i*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "the 1986 Vienna Convention").

[830] A firm foundation for the international personality of the United Nations is laid in the advisory opinion of the Court in *Reparation for Injuries* (see footnote 38 above), at p. 179.

[831] As the Court has observed, "the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts", *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 56 above).

(3) Just as a State may second officials to another State, putting them at its disposal so that they act for the purposes of and under the control of the latter, so the same could occur as between an international organization and a State. The former situation is covered by article 6. As to the latter situation, if a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributable to the organization, not the sending State, and will fall outside the scope of the articles. As to the converse situation, in practice there do not seem to be convincing examples of organs of international organizations which have been "placed at the disposal of" a State in the sense of article 6,[832] and there is no need to provide expressly for the possibility.

(4) Article 57 also excludes from the scope of the articles issues of the responsibility of a State for the acts of an international organization, i.e. those cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization. Formally, such issues could fall within the scope of the present articles since they concern questions of State responsibility akin to those dealt with in chapter IV of Part One. But they raise controversial substantive questions as to the functioning of international organizations and the relations between their members, questions which are better dealt with in the context of the law of international organizations.[833]

(5) On the other hand article 57 does not exclude from the scope of the articles any question of the responsibility of a State for its own conduct, i.e. for conduct attributable to it under chapter II of Part One, not being conduct performed by an organ of an international organization. In this respect the scope of article 57 is narrow. It covers only what is sometimes referred to as the derivative or secondary liability of member States for the acts or debts of an international organization.[834]

### *Article 58. Individual responsibility*

**These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.**

*Commentary*

(1) Article 58 makes clear that the articles as a whole do not address any question of the individual responsibility under international law of any person acting on behalf of a State. It clarifies a matter which could be inferred in any case from the fact that the articles only address issues relating to the responsibility of States.

(2) The principle that individuals, including State officials, may be responsible under international law was established in the aftermath of the Second World War. It was included in the London Charter of 1945 which established the Nuremberg Tribunal[835] and was subsequently endorsed by the General Assembly.[836] It underpins more recent developments in the field of international criminal law, including the two *ad hoc* tribunals and the Rome Statute of the International Criminal Court.[837] So far this principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility.[838] As a saving clause, article 58 is not intended to exclude that possibility; hence the use of the general term "individual responsibility".

(3) Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility.[839] The

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[832] Cf. *Yearbook ... 1974*, vol. II (Part One), pp. 286–290. The High Commissioner for the Free City of Danzig was appointed by the League of Nations Council and was responsible to it; see *Treatment of Polish Nationals* (footnote 75 above). Although the High Commissioner exercised powers in relation to Danzig, it is doubtful that he was placed at the disposal of Danzig within the meaning of article 6. The position of the High Representative, appointed pursuant to annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina of 14 December 1995, is also unclear. The Constitutional Court of Bosnia and Herzegovina has held that the High Representative has a dual role, both as an international agent and as an official in certain circumstances acting in and for Bosnia and Herzegovina; in the latter respect, the High Representative's acts are subject to constitutional control. See *Case U 9/00 on the Law on the State Border Service*, Official Journal of Bosnia and Herzegovina, No. 1/01 of 19 January 2001.

[833] This area of international law has acquired significance following controversies, *inter alia*, over the International Tin Council: *J. H. Rayner (Mincing Lane) Ltd.* v. *Department of Trade and Industry*, case 2 A.C. 418 (1990) (England, House of Lords); *Maclaine Watson and Co., Ltd.* v. *Council and Commission of the European Communities*, case C-241/87, *Reports of cases before the Court of Justice and the Court of First Instance*, 1990-5, p. I–1797; and the Arab Organization for Industrialization (*Westland Helicopters Ltd.* v. *Arab Organization for Industrialization*, ILR, vol. 80, p. 595 (1985) (International Chamber of Commerce Award); *Arab Organization for Industrialization* v. *Westland Helicopters Ltd., ibid*., p. 622 (1987) (Switzerland, Federal Supreme Court); *Westland Helicopters Ltd.* v. *Arab Organization for Industrialization, ibid*., vol. 108, p. 564 (1994) (England, High Court). See also *Waite and Kennedy* v. *Germany*, *Eur. Court H.R.*, *Reports*, 1999–I, p. 393 (1999).

[834] See the work of the Institute of International Law under R. Higgins, *Yearbook of the Institute of International Law*, vol. 66–I (1995), p. 251, and vol. 66–II (1996), p. 444. See also P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Brussels, Bruylant Editions de l'Université de Bruxelles, 1998). See further WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (footnote 130).

[835] See footnote 636 above.

[836] General Assembly resolution 95 (I) of 11 December 1946. See also the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, elaborated by the International Law Commission, *Yearbook ... 1950*, vol. II, p. 374, document A/1316.

[837] See paragraph (6) of the commentary to chapter III of Part Two.

[838] See, e.g., article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, dealing with compensation for victims of torture.

[839] See, e.g., *Streletz, Kessler and Krenz* v. *Germany* (application Nos. 34044/96, 35532/97 and 44801/98), judgment of 22 March 2001, *Eur. Court H.R.*, *Reports*, 2001–II: "If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned. It remains to be established that alongside that State responsibility the applicants individually bore criminal responsibility at the material time" (para. 104).

State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.[840] Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25, paragraph 4, of the Rome Statute of the International Criminal Court, which provides that: "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law.[841]

(4) Article 58 reflects this situation, making it clear that the articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term "individual responsibility" has acquired an accepted meaning in the light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.

[840] Prosecution and punishment of responsible State officials may be relevant to reparation, especially satisfaction: see paragraph (5) of the commentary to article 36.

[841] See, e.g., the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle III (footnote 836 above), p. 375; and article 27 of the Rome Statute of the International Criminal Court.

### *Article 59. Charter of the United Nations*

**These articles are without prejudice to the Charter of the United Nations.**

*Commentary*

(1) In accordance with Article 103 of the Charter of the United Nations, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". The focus of Article 103 is on treaty obligations inconsistent with obligations arising under the Charter. But such conflicts can have an incidence on issues dealt with in the articles, as for example in the *Lockerbie* cases.[842] More generally, the competent organs of the United Nations have often recommended or required that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases.

(2) Article 59 accordingly provides that the articles cannot affect and are without prejudice to the Charter of the United Nations. The articles are in all respects to be interpreted in conformity with the Charter.

[842] *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; *(Libyan Arab Jamahiriya* v. *United States of America), ibid.*, p. 114.

# Chapter V

# INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES)

## A. Introduction

78. The Commission, at its thirtieth session (1978), included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Robert Q. Quentin-Baxter Special Rapporteur.[843]

79. The Commission, from its thirty-second (1980) to its thirty-sixth sessions (1984), received and considered five reports from the Special Rapporteur.[844] The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission (1982). The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

80. The Commission, at its thirty-sixth session, also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline[845] and a study prepared by the secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law".[846]

81. The Commission, at its thirty-seventh session (1985), appointed Mr. Julio Barboza, Special Rapporteur for the topic. The Commission received 12 reports from the Special Rapporteur from its thirty-seventh to its forty-eighth sessions (1996).[847]

82. At its forty-fourth session (1992), the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic.[848] On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting, on 8 July 1992, decided to continue the work on this topic in stages. First to complete work on prevention of trans-

[843] At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group, see *Yearbook ... 1978*, vol. II (Part Two), pp. 150–152.

[844] The five reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2;

Second report: *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2;

Third report: *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360;

Fourth report: *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373;

Fifth report: *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

[845] *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

[846] *Yearbook ... 1985*, vol. II (Part One), Addendum, document A/CN.4/384. See also "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law", *Yearbook ... 1995*, vol. II (Part One), p. 61, document A/CN.4/471.

[847] The 12 reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook ... 1985*, vol. II (Part One), p. 97, document A/CN.4/394;

Second report: *Yearbook ... 1986*, vol. II (Part One), p. 145, document A/CN.4/402;

Third report: *Yearbook ... 1987*, vol. II (Part One), p. 47, document A/CN.4/405;

Fourth report: *Yearbook ... 1988*, vol. II (Part One), p. 251, document A/CN.4/413;

Fifth report: *Yearbook ... 1989*, vol. II (Part One), p. 131, document A/CN.4/423;

Sixth report: *Yearbook ... 1990*, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1;

Seventh report: *Yearbook ... 1991*, vol. II (Part One), p. 71, document A/CN.4/437;

Eighth report: *Yearbook ... 1992*, vol. II (Part One), p. 59, document A/CN.4/443;

Ninth report: *Yearbook ... 1993*, vol. II (Part One), p. 187, document A/CN.4/450;

Tenth report: *Yearbook ... 1994*, vol. II (Part One), p. 129, document A/CN.4/459;

Eleventh report: *Yearbook ... 1995*, vol. II (Part One), p. 51, document A/CN.4/468;

Twelfth report: *Yearbook ... 1996*, vol. II (Part One), p. 29, document A/CN.4/475 and Add.1.

[848] See *Yearbook ... 1992*, vol. II (Part Two), p. 51, document A/47/10, paras. 341–343.

boundary harm and to proceed with remedial measures.[849] The Commission decided, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic deals with "activities" and to defer any formal change of the title.

83. At its forty-eighth session, the Commission re-established the Working Group in order to review the topic in all its aspects in the light of the reports of the Special Rapporteur and the discussions held, over the years, in the Commission and to make recommendations to the Commission.

84. The Working Group submitted a report[850] which provided a complete picture of the topic relating to the principle of prevention and that of liability for compensation or other relief, presenting articles and commentaries thereto.

85. At its forty-ninth session (1997), the Commission established again a Working Group to consider the question of how the Commission should proceed with its work on this topic. The Working Group reviewed the work of the Commission on the topic since 1978. It noted that the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to "State responsibility". The Working Group further noted that the Commission had dealt with two issues under the topic: "prevention" and "international liability". In the view of the Working Group, these two issues were distinct from one another, though related. The Working Group therefore agreed that henceforth the issues of prevention and of liability should be dealt with separately.

86. Accordingly, the Commission decided to proceed with its work on the topic "International liability for injurious consequences arising out of acts not prohibited by international law", dealing first with the issue of prevention under the subtitle "Prevention of transboundary damage from hazardous activities".[851] The General Assembly took note of this decision in paragraph 7 of its resolution 52/156 of 15 December 1997.

87. At the same session, the Commission appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for this part of the topic.[852]

88. At its fiftieth session (1998), the Commission received and considered the first report of the Special Rapporteur,[853] and adopted on first reading a set of 17 draft articles on prevention of transboundary damage from hazardous activities.

89. In accordance with articles 16 and 21 of its statute, the Commission transmitted the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2000.

90. At its fifty-first (1999) and fifty-second (2000) sessions, the Commission received and considered the second[854] and third[855] reports of the Special Rapporteur. The Commission also had before it comments and observations received from Governments.[856] At its 2643rd meeting, on 20 July 2000, the Commission referred the draft preamble and revised draft articles to the Drafting Committee.

### B. Consideration of the topic at the present session

91. At the present session, the Drafting Committee considered the draft articles which the Commission had referred to it at the previous session. The Chairman of the Drafting Committee presented the report of the Committee (A/CN.4/L.601 and Corr.1 and 2) at the 2675th meeting of the Commission, held on 11 May 2001. At the same meeting, the Commission considered the report of the Drafting Committee and adopted the final text of a draft preamble and a set of 19 draft articles on prevention of transboundary harm from hazardous activities.

92. At its 2697th, 2698th, 2699th and 2700th meetings, from 27 July to 2 August 2001, the Commission adopted the commentaries to the aforementioned draft articles.

93. In accordance with its statute, the Commission submits the draft preamble and the draft articles to the General Assembly, together with a recommendation set out below.

### C. Recommendation of the Commission

94. At its 2701st meeting, on 3 August 2001, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly the elaboration of a convention by the Assembly on the basis of the draft articles on prevention of transboundary harm from hazardous activities.

### D. Tribute to the Special Rapporteur, Mr. Pemmaraju Sreenivasa Rao

95. At its 2701st meeting, on 3 August 2001, the Commission, after adopting the text of the draft preamble and draft articles on prevention of transboundary harm from hazardous activities, adopted the following resolution by acclamation:

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[849] *Ibid*., paras. 344–349.

[850] *Yearbook ... 1996*, vol. II (Part Two), annex I.

[851] *Yearbook ... 1997*, vol. II (Part Two), p. 59, para. 168 (*a*).

[852] *Ibid*.

[853] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/487 and Add.1.

[854] *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/501.

[855] *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/510.

[856] A/CN.4/509 (see *Yearbook ... 2000*, vol. II (Part One)) and A/CN.4/516, the latter being received in 2001.

*"The International Law Commission*,

*"Having adopted* the draft preamble and draft articles on prevention of transboundary harm from hazardous activities,

*"Expresses* to the Special Rapporteur, Mr. Pemmaraju Sreenivasa Rao, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft preamble and draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft preamble and draft articles on prevention of transboundary harm from hazardous activities."

96. The Commission also expressed its deep appreciation to the previous Special Rapporteurs, Robert Q. Quentin-Baxter and Julio Barboza, for their outstanding contribution to the work on the topic.

## E. Draft articles on prevention of transboundary harm from hazardous activities

### 1. Text of the draft articles

97. The text of the draft preamble and draft articles adopted by the Commission at its fifty-third session is reproduced below.

**PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES**

***The States Parties,***

***Having in mind*** **Article 13, paragraph 1 (a), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,**

***Bearing in mind*** **the principle of permanent sovereignty of States over the natural resources within their territory or otherwise under their jurisdiction or control,**

***Bearing also in mind*** **that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited,**

***Recalling*** **the Rio Declaration on Environment and Development of 13 June 1992,**

***Recognizing*** **the importance of promoting international cooperation,**

***Have agreed*** **as follows:**

*Article 1. Scope*

**The present articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.**

*Article 2. Use of terms*

**For the purposes of the present articles:**

**(*a*) "Risk of causing significant transboundary harm" includes risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm;**

**(*b*) "Harm" means harm caused to persons, property or the environment;**

**(*c*) "Transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;**

**(*d*) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are planned or are carried out;**

**(*e*) "State likely to be affected" means the State or States in the territory of which there is the risk of significant transboundary harm or which have jurisdiction or control over any other place where there is such a risk;**

**(*f*) "States concerned" means the State of origin and the State likely to be affected.**

*Article 3. Prevention*

**The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.**

*Article 4. Cooperation*

**States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof.**

*Article 5. Implementation*

**States concerned shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present articles.**

*Article 6. Authorization*

**1. The State of origin shall require its prior authorization for:**

**(*a*) any activity within the scope of the present articles carried out in its territory or otherwise under its jurisdiction or control;**

**(*b*) any major change in an activity referred to in subparagraph (*a*);**

**(*c*) any plan to change an activity which may transform it into one falling within the scope of the present articles.**

**2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present articles. Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present articles.**

**3. In case of a failure to conform to the terms of the authorization, the State of origin shall take such actions as appropriate, including where necessary terminating the authorization.**

*Article 7. Assessment of risk*

**Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.**

*Article 8. Notification and information*

**1. If the assessment referred to in article 7 indicates a risk of causing significant transboundary harm, the State of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available**

**technical and all other relevant information on which the assessment is based.**

**2. The State of origin shall not take any decision on authorization of the activity pending the receipt, within a period not exceeding six months, of the response from the State likely to be affected.**

*Article 9. Consultations on preventive measures*

**1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof. The States concerned shall agree, at the commencement of such consultations, on a reasonable time frame for the consultations.**

**2. The States concerned shall seek solutions based on an equitable balance of interests in the light of article 10.**

**3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.**

*Article 10. Factors involved in an equitable balance of interests*

**In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 9, the States concerned shall take into account all relevant factors and circumstances, including:**

**(*a*) the degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;**

**(*b*) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the State likely to be affected;**

**(*c*) the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;**

**(*d*) the degree to which the State of origin and, as appropriate, the State likely to be affected are prepared to contribute to the costs of prevention;**

**(*e*) the economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;**

**(*f*) the standards of prevention which the State likely to be affected applies to the same or comparable activities and the standards applied in comparable regional or international practice.**

*Article 11. Procedures in the absence of notification*

**1. If a State has reasonable grounds to believe that an activity planned or carried out in the State of origin may involve a risk of causing significant transboundary harm to it, it may request the State of origin to apply the provision of article 8. The request shall be accompanied by a documented explanation setting forth its grounds.**

**2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 8, it shall so inform the requesting State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy that State, at its request, the two States shall promptly enter into consultations in the manner indicated in article 9.**

**3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a reasonable period.**

*Article 12. Exchange of information*

**While the activity is being carried out, the States concerned shall exchange in a timely manner all available information concerning that activity relevant to preventing significant transboundary harm or at any event minimizing the risk thereof. Such an exchange of information shall continue until such time as the States concerned consider it appropriate even after the activity is terminated.**

*Article 13. Information to the public*

**States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.**

*Article 14. National security and industrial secrets*

**Data and information vital to the national security of the State of origin or to the protection of industrial secrets or concerning intellectual property may be withheld, but the State of origin shall cooperate in good faith with the State likely to be affected in providing as much information as possible under the circumstances.**

*Article 15. Non-discrimination*

**Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of an activity within the scope of the present articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.**

*Article 16. Emergency preparedness*

**The State of origin shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with the State likely to be affected and competent international organizations.**

*Article 17. Notification of an emergency*

**The State of origin shall, without delay and by the most expeditious means, at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present articles and provide it with all relevant and available information.**

*Article 18. Relationship to other rules of international law*

**The present articles are without prejudice to any obligation incurred by States under relevant treaties or rules of customary international law.**

*Article 19. Settlement of disputes*

**1. Any dispute concerning the interpretation or application of the present articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties to the dispute, including negotiations, mediation, conciliation, arbitration or judicial settlement.**

**2. Failing an agreement on the means for the peaceful settlement of the dispute within a period of six months, the parties to the**

**dispute shall, at the request of any of them, have recourse to the establishment of an impartial fact-finding commission.**

**3. The Fact-finding Commission shall be composed of one member nominated by each party to the dispute and in addition a member not having the nationality of any of the parties to the dispute chosen by the nominated members who shall serve as Chairperson.**

**4. If more than one State is involved on one side of the dispute and those States do not agree on a common member of the Commission and each of them nominates a member, the other party to the dispute has the right to nominate an equal number of members of the Commission.**

**5. If the members nominated by the parties to the dispute are unable to agree on a Chairperson within three months of the request for the establishment of the Commission, any party to the dispute may request the Secretary-General of the United Nations to appoint the Chairperson who shall not have the nationality of any of the parties to the dispute. If one of the parties to the dispute fails to nominate a member within three months of the initial request pursuant to paragraph 2, any other party to the dispute may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the parties to the dispute. The person so appointed shall constitute a single-member Commission.**

**6. The Commission shall adopt its report by a majority vote, unless it is a single-member Commission, and shall submit that report to the parties to the dispute setting forth its findings and recommendations, which the parties to the dispute shall consider in good faith.**

### 2. Text of the draft articles with commentaries thereto

98. The text of the draft articles adopted by the Commission at its fifty-third session with commentaries thereto is reproduced below.

## PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES

*General commentary*

(1) The articles deal with the concept of prevention in the context of authorization and regulation of hazardous activities which pose a significant risk of transboundary harm. Prevention in this sense, as a procedure or as a duty, deals with the phase prior to the situation where significant harm or damage might actually occur, requiring States concerned to invoke remedial or compensatory measures, which often involve issues concerning liability.

(2) The concept of prevention has assumed great significance and topicality. The emphasis upon the duty to prevent as opposed to the obligation to repair, remedy or compensate has several important aspects. Prevention should be a preferred policy because compensation in case of harm often cannot restore the situation prevailing prior to the event or accident. Discharge of the duty of prevention or due diligence is all the more required as knowledge regarding the operation of hazardous activities, materials used and the process of managing them and the risks involved is steadily growing. From a legal point of view, the enhanced ability to trace the chain of causation, i.e. the physical link between the cause (activity) and the effect (harm), and even the several intermediate links in such a chain of causation, makes it also imperative for operators of hazardous activities to take all steps necessary to prevent harm. In any event, prevention as a policy is better than cure.

(3) Prevention of transboundary harm arising from hazardous activities is an objective well emphasized by principle 2 of the Rio Declaration on Environment and Development (Rio Declaration)[857] and confirmed by ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*[858] as now forming part of the corpus of international law.

(4) The issue of prevention, therefore, has rightly been stressed by the Experts Group on Environmental Law of the World Commission on Environment and Development (Brundtland Commission). Article 10 recommended by the Group in respect of transboundary natural resources and environmental interferences thus reads: "States shall, without prejudice to the principles laid down in articles 11 and 12, prevent or abate any transboundary environmental interference or a significant risk thereof which causes substantial harm—i.e. harm which is not minor or insignificant."[859] It must be further noted that the well-established principle of prevention was highlighted in the arbitral award in the *Trail Smelter* case[860] and was reiterated not only in principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)[861] and principle 2 of the Rio Declaration, but also in General Assembly resolution 2995 (XXVII) of 15 December 1972 on cooperation between States in the field of the environment. This principle is also reflected in principle 3 of the Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States, adopted by the Governing Council of UNEP in 1978, which provided that States must:

> avoid to the maximum extent possible and ... reduce to the minimum extent possible the adverse environmental effects beyond its jurisdiction of the utilization of a shared natural resource so as to protect the environment, in particular when such utilization might:
>
> (*a*) cause damage to the environment which could have repercussions on the utilization of the resource by another sharing State;
>
> (*b*) threaten the conservation of a shared renewable resource;
>
> (*c*) endanger the health of the population of another State.[862]

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[857] *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.

[858] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), pp. 241–242, para. 29; see also A/51/218, annex.

[859] *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London, Graham and Trotman/Martinus Nijhoff, 1987), p. 75, adopted by the Experts Group. It was also noted that the duty not to cause substantial harm could be deduced from the non-treaty-based practice of States, and from the statements made by States individually and/or collectively. See J. G. Lammers, *Pollution of International Watercourses* (The Hague, Martinus Nijhoff, 1984), pp. 346–347 and 374–376.

[860] *Trail Smelter* (see footnote 253 above), pp. 1905 et seq.

[861] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

[862] UNEP, *Environmental Law: Guidelines and Principles*, No. 2, *Shared Natural Resources* (Nairobi, 1978), p. 2. The principles are re-

(5) Prevention of transboundary harm to the environment, persons and property has been accepted as an important principle in many multilateral treaties concerning protection of the environment, nuclear accidents, space objects, international watercourses, management of hazardous wastes and prevention of marine pollution.[863]

### *Preamble*

***The States Parties,***

***Having in mind*** **Article 13, paragraph 1 (a), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,**

***Bearing in mind*** **the principle of permanent sovereignty of States over the natural resources within their territory or otherwise under their jurisdiction or control,**

***Bearing also in mind*** **that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited,**

***Recalling*** **the Rio Declaration on Environment and Development of 13 June 1992,**

***Recognizing*** **the importance of promoting international cooperation,**

***Have agreed*** **as follows:**

*Commentary*

(1) The preamble sets out the general context in which the topic of prevention is elaborated, keeping in view the mandate given to the Commission to codify and develop international law. Activities covered under the present topic of prevention require States to engage in cooperation and accommodation in their mutual interest. States are free to formulate necessary policies to develop their natural resources and to carry out or authorize activities in response to the needs of their populations. In so doing, however, States have to ensure that such activities are carried out taking into account the interests of other States and therefore the freedom they have within their own jurisdiction is not unlimited.

(2) The prevention of transboundary harm from hazardous activities should also be seen in the context of the general principles incorporated in the Rio Declaration and other considerations that emphasize the close interrelationship between issues of environment and development. A general reference in the fourth preambular paragraph to the Rio Declaration indicates the importance of the interactive nature of all the principles contained therein. This is without prejudice to highlighting specific principles of the Rio Declaration, as appropriate, in the commentaries to follow on particular articles.

### *Article 1. Scope*

**The present articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.**

*Commentary*

(1) Article 1 limits the scope of the articles to activities not prohibited by international law and which involve a risk of causing significant transboundary harm through their physical consequences. Subparagraph (*d*) of article 2 further limits the scope of the articles to those activities carried out in the territory or otherwise under the jurisdiction or control of a State.

(2) Any activity which involves the risk of causing significant transboundary harm through the physical consequences is within the scope of the articles. Different types of activities could be envisaged under this category. As the title of the proposed articles indicates, any hazardous and by inference any ultrahazardous activity which involves a risk of significant transboundary harm is covered. An ultrahazardous activity is perceived to be an activity with a danger that is rarely expected to materialize but might assume, on that rare occasion, grave (more than significant, serious or substantial) proportions.

(3) Suggestions have been made at different stages of the evolution of the present articles to specify a list of activities in an annex to the present articles with an option to make additions or deletions to such a list in the future as appropriate. States could also be given the option to add to or delete from the list items which they may include in any national legislation aimed at implementing the obligations of prevention.

(4) It is, however, felt that specification of a list of activities in an annex to the articles is not without problems and functionally not essential. Any such list of activities is likely to be under inclusion and could become quickly

produced in ILM, vol. 17, No. 5 (September 1978), p. 1098. See also decision 6/14 of 19 May 1978 of the Governing Council of UNEP, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 25* (A/33/25), annex I. For a mention of other sources where the principle of prevention is reflected, see *Environmental Protection and Sustainable Development …* (footnote 859 above), pp. 75–80.

[863] For a collection of treaties arranged according to the area or sector of the environment covered and protection offered against particular threats, see E. Brown Weiss, D. B. Magraw and P. C. Szasz, *International Environmental Law: Basic Instruments and References* (Dobbs Ferry, N.Y., Transnational, 1992); P. Sands, *Principles of International Environmental Law*, vol. 1: *Frameworks, Standards and Implementation* (Manchester University Press, 1995); L. Boisson de Chazournes, R. Desgagné and C. Romano, *Protection internationale de l'environnement: recueil d'instruments juridiques* (Paris, Pedone, 1998); C. Dommen and P. Cullet, eds., *Droit international de l'environnement. Textes de base et références* (London, Kluwer, 1998); M. Prieur and S. Doumbé-Billé, eds., *Recueil francophone des textes internationaux en droit de l'environnement* (Brussels, Bruylant, 1998); A. E. Boyle and D. Freestone, eds., *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999); F. L. Morrison and R. Wolfrum, eds., *International, Regional and National Environmental Law* (The Hague, Kluwer, 2000); and P. W. Birnie and A. E. Boyle, *International Law and the Environment*, 2nd ed. (Oxford University Press, 2002) (forthcoming).

dated from time to time in the light of fast evolving technology. Further, except for certain ultrahazardous activities which are mostly the subject of special regulation, e.g. in the nuclear field or in the context of activities in outer space, the risk that flows from an activity is primarily a function of the particular application, the specific context and the manner of operation. It is felt that a generic list could not capture these elements.

(5) It may be further noted that it is always open to States to specify activities coming within the scope of the articles in any regional or bilateral agreements or to do so in their national legislation regulating such activities and implementing obligations of prevention.[864] In any case, the scope of the articles is clarified by the four different criteria noted in the article.

(6) The *first criterion* to define the scope of the articles refers to "activities not prohibited by international law". This approach has been adopted in order to separate the topic of international liability from the topic of State responsibility.[865] The employment of this criterion is also intended to allow a State likely to be affected by an activity involving the risk of causing significant transboundary harm to demand from the State of origin compliance with obligations of prevention although the activity itself is not prohibited. In addition, an invocation of these articles by a State likely to be affected is not a bar to a later claim by that State that the activity in question is a prohibited activity. Equally, it is to be understood that non-fulfilment of the duty of prevention at any event of the minimization of risk under the articles would not give rise to the implication that the activity itself is prohibited.[866] However, in such a case State responsibility could be engaged to implement the obligations, including any civil responsbility or duty of the operator.[867] The articles are primarily concerned with the management of risk and emphasize the duty of cooperation and consultation among all States concerned. States likely to be affected are given the right of engagement with the State of origin in designing and, where appropriate, in the implementation of a system of management of risk commonly shared between or among them. The right thus envisaged in favour of the States likely to be affected however does not give them the right to veto the activity or project itself.[868]

(7) The *second criterion*, found in the definition of the State of origin in article 2, subparagraph (*d*), is that the activities to which preventive measures are applicable "are planned or are carried out" in the territory or otherwise under the jurisdiction or control of a State. Three concepts are used in this criterion: "territory", "jurisdiction" and "control". Even though the expression "jurisdiction or control of a State" is a more commonly used formula in some instruments,[869] the Commission finds it useful to mention also the concept of "territory" in order to emphasize the importance of the territorial link, when such a link exists, between activities under these articles and a State.

(8) For the purposes of these articles, *territorial jurisdiction* is the dominant criterion. Consequently, when an activity covered by the present articles occurs within the *territory* of a State, that State must comply with the *obligations of prevention*. "Territory" is, therefore, taken as conclusive evidence of jurisdiction. Consequently, in cases of competing jurisdictions over an activity covered by these articles, the territorially based jurisdiction prevails. The Commission, however, is mindful of situations where a State, under international law, has to accept limits to its territorial jurisdiction in favour of another State. The prime example of such a situation is innocent passage of a foreign ship through the territorial sea. In such situations, if the activity leading to significant transboundary harm

[864] For example, various conventions deal with the type of activities which come under their scope: the Convention for the Prevention of Marine Pollution from Land-based Sources; the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources; the Agreement for the Protection of the Rhine against Chemical Pollution; appendix I to the Convention on Environmental Impact Assessment in a Transboundary Context, where a number of activities such as the crude oil refineries, thermal power stations, installations to produce enriched nuclear fuels, etc., are identified as possibly dangerous to the environment and requiring environmental impact assessment under the Convention; the Convention on the Protection of the Marine Environment of the Baltic Sea Area; the Convention on the Transboundary Effects of Industrial Accidents; annex II to the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, where activities such as the installations or sites for the partial or complete disposal of solid, liquid or gaseous wastes by incineration on land or at sea, installations or sites for thermal degradation of solid, gaseous or liquid wastes under reduced oxygen supply, etc., have been identified as dangerous activities; this Convention also has a list of dangerous substances in annex I.

[865] *Yearbook ... 1977*, vol. II (Part Two), p. 6, para. 17.

[866] See M. B. Akehurst "International liability for injurious consequences arising out of acts not prohibited by international law", NYIL, 1985, vol. 16, pp. 3–16; A. E. Boyle, "State responsibility and international liability for injurious consequences of acts not prohibited by international law: a necessary distinction?", *International and Comparative Law Quarterly*, vol. 39 (1990), pp. 1–26; K. Zemanek, "State responsibility and liability", *Environmental Protection and International Law*; W. Lang, H. Neuhold and K. Zemanek, eds. (London, Graham and Trotman/Martinus Nijhoff, 1991), p. 197; and the second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), by the Special Rapporteur, Pemmaraju Sreenivasa Rao, *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/501, paras. 35–37.

[867] See P.-M. Dupuy, *La responsabilité internationale des États pour les dommages d'origine technologique et industrielle* (Paris, Pedone, 1976); Brownlie, *System of the Law of Nations …* (footnote 92 above); A. Rosas, "State responsibility and liability under civil liability regimes", *Current International Law Issues: Nordic Perspectives (Essays in honour of Jerzy Sztucki)*, O. Bring and S. Mahmoudi, eds. (Dordrecht, Martinus Nijhoff, 1994), p. 161; and F. Bitar, *Les mouvements transfrontières de déchets dangereux selon la Convention de Bâle*: *Étude des régimes de responsabilité* (Paris, Pedone, 1997), pp. 79–138. However, different standards of liability, burden of proof and remedies apply to State responsibility and liability. See also P.-M. Dupuy, "Où en est le droit international de l'environnement à la fin du siècle?", RGDIP, vol. 101, No. 4 (1997), pp. 873–903; T. A. Berwick, "Responsibility and liability for environmental damage: a roadmap for international environmental regimes", *Georgetown International Environmental Law Review*, vol. 10, No. 2 (1998), pp. 257–267; and P.-M. Dupuy, "À propos des mésaventures de la responsabilité internationale des États dans ses rapports avec la protection internationale de l'environnement", *Les hommes et l'environnement: quels droits pour le vingt-et-unième siècle? Études en hommage à Alexandre Kiss*, M. Prieur and C. Lambrechts, eds. (Paris, Frison-Roche, 1998), pp. 269–282.

[868] On the nature of the duty of engagement and the attainment of a balance of interests involved, see the first report on prevention of transboundary damage from hazardous activities, by the Special Rapporteur, Pemmaraju Sreenivasa Rao, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/487 and Add.1, paras. 43, 44, 54 and 55 (*d*).

[869] See, for example, principle 21 of the Stockholm Declaration (footnote 861 above); article 194, paragraph 2, of the United Nations Convention on the Law of the Sea; principle 2 of the Rio Declaration (footnote 857 above); and article 3 of the Convention on Biological Diversity.

emanates from the foreign ship, the flag State, and not the territorial State, must comply with the provisions of the present articles.

(9) The concept of "territory" for the purposes of these articles does not cover all cases where a State exercises "jurisdiction" or "control". The expression "jurisdiction" of a State is intended to cover, in addition to the activities being undertaken within the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority. The Commission is aware that questions involving the determination of jurisdiction are complex and sometimes constitute the core of a dispute. This article certainly does not presume to resolve all the questions of conflicts of jurisdiction.

(10) Sometimes, because of the location of the activity, there is no territorial link between a State and the activity such as, for example, activities taking place in outer space or on the high seas. The most common example is the jurisdiction of the flag State over a ship. The Geneva Conventions on the Law of the Sea and the United Nations Convention on the Law of the Sea have covered many jurisdictional capacities of the flag State.

(11) In cases of concurrent jurisdiction by more than one State over the activities covered by these articles, States shall individually and, when appropriate, jointly comply with the provisions of these articles.

(12) The function of the concept of "control" in international law is to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of unlawful intervention, occupation and unlawful annexation. Reference may be made, in this respect, to the advisory opinion by ICJ in the *Namibia* case. In that advisory opinion, the Court, after holding South Africa responsible for having created and maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the *de facto* control of South Africa over Namibia. The Court held:

> The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.[870]

(13) The *third criterion* is that activities covered in these articles must involve a "risk of causing significant transboundary harm". The term is defined in article 2 (see the commentary to article 2). The words "transboundary harm" are intended to exclude activities which cause harm only in the territory of the State within which the activity is undertaken without the possibility of any harm to any other State. For discussion of the term "significant", see the commentary to article 2.

[870] See footnote 176 above.

(14) As to the element of "risk", this is by definition concerned with future possibilities, and thus implies some element of assessment or appreciation of risk. The mere fact that harm eventually results from an activity does not mean that the activity involved a risk, if no properly informed observer was or could have been aware of that risk at the time the activity was carried out. On the other hand, an activity may involve a risk of causing significant transboundary harm even though those responsible for carrying out the activity underestimated the risk or were even unaware of it. The notion of risk is thus to be taken objectively, as denoting an appreciation of possible harm resulting from an activity which a properly informed observer had or ought to have had.

(15) In this context, it should be stressed that these articles as a whole have a continuing operation and effect, i.e. unless otherwise stated, they apply to activities as carried out from time to time. Thus, it is possible that an activity which in its inception did not involve any risk (in the sense explained in paragraph (14)), might come to do so as a result of some event or development. For example, a perfectly safe reservoir may become dangerous as a result of an earthquake, in which case the continued operation of the reservoir would be an activity involving risk. Or developments in scientific knowledge might reveal an inherent weakness in a structure or materials which carry a risk of failure or collapse, in which case again the present articles might come to apply to the activity concerned in accordance with their terms.

(16) The *fourth criterion* is that the significant transboundary harm must have been caused by the "physical consequences" of such activities. It was agreed by the Commission that in order to bring this topic within a manageable scope, it should exclude transboundary harm which may be caused by State policies in monetary, socio-economic or similar fields. The Commission feels that the most effective way of limiting the scope of these articles is by requiring that these activities should have transboundary physical consequences which, in turn, result in significant harm.

(17) The physical link must connect the activity with its transboundary effects. This implies a connection of a very specific type—a consequence which does or may arise out of the very nature of the activity or situation in question. That implies that the activities covered in these articles must themselves have a physical quality, and the consequences must flow from that quality. Thus, the stockpiling of weapons does not entail the consequence that the weapons stockpiled will be put to a belligerent use. Yet, this stockpiling may be characterized as an activity which, because of the explosive or incendiary properties of the materials stored, entails an inherent risk of disastrous misadventure.

### *Article 2. Use of terms*

**For the purposes of the present articles:**

**(*a*) "Risk of causing significant transboundary harm" includes risks taking the form of a high probability of causing significant transboundary harm and**

**a low probability of causing disastrous transboundary harm;**

**(*b*) "Harm" means harm caused to persons, property or the environment;**

**(*c*) "Transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;**

**(*d*) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are planned or are carried out;**

**(*e*) "State likely to be affected" means the State or States in the territory of which there is the risk of significant transboundary harm or which have jurisdiction or control over any other place where there is such a risk;**

**(*f*) "States concerned" means the State of origin and the State likely to be affected.**

*Commentary*

(1) *Subparagraph* (a) defines the concept of "risk of causing significant transboundary harm" as encompassing a low probability of causing disastrous transboundary harm or a high probability of causing significant transboundary harm. The Commission feels that instead of defining separately the concept of "risk" and then "harm", it is more appropriate to define the expression of "risk of causing significant transboundary harm" because of the interrelationship between "risk" and "harm" and the relationship between them and the adjective "significant".

(2) For the purposes of these articles, "risk of causing significant transboundary harm" refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of "risk" and "harm" which sets the threshold. In this respect inspiration is drawn from the Code of Conduct on Accidental Pollution of Transboundary Inland Waters,[871] adopted by ECE in 1990. Under section I, subparagraph (*f*), of the Code of Conduct, "'risk' means the combined effect of the probability of occurrence of an undesirable event and its magnitude". A definition based on the combined effect of "risk" and "harm" is more appropriate for these articles, and *the combined effect should reach a level that is deemed significant*. The obligations of prevention imposed on States are thus not only reasonable but also sufficiently limited so as not to impose such obligations in respect of virtually any activity. The purpose is to strike a balance between the interests of the States concerned.

(3) The definition in the preceding paragraph allows for a spectrum of relationships between "risk" and "harm", all of which would reach the level of "significant". The definition refers to two types of activities under these articles. One is where there is a low probability of causing disastrous harm. This is normally the characteristic of ultrahazardous activities. The other one is where there is a high probability of causing significant harm. This includes activities which have a high probability of causing harm which, while not disastrous, is still significant. But it would exclude activities where there is a very low probability of causing significant transboundary harm. The word "includes" is intended to highlight the intention that the definition is providing a spectrum within which the activities under these articles will fall.

(4) The term "significant" is not without ambiguity and a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that "*significant" is something more than "detectable" but need not be at the level of "serious" or "substantial"*. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards.

(5) The ecological unity of the planet does not correspond to political boundaries. In carrying out lawful activities within their own territories, States have impacts on each other. These mutual impacts, so long as they have not reached the level of "significant", are considered tolerable.

(6) The idea of a threshold is reflected in the *Trail Smelter* award, which used the words "serious consequence[s]",[872] as well as in the *Lake Lanoux* award, which relied on the concept "seriously" (*gravement*).[873] A number of conventions have also used "significant", "serious" or "substantial" as the threshold.[874] "Significant" has also been used in other legal instruments and domestic law.[875]

[871] United Nations publication, Sales No. E.90.II.E.28. See also G. Handl, *Grenzüberschreitendes nukleares Risiko und völkerrechtlicher Schutzanspruch* (Berlin, Duncker und Humblot, 1992), pp. 15–20.

[872] See footnote 253 above.

[873] *Lake Lanoux* case, UNRIAA, vol. XII (Sales No. 63.V.3), p. 281.

[874] See, for example, article 4, paragraph 2, of the Convention on the Regulation of Antarctic Mineral Resource Activities; articles 2, paragraphs 1 and 2, of the Convention on Environmental Impact Assessment in a Transboundary Context; section I, subparagraph (*b*), of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (footnote 871 above); and article 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

[875] See, for example, article 5 of the draft convention on industrial and agricultural uses of international rivers and lakes, prepared by the Inter-American Juridical Committee in 1965 (OAS, *Ríos y lagos internacionales (utilización para fines agrícolas e industriales)*, 4th ed. rev. (OEA/Ser.1/VI, CIJ-75 Rev.2) (Washington, D.C., 1971), p. 132); article X of the Helsinki Rules on the Uses of the Waters of International Rivers (International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 496); paragraphs 1 and 2 of General Assembly resolution 2995 (XXVII) of 15 December 1972 concerning cooperation between States in the field of the environment; paragraph 6 of the annex to OECD Council recommendation C(74)224 of 14 November 1974 on Principles concerning transfrontier pollution (OECD, *OECD and the Environment* (Paris, 1986), p. 142, reprinted in ILM, vol. 14, No. 1 (January 1975), p. 246); the Memorandum of Intent Concerning Transboundary Air Pollution, between the Government of the United States and the Government of Canada, of 5 August 1980 (United Nations, *Treaty Series*, vol. 1274, No. 21009, p. 235) and article 7 of the Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and

(7) The term "significant", while determined by factual and objective criteria, also involves a value determination which depends on the circumstances of a particular case and the period in which such determination is made. For instance, a particular deprivation at a particular time might not be considered "significant" because at that specific time scientific knowledge or human appreciation for a particular resource had not reached a point at which much value was ascribed to that particular resource. But some time later that view might change and the same harm might then be considered "significant".

(8) *Subparagraph* (b) is self-explanatory in that "harm" for the purpose of the present articles would cover harm caused to persons, property or the environment.

(9) *Subparagraph* (c) defines "transboundary harm" as meaning harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border. This definition includes, in addition to a typical scenario of an activity within a State with injurious effects on another State, activities conducted under the jurisdiction or control of a State, for example, on the high seas, with effects on the territory of another State or in places under its jurisdiction or control. It includes, for example, injurious impacts on ships or platforms of other States on the high seas as well. It will also include activities conducted in the territory of a State with injurious consequences on, for example, the ships or platforms of another State on the high seas. The Commission cannot forecast all the possible future forms of "transboundary harm". However, it makes clear that the intention is to be able to draw a line and clearly distinguish a State under whose jurisdiction and control an activity covered by these articles is conducted from a State which has suffered the injurious impact.

(10) *In subparagraph* (d), the term "State of origin" is introduced to refer to the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.[876]

(11) In *subparagraph* (e), the term "State likely to be affected" is defined to mean the State on whose territory or in other places under whose jurisdiction or control there is the risk of significant transboundary harm. There may be more than one such State likely to be affected in relation to any given activity.

(12) In *subparagraph* (f), the term "States concerned" refers to both the State of origin and the State likely to be affected to which some of the articles refer together.

Improvement of the Environment in the Border Area, of 14 August 1983 (reprinted in ILM, vol. 22, No. 5 (September 1983), p. 1025). The United States has also used the word "significant" in its domestic law dealing with environmental issues; see *Restatement of the Law Third, Restatement of the Law, The Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute Publishers, 1987), vol. 2, pp. 111–112.

[876] See paragraphs (7) to (12) of the commentary to article 1.

### *Article 3. Prevention*

**The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.**

*Commentary*

(1) Article 3 is based on the fundamental principle *sic utere tuo ut alienum non laedas*, which is reflected in principle 21 of the Stockholm Declaration,[877] reading:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

(2) However, the limitations on the freedom of States reflected in principle 21 are made more specific in article 3 and subsequent articles.

(3) This article, together with article 4, provides the basic foundation for the articles on prevention. The articles set out the more specific obligations of States to prevent significant transboundary harm or at any event to minimize the risk thereof. The article thus emphasizes the primary duty of the State of origin to prevent significant transboundary harm; and only in case this is not fully possible it should exert its best efforts to minimize the risk thereof. The phrase "at any event" is intended to express priority in favour of the duty of prevention. The word "minimize" should be understood in this context as meaning to pursue the aim of reducing to the lowest point the possibility of harm.

(4) The present article is in the nature of a statement of principle. It provides that States shall take all appropriate measures to prevent significant transboundary harm or at any event minimize the risk thereof. The phrase "all appropriate measures" refers to all those specific actions and steps that are specified in the articles on prevention and minimization of transboundary harm. Article 3 is complementary to articles 9 and 10 and together they constitute a harmonious ensemble. In addition, it imposes an obligation on the State of origin to adopt and implement national legislation incorporating accepted international standards. These standards would constitute a necessary reference point to determine whether measures adopted are suitable.

(5) As a general principle, the obligation in article 3 to prevent significant transboundary harm or minimize the risk thereof applies only to activities which involve a risk of causing significant transboundary harm, as those terms are defined in article 2. In general, in the context of prevention, a State of origin does not bear the risk of unforeseeable consequences to States likely to be affected by activities within the scope of these articles. On the other hand, the obligation to "take all appropriate measures" to prevent harm, or to minimize the risk thereof, cannot be

[877] See footnote 861 above. See also the Rio Declaration (footnote 857 above).

confined to activities which are already properly appreciated as involving such a risk. The obligation extends to taking appropriate measures to identify activities which involve such a risk, and this obligation is of a continuing character.

(6) This article, then, sets up the principle of prevention that concerns every State in relation to activities covered by article 1. The *modalities* whereby the State of origin may discharge the obligations of prevention which have been established include, for example, legislative, administrative or other action necessary for enforcing the laws, administrative decisions and policies which the State of origin has adopted.[878]

(7) The obligation of the State of origin to take preventive or minimization measures is one of due diligence. It is the conduct of the State of origin that will determine whether the State has complied with its obligation under the present articles. The duty of due diligence involved, however, is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so. In that eventuality, the State of origin is required, as noted above, to exert its best possible efforts to minimize the risk. In this sense, it does not guarantee that the harm would not occur.[879]

(8) An obligation of due diligence as the standard basis for the protection of the environment from harm can be deduced from a number of international conventions[880] as well as from the resolutions and reports of international conferences and organizations.[881] The obligation of due diligence was discussed in a dispute which arose in 1986 between Germany and Switzerland relating to the pollution of the Rhine by Sandoz. The Swiss Government acknowledged responsibility for lack of due diligence in preventing the accident through adequate regulation of its pharmaceutical industries.[882]

(9) In the *"Alabama"* case, the tribunal examined two different definitions of due diligence submitted by the parties. The United States defined due diligence as:

> [A] diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will.[883]

The United Kingdom defined due diligence as "such care as Governments ordinarily employ in their domestic concerns".[884] The tribunal seemed to have been persuaded by the broader definition of the standard of due diligence presented by the United States and expressed concern about the "national standard" of due diligence presented by the United Kingdom. The tribunal stated that:

> [the] British case seemed also to narrow the international duties of a Government to the exercise of the restraining powers conferred upon it by municipal law, and to overlook the obligation of the neutral to amend its laws when they were insufficient.[885]

(10) In the context of the present articles, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in timely fashion, to address them. Thus, States are under an obligation to take unilateral measures to prevent significant transboundary harm or at any event to minimize the risk thereof arising out of activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent significant transboundary harm or to minimize the risk thereof and, secondly, implementing those policies. Such policies are expressed in legislation and administrative regulations and implemented through various enforcement mechanisms.

(11) The standard of due diligence against which the conduct of the State of origin should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which may be considered ultrahazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location, special climate conditions, materials used in the activity, and whether the conclusions drawn from the application of these factors in a specific case are reasonable, are among the factors to be considered in determining the due diligence requirement in each instance. What would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future. Hence, due diligence in ensuring safety requires a State to keep abreast of technological changes and scientific developments.

(12) It is also necessary in this connection to note principle 11 of the Rio Declaration, which states:

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[878] See article 5 and commentary.

[879] For a similar observation, see paragraph (4) of the commentary to article 7 of the draft articles on the law of the non-navigational uses of international watercourses adopted by the Commission on second reading, *Yearbook … 1994*, vol. II (Part Two), p. 103. As to the lack of scientific information, see A. Epiney and M. Scheyli, *Strukturprinzipien des Umweltvölkerrechts* (Baden-Baden, Nomos-Verlagsgesellschaft, 1998), pp. 126–140.

[880] See, for example, article 194, paragraph 1, of the United Nations Convention on the Law of the Sea; articles I and II and article VII, paragraph 2, of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; article 2 of the Vienna Convention for the Protection of the Ozone Layer; article 7, paragraph 5, of the Convention on the Regulation of Antarctic Mineral Resource Activities; article 2, paragraph 1, of the Convention on Environmental Impact Assessment in a Transboundary Context; and article 2, paragraph 1, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

[881] See principle 21 of the World Charter for Nature (General Assembly resolution 37/7 of 28 October 1982, annex); and principle VI of the draft principles of conduct for the guidance of States concerning weather modification, prepared by WMO and UNEP (M. L. Nash, *Digest of United States Practice in International Law* (Washington, D.C., United States Government Printing Office, 1978), p. 1205).

[882] See *The New York Times*, 11, 12 and 13 November 1986, pp. A1, A8 and A3, respectively. See also A. C. Kiss, "'Tchernobâle' ou la pollution accidentelle du Rhin par les produits chimiques", *Annuaire français de droit international*, vol. 33 (1987), pp. 719–727.

[883] *"Alabama"* (see footnote 87 above), pp. 572–573.

[884] *Ibid*., p. 612.

[885] *Ibid*., p. 613.

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.[886]

(13) Similar language is found in principle 23 of the Stockholm Declaration. That principle, however, specifies that such domestic standards are "[w]ithout prejudice to such criteria as may be agreed upon by the international community".[887] The economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence. But a State's economic level cannot be used to dispense the State from its obligation under the present articles.

(14) Article 3 imposes on the State a duty to take all necessary measures to prevent significant transboundary harm or at any event to minimize the risk thereof. This could involve, *inter alia*, taking such measures as are appropriate by way of abundant caution, even if full scientific certainty does not exist, to avoid or prevent serious or irreversible damage. This is well articulated in principle 15 of the Rio Declaration and is subject to the capacity of States concerned (see paragraphs (5) to (8) of the commentary to article 10). An efficient implementation of the duty of prevention may well require upgrading the input of technology in the activity as well as the allocation of adequate financial and manpower resources with necessary training for the management and monitoring of the activity.

(15) The operator of the activity is expected to bear the costs of prevention to the extent that he is responsible for the operation. The State of origin is also expected to undertake the necessary expenditure to put in place the administrative, financial and monitoring mechanisms referred to in article 5.

(16) States are engaged in continuously evolving mutually beneficial schemes in the areas of capacity-building, transfer of technology and financial resources. Such efforts are recognized to be in the common interest of all States in developing uniform international standards regulating and implementing the duty of prevention.

(17) The main elements of the obligation of due diligence involved in the duty of prevention could be thus stated: the degree of care in question is that expected of a good Government. It should possess a legal system and sufficient resources to maintain an adequate administrative apparatus to control and monitor the activities. It is, however, understood that the degree of care expected of a State with a well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed.[888] Even in the latter case, vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State, which is a natural attribute of any Government, are expected.[889]

(18) The required degree of care is proportional to the degree of hazard involved. The degree of harm itself should be foreseeable and the State must know or should have known that the given activity has the risk of significant harm. The higher the degree of inadmissible harm, the greater would be the duty of care required to prevent it.

### *Article 4. Cooperation*

**States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof.**

*Commentary*

(1) The principle of cooperation between States is essential in designing and implementing effective policies to prevent significant transboundary harm or at any event to minimize the risk thereof. The requirement of cooperation of States extends to all phases of planning and of implementation. Principle 24 of the Stockholm Declaration and principle 7 of the Rio Declaration recognize cooperation as an essential element in any effective planning for the protection of the environment. More specific forms of cooperation are stipulated in subsequent articles. They envisage the participation of the State likely to be affected in any preventive action, which is indispensable to enhance the effectiveness of any such action. The latter State may know better than anybody else, for instance, which features of the activity in question may be more damaging to it, or which zones of its territory close to the border may be more affected by the transboundary effects of the activity, such as a specially vulnerable ecosystem.

(2) The article requires States concerned to cooperate in *good faith*. Paragraph 2 of Article 2 of the Charter of the United Nations provides that all Members "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter". The 1969 and 1978 Vienna Conventions declare in their preambles that the principle of good faith is universally recognized. In addition, article 26 and article 31, paragraph 1, of the 1969 Vienna Convention acknowledge the essential place of this principle in the law of treaties. The decision of ICJ in the *Nuclear Tests* case touches upon the scope of the application of good faith. In that case, the Court proclaimed that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith".[890] This dictum of the Court implies that good faith applies also to unilateral

[886] See footnote 857 above.

[887] See footnote 861 above.

[888] See A. C. Kiss and S. Doumbé-Billé, "La Conférence des Nations Unies sur l'environnement et le développement (Rio de Janeiro, 3–14 June 1992)", *Annuaire français de droit international*, vol. 38 (1992), pp. 823–843; M. Kamto, "Les nouveaux principes du droit international de l'environnement", *Revue juridique de l'environnement*, vol. 1 (1993), pp. 11–21; and R. Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (The Hague, Kluwer, 1996), p. 65.

[889] See the observation of Max Huber in the *British Claims in the Spanish Zone of Morocco* case (footnote 44 above), p. 644.

[890] See footnote 196 above.

acts.[891] Indeed, the principle of good faith covers "the entire structure of international relations".[892]

(3) The arbitration tribunal, established in 1985 between Canada and France in the *La Bretagne* case, held that the principle of good faith was among the elements that afforded a sufficient guarantee against any risk of a party exercising its rights abusively.[893]

(4) The words "States concerned" refer to the State of origin and the State or States likely to be affected. While other States in a position to contribute to the goals of these articles are encouraged to cooperate, no legal obligations are imposed upon them to do so.

(5) The article provides that States shall "as necessary" seek the assistance of one or more international organizations in performing their preventive obligations as set out in these articles. States shall do so only when it is deemed necessary. The words "as necessary" are intended to take account of a number of possibilities: First, assistance from international organizations may not be necessary in every case. For example, the State of origin or the States likely to be affected may, themselves, be technologically advanced and have the necessary technical capability. Secondly, the term "international organization" is intended to refer to organizations that are competent and in a position to assist in such matters. Thirdly, even if there are competent international organizations, they could extend necessary assistance only in accordance with their constitutions. In any case, the article does not purport to create any obligation for international organizations to respond to requests for assistance independent of its own constitutional requirements.

(6) Requests for assistance from international organizations may be made by one or more States concerned. The principle of cooperation means that it is preferable that such requests be made by all States concerned. The fact, however, that all States concerned do not seek necessary assistance does not free individual States from the obligation to seek assistance. Of course, the response and type of involvement of an international organization in cases in which the request has been lodged by only one State will depend, for instance, on the nature of the request, the type of assistance involved and the place where the international organization would have to perform such assistance.

### *Article 5. Implementation*

**States concerned shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present articles.**

*Commentary*

(1) This article states what might be thought to be the obvious, viz. that under the present articles, States are required to take the necessary measures of implementation, whether of a legislative, administrative or other character. Implementation, going beyond formal application, involves the adoption of specific measures to ensure the effectiveness of the provisions of the present articles. Article 5 has been included here to emphasize the continuing character of the obligations, which require action to be taken from time to time to prevent transboundary harm or at any event to minimize the risk thereof arising from activities to which the articles apply.[894]

(2) The measures referred to in this article include, for example, the opportunity available to persons concerned to make representations and the establishment of quasi-judicial procedures. The use of the term "other action" is intended to cover the variety of ways and means by which States could implement the present articles. Article 5 mentions some measures expressly only in order to give guidance to States; it is left up to them to decide upon necessary and appropriate measures. Reference is made to "suitable monitoring mechanisms" in order to highlight the measures of inspection which States generally adopt in respect of hazardous activities.

(3) To say that States must take the necessary measures does not mean that they must themselves get involved in operational issues relating to the activities to which article 1 applies. Where these activities are conducted by private persons or enterprises, the obligation of the State is limited to establishing the appropriate regulatory framework and applying it in accordance with these articles. The application of that regulatory framework in the given case will then be a matter of ordinary administration or, in the case of disputes, for the relevant courts or tribunals, aided by the principle of non-discrimination contained in article 15.

(4) The action referred to in article 5 may appropriately be taken in advance. Thus, States may establish a suitable monitoring mechanism before the activity in question is approved or instituted.

### *Article 6. Authorization*

**1. The State of origin shall require its prior authorization for:**

**(*a*) any activity within the scope of the present articles carried out in its territory or otherwise under its jurisdiction or control;**

[891] M. Virally, "Review essay: good faith in public international law", AJIL, vol. 77, No. 1 (1983), p. 130.

[892] See R. Rosenstock, "The declaration of principles of international law concerning friendly relations: a survey", AJIL, vol. 65 (1971), p. 734; see, more generally, R. Kolb, *La bonne foi en droit international public*: *contribution à l'étude des principes généraux de droit* (Paris, Presses Universitaires de France, 2000).

[893] ILR, vol. 82 (1990), p. 614.

[894] This article is similar to article 2, paragraph 2, of the Convention on Environmental Impact Assessment in a Transboundary Context, which reads: "Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in appendix II."

**(*b*) any major change in an activity referred to in subparagraph (a);**

**(*c*) any plan to change an activity which may transform it into one falling within the scope of the present articles.**

**2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present articles. Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present articles.**

**3. In case of a failure to conform to the terms of the authorization, the State of origin shall take such actions as appropriate, including where necessary terminating the authorization.**

*Commentary*

(1) This article sets forth the fundamental principle that the prior authorization of a State is required for activities which involve a risk of causing significant transboundary harm undertaken in its territory or otherwise under its jurisdiction or control. The word "authorization" means granting permission by governmental authorities to conduct an activity covered by these articles. States are free to choose the form of such authorization.

(2) The requirement of authorization noted in article 6, *paragraph 1* (a), obliges a State to ascertain whether activities with a possible risk of significant transboundary harm are taking place in its territory or otherwise under its jurisdiction or control and implies that the State should take the measures indicated in these articles. It also requires the State to take a responsible and active role in regulating such activities. The tribunal in the *Trail Smelter* arbitration held that Canada had "the duty ... to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined". The tribunal held that, in particular, "the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington".[895] Article 6, paragraph 1 (*a*), is compatible with this requirement.

(3) ICJ in the *Corfu Channel* case held that a State has an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States".[896]

(4) The words "in its territory or otherwise under its jurisdiction or control" are taken from article 2. The expression "any activity within the scope of the present articles" introduces all the requirements specified in article 1 for an activity to fall within the scope of these articles.

(5) Article 6, *paragraph 1* (b), makes the requirement of prior authorization applicable also for a major change planned in an activity already within the scope of article 1 where that change may increase the risk or alter the nature or the scope of the risk. Some examples of major changes are: building of additional production capacities, large-scale employment of new technology in an existing activity, re-routing of motorways, express roads or re-routing airport runways. Changing investment and production (volume and type), physical structure or emissions and changes bringing existing activities to levels higher than the allowed threshold could also be considered as part of a major change.[897] Similarly, article 6, *paragraph 1* (c), contemplates a situation where a change is proposed in the conduct of an activity that is otherwise innocuous, where the change would transform that activity into one which involves a risk of causing significant transboundary harm. The implementation of such a change would also require State authorization.

(6) *Paragraph 2* of article 6 emphasizes that the requirement of authorization should be made applicable to all the pre-existing activities falling within the scope of the present articles, once a State adopts these articles. It might be unreasonable to require States when they assume the obligations under these articles to apply them immediately in respect of existing activities. A suitable period of time might be needed in that case for the operator of the activity to comply with the authorization requirements. The decision as to whether the activity should be stopped pending authorization or should continue while the operator goes through the process of obtaining authorization is left to the State of origin. In case the authorization is denied by the State of origin, it is assumed that the State of origin will stop the activity.

(7) The adjustment envisaged in paragraph 2 generally occurs whenever new legislative and administrative terms are put in place because of safety standards or new international standards or obligations which the State has accepted and needed to enforce.

(8) *Paragraph 3* of article 6 notes the consequences of the failure of an operator to comply with the requirement of authorization. The State of origin, which has the main responsibility to monitor these activities, is given the necessary flexibility to ensure that the operator complies with the requirements involved. As appropriate, the State of origin shall terminate the authorization and, where appropriate, prohibit the activity from taking place altogether.

### *Article 7. Assessment of risk*

**Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.**

*Commentary*

(1) Under article 7, a State of origin, before granting authorization to operators to undertake activities referred to in article 1, should ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm. This assessment enables the State to determine the extent and the nature of the risk involved in an

[895] *Trail Smelter* (see footnote 253 above), pp. 1965–1966.

[896] *Corfu Channel* (see footnote 35 above), p. 22.

[897] See ECE, *Current Policies, Strategies and Aspects of Environmental Impact Assessment in a Transboundary Context* (United Nations publication, Sales No. E.96.II.E.11), p. 48.

activity and consequently the type of preventive measures it should take.

(2) Although the assessment of risk in the *Trail Smelter* case may not directly relate to liability for risk, it nevertheless emphasized the importance of an assessment of the consequences of an activity causing significant risk. The tribunal in that case indicated that the study undertaken by well-established and known scientists was "probably the most thorough [one] ever made of any area subject to atmospheric pollution by industrial smoke".[898]

(3) The requirement of article 7 is fully consonant with principle 17 of the Rio Declaration, which provides also for assessment of risk of activities that are likely to have a significant adverse impact on the environment:

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.[899]

The requirement of assessment of adverse effects of activities has been incorporated in various forms in many international agreements.[900] The most notable is the Convention on Environmental Impact Assessment in a Transboundary Context.

(4) The practice of requiring an environmental impact assessment has become very prevalent in order to assess whether a particular activity has the potential of causing significant transboundary harm. The legal obligation to conduct an environmental impact assessment under national law was first developed in the United States of America in the 1970s. Later, Canada and Europe adopted the same approach and essentially regulated it by guidelines. In 1985, a European Community directive required member States to conform to a minimum requirement of environmental impact assessment. Since then, many other countries have also made environmental impact assessment a necessary condition under their national law for authorization to be granted for developmental but hazardous industrial activities.[901] According to one United Nations study, the environmental impact assessment has already shown its value for implementing and strengthening sustainable development, as it combines the precautionary principle with the principle of preventing environmental damage and also allows for public participation.[902]

(5) The question of who should conduct the assessment is left to States. Such assessment is normally conducted by operators observing certain guidelines set by the States. These matters would have to be resolved by the States themselves through their domestic laws or as parties to international instruments. However, it is presumed that a State of origin will designate an authority, whether or not governmental, to evaluate the assessment on behalf of the Government and will accept responsibility for the conclusions reached by that authority.

(6) The article does not specify what the content of the risk assessment should be. Obviously, the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead. This corresponds to the basic duty contained in article 3. Most existing international conventions and legal instruments do not specify the content of assessment. There are exceptions, such as the Convention on Environmental Impact Assessment in a Transboundary Context, which provides in detail the content of such assessment.[903] The 1981 study of the legal aspects concerning the environment related to offshore mining and drilling within the limits of national jurisdiction, prepared by the Working Group of Experts on Environmental Law of UNEP,[904] also provides, in its conclusion No. 8, in detail the content of assessment for offshore mining and drilling.

(7) The specifics of what ought to be the content of assessment is left to the domestic laws of the State

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[898] *Trail Smelter* (see footnote 253 above), pp. 1973–1974.

[899] See footnote 857 above.

[900] See, for example, article XI of the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution; articles 205 and 206 of the United Nations Convention on the Law of the Sea; the Regional Convention for the Conservation of the Environment of the Red Sea and Gulf of Aden; article 14 of the ASEAN Agreement on the Conservation of Nature and Natural Resources; Convention for the Protection of the Natural Resources and Environment of the South Pacific Region; article 4 of the Convention on the Regulation of Antarctic Mineral Resource Activities; article 8 of the Protocol on Environmental Protection to the Antarctic Treaty; article 14, paragraphs 1 (*a*) and (*b*), of the Convention on Biological Diversity; and article 4 of the Convention on the Transboundary Effects of Industrial Accidents.

[901] For a survey of various North American and European legal and administrative systems of environmental impact assessment policies, plans and programmes, see ECE, *Application of Environmental Impact Assessment Principles to Policies, Plans and Programmes* (United Nations publication, Sales No. E.92.II.E.28), pp. 43 et seq.; approximately 70 developing countries have environmental impact assessment legislation of some kind. Other countries either are in the process of drafting new and additional environmental impact assessment legislation or are planning to do so; see M. Yeater and L. Kurukulasuriya, "Environmental impact assessment legislation in developing countries", *UNEP's New Way Forward: Environmental Law and Sustainable Development*, Sun Lin and L. Kurukulasuriya, eds. (UNEP, 1995), p. 259; and G. J. Martin "Le concept de risque et la protection de l'environnement: évolution parallèle ou fertilisation croisée?", *Les hommes et l'environnement …* (footnote 867 above), pp. 451–460.

[902] See footnote 897 above.

[903] Article 4 of the Convention provides that the environmental impact assessment of a State party should contain, as a minimum, the information described in appendix II to the Convention. Appendix II (Content of the environmental impact assessment documentation) lists nine items as follows:

"(*a*) A description of the proposed activity and its purpose;

"(*b*) A description, where appropriate, of reasonable alternatives (for example, location or technological) to the proposed activity and also the no-action alternative;

"(*c*) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;

"(*d*) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;

"(*e*) A description of mitigation measures to keep adverse environmental impact to a minimum;

"(*f*) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;

"(*g*) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;

"(*h*) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and

"(*i*) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.)."

[904] See UNEP/GC.9/5/Add.5, annex III.

conducting such assessment.[905] For the purposes of article 7, however, such an assessment should contain an evaluation of the possible transboundary harmful impact of the activity. In order for the States likely to be affected to evaluate the risk to which they might be exposed, they need to know what possible harmful effects that activity might have on them.

(8) The assessment should include the effects of the activity not only on persons and property, but also on the environment of other States. The importance of the protection of the environment, independently of any harm to individual human beings or property, is clearly recognized.

(9) This article does not oblige the State of origin to require risk assessment for any activity being undertaken within their territory or otherwise under their jurisdiction or control. Activities involving a risk of causing significant transboundary harm have some general characteristics which are identifiable and could provide some indication to States as to which activities might fall within the terms of these articles. For example, the type of the source of energy used in manufacturing, the location of the activity and its proximity to the border area, etc. could all give an indication of whether the activity might fall within the scope of these articles. There are certain substances that are listed in some conventions as dangerous or hazardous and their use in any activity may in itself be an indication that those activities might involve a risk of significant transboundary harm.[906] There are also certain conventions that list the activities that are presumed to be harmful and that might signal that those activities might fall within the scope of these articles.[907]

### *Article 8. Notification and information*

**1. If the assessment referred to in article 7 indicates a risk of causing significant transboundary harm, the State of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based.**

**2. The State of origin shall not take any decision on authorization of the activity pending the receipt, within a period not exceeding six months, of the response from the State likely to be affected.**

*Commentary*

(1) Article 8 deals with a situation in which the assessment undertaken by a State of origin, in accordance with article 7, indicates that the activity planned does indeed pose a risk of causing significant transboundary harm. This article, together with articles 9, 11, 12 and 13, provides for a set of procedures essential to balancing the interests of all the States concerned by giving them a reasonable opportunity to find a way to undertake the activity with satisfactory and reasonable measures designed to prevent or minimize transboundary harm.

(2) Article 8 calls on the State of origin to notify States likely to be affected by the planned activity. The activities here include both those that are planned by the State itself and those planned by private entities. The requirement of notification is an indispensable part of any system designed to prevent transboundary harm or at any event to minimize the risk thereof.

(3) The obligation to notify other States of the risk of significant harm to which they are exposed is reflected in the *Corfu Channel* case, where ICJ characterized the duty to warn as based on "elementary considerations of humanity".[908] This principle is recognized in the context of the use of international watercourses and in that context is embodied in a number of international agreements, decisions of international courts and tribunals, declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations.[909]

(4) In addition to the utilization of international watercourses, the principle of notification has also been recognized in respect of other activities with transboundary effects, for example, article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context[910] and articles 3 and 10 of the Convention on the Transboundary Effects of Industrial Accidents. Principle 19 of the Rio Declaration speaks of timely notification:

> States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.[911]

[905] For the format of environmental impact assessment adopted in most legislations, see M. Yeater and L. Kurukulasuriya, *loc. cit*. (footnote 901 above), p. 260.

[906] For example, the Convention for the Prevention of Marine Pollution from Land-based Sources provides in article 4 an obligation for the parties to eliminate or restrict the pollution of the environment by certain substances, and the list of those substances is annexed to the Convention. Similarly, the Convention on the Protection of the Marine Environment of the Baltic Sea Area provides a list of hazardous substances in annex I and of noxious substances and materials in annex II, deposits of which are either prohibited or strictly limited; see also the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources; and the Agreement for the Protection of the Rhine against Chemical Pollution.

[907] See footnote 864 above.

[908] *Corfu Channel* (see footnote 35 above), p. 22.

[909] For treaties dealing with prior notification and exchange of information in respect of watercourses, see paragraph (6) of the commentary to article 12 (Notification concerning planned measures with possible adverse effects), of the draft articles on the law of the non-navigational uses of international watercourses (*Yearbook ... 1994*, vol. II (Part Two), pp. 119–120).

[910] Article 3, paragraph 2, of the Convention provides for a system of notification which reads:

> "This notification shall contain, *inter alia*:
>
> "(*a*) Information on the proposed activity, including any available information on its possible transboundary impact;
>
> "(*b*) The nature of the possible decision; and
>
> "(*c*) An indication of a reasonable time within which a response under paragraph 3 of this Article is required, taking into account the nature of the proposed activity;
>
> "and may include the information set out in paragraph 5 of this Article."

[911] See footnote 857 above.

(5) The procedure for notification has been established by a number of OECD resolutions. For example, in respect of certain chemical substances, the annex to OECD resolution C(71)73 of 18 May 1971 stipulates that each member State is to receive notification prior to the proposed measures in each other member State regarding substances which have an adverse impact on man or the environment where such measures could have significant effects on the economies and trade of the other States.[912] The annex to OECD Council recommendation C(74)224 of 14 November 1974 on "Some principles concerning transfrontier pollution" in its "Principle of information and consultation" requires notification and consultation prior to undertaking an activity which may create a risk of significant transboundary pollution.[913] The principle of notification is well established in the case of environmental emergencies.[914]

(6) Where assessment reveals the risk of causing significant transboundary harm, in accordance with *paragraph 1*, the State which plans to undertake such activity has the obligation to notify the States which may be affected. The notification shall be accompanied by available technical information on which the assessment is based. The reference to "available" technical and other relevant information is intended to indicate that the obligation of the State of origin is limited to transmitting the technical and other information which was developed in relation to the activity. This information is generally revealed during the assessment of the activity in accordance with article 7. Paragraph 1 assumes that technical information resulting from the assessment includes not only what might be called raw data, namely fact sheets, statistics, etc., but also the analysis of the information which was used by the State of origin itself to make the determination regarding the risk of transboundary harm. The reference to the available data includes also other data which might become available later after transmitting the data which was initially available to the States likely to be affected.

(7) States are free to decide how they wish to inform the States that are likely to be affected. As a general rule, it is assumed that States will directly contact the other States through diplomatic channels.

(8) Paragraph 1 also addresses the situation where the State of origin, despite all its efforts and diligence, is unable to identify *all* the States which may be affected prior to authorizing the activity and gains that knowledge only after the activity is undertaken. In accordance with this paragraph, the State of origin, in such cases, is under an obligation to notify the other States likely to be affected as soon as the information comes to its knowledge and it has had an opportunity, within a reasonable time, to determine the States concerned.

(9) *Paragraph 2* addresses the need for the States likely to be affected to respond within a period not exceeding six months. It is generally a period of time that should allow these States to evaluate the data involved and arrive at their own conclusion. This is a requirement that is conditioned by cooperation and good faith.

### *Article 9. Consultations on preventive measures*

**1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof. The States concerned shall agree, at the commencement of such consultations, on a reasonable time frame for the consultations.**

**2. The States concerned shall seek solutions based on an equitable balance of interests in the light of article 10.**

**3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.**

*Commentary*

(1) Article 9 requires the States concerned, that is, the State of origin and the States that are likely to be affected, to enter into consultations in order to agree on the measures to prevent significant transboundary harm, or at any event to minimize the risk thereof. Depending upon the time at which article 9 is invoked, consultations may be prior to authorization and commencement of an activity or during its performance.

(2) There is a need to maintain a balance between two equally important considerations in this article. First, the article deals with activities that are not prohibited by international law and that, normally, are important to the economic development of the State of origin. Secondly, it would be unfair to other States to allow those activities to be conducted without consulting them and taking appropriate preventive measures. Therefore, the article does not provide a mere formality which the State of origin has to go through with no real intention of reaching a solution acceptable to the other States, nor does it provide a right of veto for the States that are likely to be affected. To maintain a balance, the article relies on the manner in which, and purpose for which, the parties enter into consultations. The parties must enter into consultations in good faith and must take into account each other's legitimate interests. The parties should consult each other with a view to arriving at an acceptable solution regarding the measures to be adopted to prevent significant transboundary harm, or at any event to minimize the risk thereof.

(3) The principle of good faith is an integral part of any requirement of consultations and negotiations. The obligation to consult and negotiate genuinely and in good faith was recognized in the *Lake Lanoux* award where the tribunal stated that:

[912] OECD, *OECD and the Environment* (see footnote 875 above), annex, p. 91, para. 1.

[913] *Ibid*., p. 142.

[914] See paragraph (1) of the commentary to article 17.

Consultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities. The rules of reason and good faith are applicable to procedural rights and duties relative to the sharing of the use of international rivers.[915]

(4) With regard to this particular point about good faith, the judgment of ICJ in the *Fisheries Jurisdiction* case is also relevant. There the Court stated that "[t]he task [of the parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other".[916] In the *North Sea Continental Shelf* cases the Court held that:

(*a*) [T]he parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.[917]

Even though the Court in this judgment speaks of "negotiations", it is believed that the good-faith requirement in the conduct of the parties during the course of consultation or negotiations is the same.

(5) The purpose of consultations is for the parties to find acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm, or at any event to minimize the risk thereof. The words "acceptable solutions", regarding the adoption of preventive measures, refer to those measures that are accepted by the parties within the guidelines specified in paragraph 2. Generally, the consent of the parties on measures of prevention will be expressed by means of some form of agreement.

(6) The parties should obviously aim, first, at selecting those measures which may avoid any risk of causing significant transboundary harm or, if that is not possible, which minimize the risk of such harm. Under the terms of article 4, the parties are required, moreover, to cooperate in the implementation of such measures. This requirement, again, stems from the assumption that the obligation of due diligence, the core base of the provisions intended to prevent significant transboundary harm, or at any event to minimize the risk thereof, is of a continuous nature affecting every stage related to the conduct of the activity.

(7) Article 9 may be invoked whenever there is a question about the need to take preventive measures. Such questions obviously may arise as a result of article 8, because a notification to other States has been made by the State of origin that an activity it intends to undertake may pose a risk of causing significant transboundary harm, or in the course of the exchange of information under article 12 or in the context of article 11 on procedures in the absence of notification.

(8) Article 9 has a broad scope of application. It is to apply to all issues related to preventive measures. For example, when parties notify under article 8 or exchange information under article 12 and there are ambiguities in those communications, a request for consultations may be made simply in order to clarify those ambiguities.

(9) *Paragraph 2* provides guidance for States when consulting each other on preventive measures. The parties shall seek solutions based on an equitable balance of interests in the light of article 10. Neither paragraph 2 of this article nor article 10 precludes the parties from taking account of other factors which they perceive as relevant in achieving an equitable balance of interests.

(10) *Paragraph 3* deals with the possibility that, despite all efforts by the parties, they cannot reach an agreement on acceptable preventive measures. As explained in paragraph (3) above, the article maintains a balance between the two considerations, one of which is to deny the States likely to be affected a right of veto. In this context, the *Lake Lanoux* award may be recalled where the tribunal noted that, in certain situations, the party that was likely to be affected might, in violation of good faith, paralyse genuine negotiation efforts.[918] To take account of this possibility, the article provides that the State of origin is permitted to go ahead with the activity, for the absence of such an alternative would, in effect, create a right of veto for the States likely to be affected. The State of origin, while permitted to go ahead with the activity, is still obligated, as measure of self-regulation, to take into account the interests of the States likely to be affected. As a result of consultations, the State of origin is aware of the concerns of the States likely to be affected and is in a better position to seriously take them into account in carrying out the activity. The last part of paragraph 3 preserves the rights of States likely to be affected.

### *Article 10. Factors involved in an equitable balance of interests*

**In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 9, the States concerned shall take into account all relevant factors and circumstances, including:**

**(*a*) the degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;**

**(*b*) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the State likely to be affected;**

**(*c*) the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;**

**(*d*) the degree to which the State of origin and, as appropriate, the State likely to be affected are prepared to contribute to the costs of prevention;**

[915] See footnote 873 above.

[916] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment*, *I.C.J. Reports 1974*, p. 33, para. 78.

[917] *North Sea Continental Shelf* (see footnote 197 above), para. 85. See also paragraph 87.

[918] See footnote 873 above.

**(*e*) the economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;**

**(*f*) the standards of prevention which the State likely to be affected applies to the same or comparable activities and the standards applied in comparable regional or international practice.**

*Commentary*

(1) The purpose of this article is to provide some guidance for States which are engaged in consultations seeking to achieve an equitable balance of interests. In reaching an equitable balance of interests, the facts have to be established and all the relevant factors and circumstances weighed. This article draws its inspiration from article 6 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

(2) The main clause of the article provides that in order "to achieve an equitable balance of interests as referred to in paragraph 2 of article 9, the States concerned shall take into account all relevant factors and circumstances". The article proceeds to set forth a non-exhaustive list of such factors and circumstances. The wide diversity of types of activities which is covered by these articles, and the different situations and circumstances in which they will be conducted, make it impossible to compile an exhaustive list of factors relevant to all individual cases. No priority or weight is assigned to the factors and circumstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases. In general, the factors and circumstances indicated will allow the parties to compare the costs and benefits which may be involved in a particular case.

(3) *Subparagraph* (a) compares the degree of risk of significant transboundary harm to the availability of means of preventing such harm or minimizing the risk thereof and the possibility of repairing the harm. For example, the degree of risk of harm may be high, but there may be measures that can prevent the harm or reduce that risk, or there may be possibilities for repairing the harm. The comparisons here are both quantitative and qualitative.

(4) *Subparagraph* (b) compares the importance of the activity in terms of its social, economic and technical advantages for the State of origin and the potential harm to the States likely to be affected. The Commission in this context recalls the decision in the *Donauversinkung* case where the court stated that:

> The interests of the States in question must be weighed in an equitable manner one against another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by the one to the injury caused to the other.[919]

In more recent times, States have negotiated what might be seen as equitable solutions to transboundary disputes; agreements concerning French potassium emissions into the Rhine, pollution of United States–Mexican boundary waters, and North American and European acid rain all display elements of this kind.[920]

(5) *Subparagraph* (c) compares, in the same fashion as subparagraph (*a*), the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof and the possibility of restoring the environment. It is necessary to emphasize the particular importance of protection of the environment. Principle 15 of the Rio Declaration is relevant to this subparagraph. Requiring that the precautionary approach be widely applied to States according to their capabilities, principle 15 states:

> Where 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.[921]

(6) The precautionary principle was affirmed in the "pan-European" Bergen Ministerial Declaration on Sustainable Development in the ECE Region, adopted in May 1990 by the ECE member States. It stated that: "Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[922] The precautionary principle was recommended by the UNEP Governing Council in order to promote the prevention and elimination of marine pollution, which is increasingly becoming a threat to the marine environment and a cause of human suffering.[923] The precautionary principle has also been referred to or incorporated without any explicit reference in various other conventions.[924]

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[919] *Streitsache des Landes Wurttemberg und des Landes Preussen gegen das Land Baden (Wurttemberg and Prussia v. Baden), betreffend die Donauversinkung*, German Staatsgerichtshof, 18 June 1927, *Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin), vol. 116, appendix, pp. 18 et seq.; see also A. McNair and H. Lauterpacht, eds., *Annual Digest of Public International Law Cases, 1927 and 1928* (London, Longmans, 1931), vol. 4, p. 131; *Kansas* v. *Colorado, United States Reports*, vol. 206 (1921), p. 100 (1907); and *Washington* v. *Oregon, ibid.*, vol. 297 (1936), p. 517 (1936).

[920] See the Convention on the Protection of the Rhine against Pollution from Chlorides, with the Additional Protocol to the Convention on the Protection of the Rhine against Pollution from Chlorides; the Agreement on the Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River, ILM, vol. 12, No. 5 (September1973), p. 1105; the Convention on Long-Range Transboundary Air Pollution; and the Agreement between the United States and Canada on Air Quality of 1991 (United Nations, *Treaty Series*, vol. 1852, No. 31532, p. 79, reprinted in ILM, vol. 30 (1991), p. 678). See also A. E. Boyle and D. Freestone, *op. cit.* (footnote 863 above), p. 80; and I. Romy, *Les pollutions transfrontières des eaux: l'exemple du Rhin* (Lausanne, Payot, 1990).

[921] See footnote 857 above.

[922] Report of the Economic Commission for Europe on the Bergen Conference (8–16 May 1990), A/CONF.151/PC/10, annex I, para. 7.

[923] Governing Council decision 15/27 (1989); see *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 25* (A/44/25), annex I. See also P. Sands, *op. cit.* (footnote 863 above), p. 210.

[924] See article 4, paragraph 3, of the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa; article 3, paragraph 3, of the United Nations Framework Convention on Climate Change; article 174 (ex-article 130r) of the Treaty establishing the European Community as amended by the Treaty of Amsterdam; and article 2 of the Vienna Convention for the Protection of the Ozone Layer. It may be noted that previous treaties apply the precautionary principle in a very general sense without making any explicit reference to it.

(7) According to the Rio Declaration, the precautionary principle constitutes a very general rule of conduct of prudence. It implies the need for States to review their obligations of prevention in a continuous manner to keep abreast of the advances in scientific knowledge.[925] ICJ in its judgment in the *Gabčíkovo-Nagymaros Project* case invited the parties to "look afresh at the effects on the environment of the operation of the Gabčíkovo power plant", built on the Danube pursuant to the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 1977, in the light of the new requirements of environmental protection.[926]

(8) States should consider suitable means to restore, as far as possible, the situation existing prior to the occurrence of harm. It is considered that this should be highlighted as a factor to be taken into account by States concerned which should adopt environmentally friendly measures.

(9) *Subparagraph* (d) provides that one of the elements determining the choice of preventive measures is the willingness of the State of origin and States likely to be affected to contribute to the cost of prevention. For example, if the States likely to be affected are prepared to contribute to the expense of preventive measures, it may be reasonable, taking into account other factors, to expect the State of origin to take more costly but more effective preventive measures. This, however, should not underplay the measures the State of origin is obliged to take under these articles.

(10) These considerations are in line with the basic policy of the so-called polluter-pays principle. This principle was initiated first by the Council of OECD in 1972.[927] The polluter-pays principle was given cognizance at the global level when it was adopted as principle 16 of the Rio Declaration. It noted:

> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.[928]

This is conceived as the most efficient means of allocating the cost of pollution prevention and control measures so as to encourage the rational use of scarce resources. It also encourages internalization of the cost of publicly mandated technical measures in preference to inefficiencies and competitive distortions in governmental subsidies.[929] This principle is specifically referred to in article 174 (ex-article 130r) of the Treaty establishing the European Community as amended by the Treaty of Amsterdam.

(11) The expression "as appropriate" indicates that the State of origin and the States likely to be affected are not put on the same level as regards the contribution to the costs of prevention. States concerned frequently embark on negotiations concerning the distribution of costs for preventive measures. In so doing, they proceed from the basic principle derived from article 3 according to which these costs are to be assumed by the operator or the State of origin. These negotiations mostly occur in cases where there is no agreement on the amount of the preventive measures and where the affected State contributes to the costs of preventive measures in order to ensure a higher degree of protection that it desires over and above what is essential for the State of origin to ensure. This link between the distribution of costs and the amount of preventive measures is in particular reflected in subparagraph (*d*).

(12) *Subparagraph* (e) introduces a number of factors that must be compared and taken into account. The economic viability of the activity must be compared to the costs of prevention. The cost of the preventive measures should not be so high as to make the activity economically non-viable. The economic viability of the activity should also be assessed in terms of the possibility of changing the location, or conducting it by other means, or replacing it with an alternative activity. The words "carrying out the activity ... by other means" intend to take into account, for example, a situation in which one type of chemical substance used in the activity, which might be the source of transboundary harm, could be replaced by another chemical substance; or mechanical equipment in the plant or the factory could be replaced by different equipment. The words "replacing [the activity] with an alternative activity" are intended to take account of the possibility that the same or comparable results may be reached by another activity with no risk, or lower risk, of significant transboundary harm.

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[925] On the principle of precaution generally, see H. Hohmann, *Präventive Rechtspflichten und -prinzipien des modernen Umweltvölkerrechts: Zum Stand des Umweltvölkerrechts zwischen Umweltnutzung und Umweltschutz* (Berlin, Duncker und Humblot, 1992), pp. 406–411; J. Cameron, "The status of the precautionary principle in international law", *Interpreting the Precautionary Principle*, T. O'Riordan and J. Cameron, eds. (London, Earthscan, 1994), pp. 262–289; H. Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law: The Precautionary Principle — International Environmental Law between Exploitation and Protection* (London, Graham and Trotman/Martinus Nijhoff, 1994); D. Freestone and E. Hey, eds., *The Precautionary Principle and International Law: The Challenge of Implementation* (The Hague, Kluwer, 1996); A. Epiney and M. Scheyli, *op. cit.* (footnote 879 above), pp. 103–125; P. Martin-Bidou, "Le principe de précaution en droit international de l'environnement", RGDIP, vol. 103, No. 3 (1999), pp. 631–666; and N. de Sadeleer, "Réflexions sur le statut juridique du principe de précaution", *Le principe de précaution: significations et conséquences*, E. Zaccai and J.-N. Missa, eds. (Éditions de l'Université de Bruxelles, 2000), pp. 117–142.

[926] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 77–78, para. 140. However, in this case the Court did not accept Hungary's claim that it was entitled to terminate the Treaty on the grounds of "ecological state of necessity" arising from risks to the environment that had not been detected at the time of its conclusion. It stated that other means could be used to remedy the vague "peril"; see paragraphs 49 to 58 of the judgment, pp. 39–46.

[927] See OECD Council recommendation C(72)128 on Principles relative to transfrontier pollution (OECD, *Guiding Principles concerning International Economic Aspects of Environmental Policies*) and OECD environment directive on equal right of access and non-discrimination in relation to transfrontier pollution, mentioned in the "Survey of liability regimes …" (footnote 846 above), paras. 102–130.

[928] See footnote 857 above.

[929] See G. Hafner, "Das Verursacherprinzip", *Economy-Fachmagazin* No. 4/90 (1990), pp. F23–F29; S. E. Gaines, "The polluter-pays principle: from economic equity to environmental ethos", *Texas International Law Journal*, vol. 26 (1991), p. 470; H. Smets, "The polluter-pays principle in the early 1990s", *The Environment after Rio: International Law and Economics*, L. Campiglio *et al*., eds. (London, Graham and Trotman/Martinus Nijhoff, 1994), p. 134; "Survey of liability regimes …" (footnote 846 above), para. 113; Rio Declaration on Environment and Development—application and implementation: report of the Secretary-General (E/CN.17/1997/8, paras. 87–90); and A. Epiney and M. Scheyli, *op. cit.* (see footnote 879 above), p. 152.

(13) According to *subparagraph* (f), States should also take into account the standards of prevention applied to the same or comparable activities in the State likely to be affected, other regions or, if they exist, the international standards of prevention applicable for similar activities. This is particularly relevant when, for example, the States concerned do not have any standard of prevention for such activities, or they wish to improve their existing standards.

### *Article 11. Procedures in the absence of notification*

**1. If a State has reasonable grounds to believe that an activity planned or carried out in the State of origin may involve a risk of causing significant transboundary harm to it, it may request the State of origin to apply the provision of article 8. The request shall be accompanied by a documented explanation setting forth its grounds.**

**2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 8, it shall so inform the requesting State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy that State, at its request, the two States shall promptly enter into consultations in the manner indicated in article 9.**

**3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a reasonable period.**

*Commentary*

(1) Article 11 addresses the situation in which a State, although it has received no notification about an activity in accordance with article 8, becomes aware that an activity is being carried out in the State of origin, either by the State itself or by a private operator, and believes, on reasonable grounds, that the activity carries a risk of causing it significant harm.

(2) The expression "a State" is not intended to exclude the possibility that more than one State could entertain the belief that a planned activity could adversely affect them in a significant way. The words "apply the provision of article 8" should not be taken as suggesting that the State which intends to authorize or has authorized an activity has necessarily failed to comply with its obligations under article 8. In other words, the State of origin may have made an assessment of the potential of the planned activity for causing significant transboundary harm and concluded in good faith that no such effects would result therefrom. *Paragraph 1* allows a State to request that the State of origin take a "second look" at its assessment and conclusion, and does not prejudge the question whether the State of origin initially complied with its obligations under article 8.

(3) The State likely to be affected could make such a request, however, only upon satisfaction of two conditions. The first is that the requesting State must have "reasonable grounds to believe" that the activity in question may involve a risk of causing significant transboundary harm. The second is that the requesting State must provide a "documented explanation setting forth its grounds". These conditions are intended to require that the requesting State have more than a vague and unsubstantiated apprehension. A serious and substantiated belief is necessary, particularly in view of the possibility that the State of origin may be required to suspend implementation of its plans under paragraph 3 of article 11.

(4) The first sentence of *paragraph 2* deals with the case in which the planning State concludes, after taking a "second look" as described in paragraph (2) of the present commentary, that it is not under an obligation to provide a notification under article 8. In such a situation, paragraph 2 seeks to maintain a fair balance between the interests of the States concerned by requiring the State of origin to provide the same kind of justification for its finding as was required of the requesting State under paragraph 1. The second sentence of paragraph 2 deals with the case in which the finding of the State of origin does not satisfy the requesting State. It requires that, in such a situation, the State of origin promptly enter into consultations with the other State (or States), at the request of the latter. The consultations are to be conducted in the manner indicated in paragraphs 1 and 2 of article 9. In other words, their purpose is to achieve "acceptable solutions" regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof, and that the solutions to be sought should be "based on an equitable balance of interests". These phrases are discussed in the commentary to article 9.

(5) *Paragraph 3* requires the State of origin to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a reasonable period, if it is requested to do so by the other State during the course of consultations. States concerned could also agree otherwise.

(6) Similar provisions have been provided for in other legal instruments. Article 18 of the Convention on the Law of the Non-navigational Uses of International Watercourses, and article 3, paragraph 7, of the Convention on Environmental Impact Assessment in a Transboundary Context also contemplate a procedure whereby a State likely to be affected by an activity can initiate consultations with the State of origin.

### *Article 12. Exchange of information*

**While the activity is being carried out, the States concerned shall exchange in a timely manner all available information concerning that activity relevant to preventing significant transboundary harm or at any event minimizing the risk thereof. Such an exchange of information shall continue until such time as the States concerned consider it appropriate even after the activity is terminated.**

*Commentary*

(1) Article 12 deals with steps to be taken after an activity has been undertaken. The purpose of all these steps is the same as previous articles, viz. to prevent significant transboundary harm or at any event to minimize the risk thereof.

(2) Article 12 requires the State of origin and the States likely to be affected to exchange information regarding the activity after it has been undertaken. The phrase "concerning that activity" after the words "all available information" is intended to emphasize the link between the information and the activity and not any information. The duty of prevention based on the concept of due diligence is not a one-time effort but requires continuous effort. This means that due diligence is not terminated after granting authorization for the activity and undertaking the activity; it continues in respect of monitoring the implementation of the activity as long as the activity continues.

(3) The information that is required to be exchanged, under article 12, is whatever would be useful, in the particular instance, for the purpose of prevention of risk of significant harm. Normally, such information comes to the knowledge of the State of origin. However, when the State that is likely to be affected has any information which might be useful for prevention purposes, it should make it available to the State of origin.

(4) The requirement of exchange of information is fairly common in conventions designed to prevent or reduce environmental and transboundary harm. These conventions provide for various ways of gathering and exchanging information, either between the parties or through providing the information to an international organization which makes it available to other States.[930] In the context of these articles, where the activities are most likely to involve a few States, the exchange of information is effected between the States directly concerned. Where the information might affect a large number of States, relevant information may be exchanged through other avenues, such as, for example, competent international organizations.

(5) Article 12 requires that such information should be exchanged in a *timely manner*. This means that when the State becomes aware of such information, it should inform the other States quickly so that there will be enough time for the States concerned to consult on appropriate preventive measures or the States likely to be affected will have sufficient time to take proper actions.

[930] For example, article 10 of the Convention for the Prevention of Marine Pollution from Land-based Sources, article 200 of the United Nations Convention on the Law of the Sea and article 4 of the Vienna Convention for the Protection of the Ozone Layer speak of individual or joint research by the States parties on prevention or reduction of pollution and of transmitting to each other directly or through a competent international organization the information so obtained. The Convention on Long-Range Transboundary Air Pollution provides for research and exchange of information regarding the impact of activities undertaken by the States parties. Examples are found in other instruments such as section VI, para. 1 (*b*) (iii), of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (see footnote 871 above), article 17 of the Convention on Biological Diversity and article 13 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

(6) There is no requirement in the article as to the frequency of exchange of information. The requirement of article 12 comes into operation only when States have any information which is relevant to preventing transboundary harm or at any rate to minimizing the risk thereof.

(7) The second sentence of article 12 is designed to ensure exchange of information under this provision not only while an activity is "carried out", but even after it ceases to exist, if the activity leaves behind by-products or materials associated with the activity which require monitoring to avoid the risk of significant transboundary harm. An example in this regard is nuclear activity which leaves behind nuclear waste even after the activity is terminated. But it is a recognition of the fact that the consequences of certain activities even after they are terminated continue to pose a significant risk of transboundary harm. Under these circumstances, the obligations of the State of origin do not end with the termination of the activity.

### *Article 13. Information to the public*

**States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.**

*Commentary*

(1) Article 13 requires States, whenever possible and by such means as are appropriate, to provide the public likely to be affected, whether their own or that of other States, with information relating to the risk and harm that might result from an activity to ascertain their views thereon. The article therefore requires States (*a*) to provide information to the public regarding the activity and the risk and the harm it involves; and (*b*) to ascertain the views of the public. It is, of course, clear that the purpose of providing information to the public is to allow its members to inform themselves and then to ascertain their views. Without that second step, the purpose of the article would be defeated.

(2) The content of the information to be provided to the public includes information about the activity itself as well as the nature and the scope of risk and harm that it entails. Such information is contained in the documents accompanying the notification which is effected in accordance with article 8 or in the assessment which may be carried out by the requesting State under article 11.

(3) This article is inspired by new trends in international law, in general, and environmental law, in particular, of seeking to involve, in the decision-making processes, individuals whose lives, health, property and environment might be affected by providing them with a chance to present their views and be heard by those responsible for making the ultimate decisions.

(4) Principle 10 of the Rio Declaration provides for public involvement in decision-making processes as follows:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[931]

(5) A number of other recent international instruments dealing with environmental issues have required States to provide the public with information and to give it an opportunity to participate in decision-making processes. Section VII, paragraphs 1 and 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters is relevant in that context:

> 1. In order to promote informed decision-making by central, regional or local authorities in proceedings concerning accidental pollution of transboundary inland waters, countries should facilitate participation of the public likely to be affected in hearings and preliminary inquiries and the making of objections in respect of proposed decisions, as well as recourse to and standing in administrative and judicial proceedings.
>
> 2. Countries of incident should take all appropriate measures to provide physical and legal persons exposed to a significant risk of accidental pollution of transboundary inland waters with sufficient information to enable them to exercise the rights accorded to them by national law in accordance with the objectives of this Code.[932]

Article 3, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary Context; article 17 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area; article 6 of the United Nations Framework Convention on Climate Change; the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (art. 16); the Convention on the Transboundary Effects of Industrial Accidents (art. 9 and annex VIII); article 12 of the Convention on the Law of the Non-navigational Uses of International Watercourses; the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters; the European Council directives 90/313/EEC on the freedom of access to information on the environment[933] and 96/82/EC on the control of major-accident hazards involving dangerous substances;[934] and OECD Council recommendation C(74)224 on Principles concerning transfrontier pollution[935] all provide for information to the public.

(6) There are many modalities for participation in decision-making processes. Reviewing data and information on the basis of which decisions will be based and having an opportunity to confirm or challenge the accuracy of the facts, the analysis and the policy considerations either through administrative tribunals, courts, or groups of concerned citizens is one way of participation in decision-making. This form of public involvement enhances the efforts to prevent transboundary and environmental harm.

(7) The obligation contained in article 13 is circumscribed by the phrase "by such means as are appropriate", which is intended to leave the ways in which such information could be provided to the States, their domestic law requirements and the State policy as to, for example, whether such information should be provided through media, non-governmental organizations, public agencies and local authorities. In the case of the public beyond a State's borders, information may be provided, as appropriate, through the good offices of the State concerned, if direct communication is not feasible or practical.

(8) Further, the State that might be affected, after receiving notification and information from the State of origin and before responding to the notification shall, by such means as are appropriate, inform those parts of its own public likely to be affected.

(9) "Public" includes individuals, interest groups (non-governmental organizations) and independent experts. General "public", however, refers to individuals who are not organized into groups or affiliated to specific groups. Public participation could be encouraged by holding public meetings or hearings. The public should be given the opportunity for consultation and their participation should be facilitated by providing them with necessary information on the proposed policy, plan or programme under consideration. It must, however, be understood that requirements of confidentiality may affect the extent of public participation in the assessment process. It is also common that the public is not involved, or only minimally involved, in efforts to determine the scope of a policy, plan or programme. Public participation in the review of a draft document or environmental impact assessment would be useful in obtaining information regarding concerns related to the proposed action, additional alternatives and potential environmental impact.[936]

(10) Apart from the desirability of encouraging public participation in national decision-making on vital issues regarding development and the tolerance levels of harm in order to enhance the legitimacy of and compliance with the decisions taken, it is suggested that, given the development of human rights law, public participation could also be viewed as a growing right under national law as well as international law.[937]

### *Article 14. National security and industrial secrets*

**Data and information vital to the national security of the State of origin or to the protection of industrial secrets or concerning intellectual property may**

[931] See footnote 857 above.

[932] See footnote 871 above.

[933] *Official Journal of the European Communities*, No. L 158 of 23 June 1990, p. 56.

[934] *Ibid*., No. L 10 of 14 January 1997, p. 13.

[935] See footnote 875 above.

[936] See ECE, *Application of Environmental Impact Assessment Principles* … (footnote 901 above), pp. 4 and 8.

[937] See T. M. Franck, "Fairness in the international legal and institutional system: general course on public international law", *Recueil des cours..., 1993–III* (Dordrecht, Martinus Nijhoff, 1994), vol. 240, p. 110. See also D. Craig and D. Ponce Nava, "Indigenous peoples' rights and environmental law", *UNEP's New Way Forward …* (footnote 901 above), pp. 115–146.

**be withheld, but the State of origin shall cooperate in good faith with the State likely to be affected in providing as much information as possible under the circumstances.**

*Commentary*

(1) Article 14 is intended to create a narrow exception to the obligation of States to provide information in accordance with articles 8, 12 and 13. States are not obligated to disclose information that is vital to their national security. This type of clause is not unusual in treaties which require exchange of information. Article 31 of the Convention on the Law of the Non-navigational Uses of International Watercourses also provides for a similar exception to the requirement of disclosure of information vital to national defence or security.

(2) Article 14 includes industrial secrets and information protected by intellectual property in addition to national security. Although industrial secrets are a part of the intellectual property rights, both terms are used to give sufficient coverage to protected rights. In the context of these articles, it is highly probable that some of the activities which come within the scope of article 1 might involve the use of sophisticated technology involving certain types of information which are protected under the domestic law. Normally, domestic laws of States determine the information that is considered an industrial secret and provide protection for them. This type of safeguard clause is not unusual in legal instruments dealing with exchange of information relating to industrial activities. For example, article 8 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and article 2, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary Context provide for similar protection of industrial and commercial secrecy.

(3) Article 14 recognizes the need for balance between the legitimate interests of the State of origin and the States that are likely to be affected. It therefore requires the State of origin that is withholding information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as possible under the circumstances. The words "as much information as possible" include, for example, the general description of the risk and the type and the extent of harm to which a State may be exposed. The words "under the circumstances" refer to the conditions invoked for withholding the information. Article 14 essentially encourages and relies on the good-faith cooperation of the parties.

### *Article 15. Non-discrimination*

**Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of an activity within the scope of the present articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.**

*Commentary*

(1) This article sets out the basic principle that the State of origin is to grant access to its judicial and other procedures without discrimination on the basis of nationality, residence or the place where the injury might occur. The content of this article is based on article 32 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

(2) Article 15 contains two basic elements, namely, non-discrimination on the basis of nationality or residence and non-discrimination on the basis of where the injury might occur. The rule set forth obliges States to ensure that any person, whatever his nationality or place of residence, who might suffer significant transboundary harm as a result of activities referred to in article 1 should, regardless of where the harm might occur, receive the same treatment as that afforded by the State of origin to its nationals in case of possible domestic harm. It is not intended that this obligation should affect the existing practice in some States of requiring that non-residents or aliens post a bond, as a condition of utilizing the court system, to cover court costs or other fees. Such a practice is not "discriminatory" under the article, and is taken into account by the phrase "in accordance with its legal system".

(3) Article 15 also provides that the State of origin may not discriminate on the basis of the place where the damage might occur. In other words, if significant harm may be caused in State A as a result of an activity referred to in article 1 in State B, State B may not bar an action on the grounds that the harm would occur outside its jurisdiction.

(4) This rule is residual, as indicated by the phrase "unless the States concerned have agreed otherwise". Accordingly, States concerned may agree on the best means of providing protection or redress to persons who may suffer a significant harm, for example through a bilateral agreement. States concerned are encouraged under the present articles to agree on a special regime dealing with activities with the risk of significant transboundary harm. In such arrangements, States may also provide for ways and means of protecting the interests of the persons concerned in case of significant transboundary harm. The phrase "for the protection of the interests of persons" has been used to make it clear that the article is not intended to suggest that States can decide by mutual agreement to discriminate in granting access to their judicial or other procedures or a right to compensation. The purpose of the inter-State agreement should always be the protection of the interests of the victims of the harm.

(5) Precedents for the obligation contained in this article may be found in international agreements and in recommendations of international organizations. For example, the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden in its article 3 provides as follows:

Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court or the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.

The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured Party than the rules of compensation of the State in which the activities are being carried out.[938]

(6) The OECD Council has adopted recommendation C(77)28(Final) on implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution. Paragraph 4, subparagraph (*a*), of the annex to that recommendation provides as follows:

Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution shall at least receive equivalent treatment to that afforded in the Country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status ...[939]

### *Article 16. Emergency preparedness*

**The State of origin shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with the State likely to be affected and competent international organizations.**

*Commentary*

(1) This article contains an obligation that calls for anticipatory rather than responsive action. The text of article 16 is based on article 28, paragraph 4, of the Convention on the Law of the Non-navigational Uses of International Watercourses which reads:

When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations.

The need for the development of contingency plans for responding to possible emergencies is well recognized.[940] It is suggested that the duty to prevent environmental disasters obligates States to enact safety measures and procedures to minimize the likelihood of major environmental accidents, such as nuclear reactor accidents, toxic chemical spills, oil spills or forest fires. Where necessary, specific safety or contingency measures are open to States to negotiate and agree in matters concerning management of risk of significant transboundary harm, such safety measures could include: (*a*) adoption of safety standards for the location and operation of industrial and nuclear plants and vehicles; (*b*) maintenance of equipment and facilities to ensure ongoing compliance with safety measures; (*c*) monitoring of facilities, vehicles or conditions to detect dangers; and (*d*) training of workers and monitoring of their performance to ensure compliance with safety standards. Such contingency plans should include establishment of early warning systems.

(2) While States of origin bear the primary responsibility for developing contingency plans, in many cases it will be appropriate to prepare them in cooperation with other States likely to be affected and competent international organizations. For example, the contingency plans may necessitate the involvement of other States likely to be affected, as well as international organizations with competence in the particular field.[941] In addition, the coordination of response efforts might be most effectively handled by a competent international organization of which the States concerned are members.

(3) Development of contingency plans are also better achieved through establishment of common or joint commissions composed of members representing all States concerned. National points of contact would also have to be established to review matters and employ the latest means of communication to suit early warnings.[942] Contingency plans to respond to marine pollution disasters are well known. Article 199 of the United Nations Convention on the Law of the Sea requires States to develop such plans. The obligation to develop contingency plans is also found in certain bilateral and multilateral agreements concerned with forest fires, nuclear accidents and other environmental catastrophes.[943] The Convention for the Protection of the Natural Resources and Environment of the South Pacific Region provides in article 15 that the "Parties shall develop and promote individual

[938] Similar provisions may be found in article 2, paragraph 6, of the Convention on Environmental Impact Assessment in a Transboundary Context; the Guidelines on responsibility and liability regarding transboundary water pollution, part II.E.8, prepared by the ECE Task Force on responsibility and liability regarding transboundary water pollution (document ENVWA/R.45, annex); and paragraph 6 of the Draft ECE Charter on environmental rights and obligations, prepared at a meeting of experts on environmental law, 25 February to 1 March 1991 (document ENVWA/R.38, annex I).

[939] OECD, *OECD and the Environment* (see footnote 875 above), p. 150. This is also the main thrust of principle 14 of the Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States (see footnote 862 above). A discussion of the principle of equal access may be found in S. van Hoogstraten, P.-M. Dupuy and H. Smets, "L'égalité d'accès: pollution transfrontière", *Environmental Policy and Law*, vol. 2, No. 2 (June 1976), p. 77.

[940] See E. Brown Weiss, "Environmental disasters in international law", *Anuario Jurídico Interamericano*, 1986 (OAS, Washington, D.C., 1987), pp. 141–169. Resolution No. 13 of 17 December 1983 of the European Council of Environmental Law concerning "Principles concerning international cooperation in environmental emergencies linked to technological development" expressly calls for limits on siting of all hazardous installations, for the adoption of safety standards to reduce risk of emergencies, and for monitoring and emergency planning; see *Environmental Policy and Law*, vol. 12, No. 3 (April 1984), p. 68. See also G. Handl, *op. cit.* (footnote 871 above), pp. 62–65.

[941] For a review of various contingency plans established by several international organizations and bodies such as UNEP, FAO, the United Nations Disaster Relief Coordinator, UNHCR, UNICEF, WHO, IAEA and ICRC, see B. G. Ramcharan, *The International Law and Practice of Early-Warning and Preventive Diplomacy: The Emerging Global Watch* (Dordrecht, Kluwer, 1991), chapter 7 (The Practice of Early-Warning: Environment, Basic Needs and Disaster-Preparedness), pp. 143–168.

[942] For establishment of joint commissions, see, for example, the Indus Waters Treaty, 1960 and the Agreement for the Protection of the Rhine against Chemical Pollution.

[943] For a mention of these agreements, see E. Brown Weiss, *loc. cit.* (see footnote 940 above), p. 148.

contingency plans and joint contingency plans for responding to incidents".

### *Article 17. Notification of an emergency*

**The State of origin shall, without delay and by the most expeditious means, at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present articles and provide it with all relevant and available information.**

*Commentary*

(1) This article deals with the obligations of States of origin in responding to an actual emergency situation. The provision is based on article 28, paragraph 2, of the Convention on the Law of the Non-navigational Uses of International Watercourses which reads:

> A watercourse State shall, without delay and by the most expeditious means available notify other potentially affected States and competent international organizations of any emergency originating within its territory.

Similar obligations are also contained, for example, in Principle 18 of the Rio Declaration;[944] the Convention on Early Notification of a Nuclear Accident;[945] article 198 of the United Nations Convention on the Law of the Sea; article 14, paragraph 1 (*d*) of the Convention on Biological Diversity; article 5, paragraph 1 (*c*), of the International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 and a number of other agreements concerning international watercourses.[946]

(2) According to this article, the seriousness of the harm involved together with the suddenness of the emergency's occurrence justifies the measures required. However, suddenness does not denote that the situation needs to be wholly unexpected. Early warning systems established or forecasting of severe weather disturbances could indicate that the emergency is imminent. This may give the States concerned some time to react and take reasonable, feasible and practical measures to avoid or at any event mitigate ill effects of such emergencies. The words "without delay" mean immediately upon learning of the emergency and the phrase "by the most expeditious means, at its disposal" indicates that the most rapid means of communication to which a State may have recourse is to be utilized.

(3) Emergencies could result from natural causes or human conduct. Measures to be taken in this regard are without prejudice to any claims of liability whose examination is outside the scope of the present articles.

### *Article 18. Relationship to other rules of international law*

**The present articles are without prejudice to any obligation incurred by States under relevant treaties or rules of customary international law.**

*Commentary*

(1) Article 18 intends to make it clear that the present articles are without prejudice to the existence, operation or effect of any obligation of States under international law relating to an act or omission to which these articles apply. It follows that no inference is to be drawn from the fact that an activity falls within the scope of these articles, as to the existence or non-existence of any other rule of international law as to the activity in question or its actual or potential transboundary effects.

(2) The reference in article 18 to any obligation of States covers both treaty obligations and obligations under customary international law. It is equally intended to extend both to rules having a particular application, whether to a given region or a specified activity, and to rules which are universal or general in scope. This article does not purport to resolve all questions of future conflict of overlap between obligations under treaties and customary international law and obligations under the present articles.

### *Article 19. Settlement of disputes*

**1. Any dispute concerning the interpretation or application of the present articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties to the dispute, including negotiations, mediation, conciliation, arbitration or judicial settlement.**

**2. Failing an agreement on the means for the peaceful settlement of the dispute within a period of six months, the parties to the dispute shall, at the request of any of them, have recourse to the establishment of an impartial fact-finding commission.**

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[944] See footnote 857 above.

[945] Article 5 of this Convention provides for detailed data to be notified to the States likely to be affected: "(*a*) the time, exact location where appropriate, and the nature of the nuclear accident; (*b*) the facility or activity involved; (*c*) the assumed or established cause and the foreseeable development of the nuclear accident relevant to the transboundary release of the radioactive materials; (*d*) the general characteristics of the radioactive release, including, as far as is practicable and appropriate, the nature, probable physical and chemical form and the quantity, composition and effective height of the radioactive release; (*e*) information on current and forecast meteorological and hydrological conditions, necessary for forecasting the transboundary release of the radioactive materials; (*f*) the results of environmental monitoring relevant to the transboundary release of the radioactive materials; (*g*) the off-site protective measures taken or planned; (*h*) the predicted behaviour over time of the radioactive release."

[946] See, e.g., article 11 of the Agreement for the Protection of the Rhine against Chemical Pollution; the Agreement concerning the Activities of Agencies for the Control of Accidental Water Pollution by Hydrocarbons or Other Substances capable of Contaminating Water and Recognized as such under the Convention of 16 November 1962 between France and Switzerland concerning Protection of the Waters of Lake Geneva against Pollution (1977 Official Collection of Swiss Laws, p. 2204), reproduced in B. Ruester, B. Simma and M. Bock, *International Protection of the Environment*, vol. XXV (Dobbs Ferry, N.Y., Oceana, 1981), p. 285; and the Agreement on Great Lakes Water Quality, concluded between Canada and the United States (*United States Treaties and Other International Agreements, 1978-79*, vol. 30, part 2 (Washington, D.C., United States Government Printing Office, 1980), No. 9257).

**3. The Fact-finding Commission shall be composed of one member nominated by each party to the dispute and in addition a member not having the nationality of any of the parties to the dispute chosen by the nominated members who shall serve as Chairperson.**

**4. If more than one State is involved on one side of the dispute and those States do not agree on a common member of the Commission and each of them nominates a member, the other party to the dispute has the right to nominate an equal number of members of the Commission.**

**5. If the members nominated by the parties to the dispute are unable to agree on a Chairperson within three months of the request for the establishment of the Commission, any party to the dispute may request the Secretary-General of the United Nations to appoint the Chairperson who shall not have the nationality of any of the parties to the dispute. If one of the parties to the dispute fails to nominate a member within three months of the initial request pursuant to paragraph 2, any other party to the dispute may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the parties to the dispute. The person so appointed shall constitute a single-member Commission.**

**6. The Commission shall adopt its report by a majority vote, unless it is a single-member Commission, and shall submit that report to the parties to the dispute setting forth its findings and recommendations, which the parties to the dispute shall consider in good faith.**

*Commentary*

(1) Article 19 provides a basic rule for the settlement of disputes arising from the interpretation or application of the regime of prevention set out in the present articles. The rule is residual in nature and applies where the States concerned do not have an applicable agreement for the settlement of such disputes.

(2) It is assumed that the application of this article would come into play only after States concerned have exhausted all the means of persuasion at their disposal through appropriate consultation and negotiations. These could take place as a result of the obligations imposed by the present articles or otherwise in the normal course of inter-State relations.

(3) Failing any agreement through consultation and negotiation, the States concerned are urged to continue to exert efforts to settle their dispute, through other peaceful means of settlement to which they may resort by mutual agreement, including mediation, conciliation, arbitration or judicial settlement. These are means of peaceful settlement of disputes set forth in Article 33 of the Charter of the United Nations, in the second paragraph of the relevant section of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations [947] and in paragraph 5 of section I of the Manila Declaration on the Peaceful Settlement of International Disputes,[948] which are open to States as free choices to be mutually agreed upon.[949]

(4) If the States concerned are unable to reach an agreement on any of the means of peaceful settlement of disputes within a period of six months, paragraph 2 of article 19 obliges States, at the request of one of them, to have recourse to the appointment of an impartial fact-finding commission. Paragraphs 3, 4, and 5 of article 19 elaborate the compulsory procedure for the appointment of the fact-finding commission.[950] This compulsory procedure is useful and necessary to help States to resolve their disputes expeditiously on the basis of an objective identification and evaluation of facts. Lack of proper appreciation of the correct and relevant facts is often at the root of differences or disputes among States.

(5) Resort to impartial fact-finding commissions is a well-known method incorporated in a number of bilateral or multilateral treaties, including the Covenant of the League of Nations, the Charter of the United Nations and the constituent instruments of certain specialized agencies and other international organizations within the United Nations system. Its potential to contribute to the settlement of international disputes is recognized by General Assembly resolution 1967 (XVIII) of 16 December 1963 on the "Question of methods of fact-finding" and the Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security adopted by the General Assembly in its resolution 46/59 of 9 December 1991, annex.

(6) By virtue of the mandate to investigate the facts and to clarify the questions in dispute, such commissions usually have the competence to arrange for hearings of the parties, the examination of witnesses or on-site visits.

(7) The report of the Commission usually should identify or clarify "facts". Insofar as they involve no assessment or evaluation, they are generally beyond further contention. States concerned are still free to give such weight as they deem appropriate to these "facts" in arriving at a resolution of the dispute. However, article 19 requires the States concerned to give the report of the fact-finding commission a good-faith consideration at the least.[951]

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[947] See footnote 273 above.

[948] General Assembly resolution 37/10 of 15 November 1982, annex.

[949] For an analysis of the various means of peaceful settlement of disputes and references to relevant international instruments, see *Handbook on the Peaceful Settlement of Disputes between States* (United Nations publication, Sales No. E.92.V.7).

[950] See article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

[951] The criteria of good faith are described in the commentary to article 9.

# Chapter VI

# RESERVATIONS TO TREATIES

## A. Introduction

99. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the Commission to include in its agenda the topic "The law and practice relating to reservations to treaties".

100. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.[952]

101. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur.[953]

102. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic. These related to the title of the topic, which should read "Reservations to treaties"; the form of the results of the study, which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[954] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31, and 49/51 of 9 December 1994. As far as the Guide to Practice was concerned, it would take the form of draft guidelines with commentaries which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

103. Also at its forty-seventh session, the Commission, in accordance with its earlier practice,[955] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions.[956] The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[957]

104. At its forty-eighth session, in 1996, the Commission had before it the Special Rapporteur's second report on the topic.[958] The Special Rapporteur had annexed to his report a draft resolution of the Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[959] Owing to lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members had expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next session.[960]

105. At its forty-ninth session, in 1997, the Commission again had before it the second report of the Special Rapporteur on the topic.

106. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[961]

107. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the Commission of having their views on the preliminary conclusions.

108. At its fiftieth session, in 1998, the Commission had before it the Special Rapporteur's third report on the topic,[962] which dealt with the definition of reservations and interpretative declarations to treaties. At the same

[952] See *Yearbook ... 1994*, vol. II (Part Two), p. 179, para. 381.

[953] *Yearbook ... 1995*, vol. II (Part One), p. 121, document A/CN.4/470.

[954] *Ibid.*, vol. II (Part Two), p. 108, document A/50/10, para. 487.

[955] See *Yearbook ... 1983*, vol. II (Part Two), p. 83, para. 286.

[956] See *Yearbook ... 1995*, vol. II (Part Two), p. 108, document A/50/10, para. 489.

[957] As at 27 July 2000, a total of 33 States and 24 international organizations had answered the questionnaire.

[958] *Yearbook ... 1996*, vol. II (Part One), p. 39, documents A/CN.4/477 and Add.1 and A/CN.4/478 and Rev.1.

[959] *Ibid.*, vol. II (Part Two), p. 83, document A/51/10, para. 136 and footnote 238.

[960] For a summary of the discussions, *ibid.*, chap. VI, sect. B, pp. 79 et seq., in particular, para. 137.

[961] *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

[962] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add. 1–6.

session, the Commission provisionally adopted six draft guidelines.[963]

109. At its fifty-first session, in 1999, the Commission again had before it the part of the Special Rapporteur's third report, which it had not had time to consider at its fiftieth session, and his fourth report on the topic.[964] Moreover, the revised bibliography on the topic, the first version of which the Special Rapporteur had submitted at the forty-eighth session attached to his second report, was annexed to the report. The fourth report also dealt with the definition of reservations and interpretative declarations. At the same session, the Commission provisionally adopted 17 draft guidelines.[965]

110. The Commission also, in the light of the consideration of interpretative declarations, adopted a new version of draft guideline 1.1.1 [1.1.4] (Object of reservations) and of the draft guideline without a title or number (which has become draft guideline 1.6 (Scope of definitions)).

111. At its fifty-second session, in 2000, the Commission had before it the Special Rapporteur's fifth report on the topic,[966] dealing, on the one hand, with alternatives to reservations and interpretative declarations and, on the other hand, with procedure regarding reservations and interpretative declarations, particularly their formulation and the question of late reservations and interpretative declarations. At the same session, the Commission provisionally adopted five draft guidelines.[967] The Commission also deferred consideration of the second part of the fifth report of the Special Rapporteur contained in documents A/CN.4/508/Add.3 and 4 to the following session.

## B. Consideration of the topic at the present session

### 1. Second part of the fifth report

112. At the present session, the Commission initially had before it the second part of the fifth report (A/CN.4/508/Add.3 and 4) relating to questions of procedure regarding reservations and interpretative declarations. The Commission considered that report at its 2677th, 2678th and 2679th meetings, on 18, 22 and 23 May 2001, respectively.

113. At its 2679th meeting, the Commission decided to refer to the Drafting Committee draft guidelines 2.2.1 (Reservations formulated when signing and formal confirmation), 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation), 2.2.3 (Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), 2.2.4 (Reservations formulated when signing for which the treaty makes express provision), 2.3.1 (Reservations formulated late), 2.3.2 (Acceptance of reservations formulated late), 2.3.3 (Objection to reservations formulated late), 2.3.4 (Late exclusion or modification of the legal effects of a treaty by procedures other than reservations), 2.4.3 (Times at which an interpretative declaration may be formulated), 2.4.4 (Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation), 2.4.5 (Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), 2.4.6 (Interpretative declarations formulated when signing for which the treaty makes express provision), 2.4.7 (Interpretative declarations formulated late) and 2.4.8 (Conditional interpretative declarations formulated late).

114. At its 2694th meeting, on 24 July 2001, the Commission considered and provisionally adopted draft guidelines 2.2.1 (Formal confirmation of reservations formulated when signing a treaty), 2.2.2 [2.2.3][968] (Instances of non-requirement of confirmation of reservations formulated when signing a treaty), 2.2.3 [2.2.4] (Reservations formulated upon signature when a treaty expressly so provides), 2.3.1 (Late formulation of a reservation), 2.3.2 (Acceptance of the late formulation of a reservation), 2.3.3 (Objection to the late formulation of a reservation), 2.3.4 (Subsequent exclusion or modification of the legal effects of a treaty by means other than reservations), 2.4.3 (Time at which an interpretative declaration may be formulated), 2.4.4 [2.4.5] (Non-requirement of confirmation of interpretative declarations made when signing a treaty), 2.4.5 [2.4.4] (Formal confirmation of conditional interpretative declarations formulated when signing a treaty), 2.4.6 [2.4.7] (Late formulation of an interpretative declaration), and 2.4.7 [2.4.8] (Late formulation of a conditional interpretative declaration).

115. The texts of these draft guidelines and the commentaries thereto are reproduced in section C below.

### 2. Sixth report

116. The Commission also had before it the sixth report of the Special Rapporteur on the topic (A/CN.4/518 and Add.1–3) relating to the modalities of formulating reservations and interpretative declarations (in particular, their form and notification) and to publicity of reservations and interpretative declarations (their communication, recipients and obligations of the depositary).

117. The Commission considered the report at its 2689th to 2693rd meetings, on 13, 17, 18, 19 and 20 July 2001.

#### (a) *Introduction by the Special Rapporteur of his sixth report*

118. The Special Rapporteur first indicated that chapter I of his sixth report contained the latest information on developments since the fifth report, including those concerning the topic in the Commission on

[963] *Ibid.*, vol. II (Part Two), p. 134, para. 540.

[964] *Yearbook … 1999*, vol. II (Part One), document A/CN.4/499.

[965] *Ibid.*, vol. II (Part Two), p. 91, para. 470.

[966] *Yearbook … 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4.

[967] *Ibid.*, vol. II (Part Two), p. 108, document A/55/10, para. 663.

[968] The numbering in square brackets corresponds to the original numbering of the draft guidelines proposed by the Special Rapporteur.

Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights. Chapter II discussed the highly complex problems associated with the formulation of reservations. (Acceptance of reservations and objection would be the subject of his next report.) The annex to the sixth report contained the consolidated text of all the draft guidelines contained in his fifth and sixth reports, although those in the fifth report had already been referred to the Drafting Committee, since it had not been possible to consider the fifth report at the fifty-second session of the Commission.

119. The Special Rapporteur began by introducing draft guidelines 2.1.1 to 2.1.4, 2.4.1 and 2.4.2 (including two *bis* draft guidelines, 2.1.3 *bis* and 2.4.1 *bis*, and two alternatives for guideline 2.1.3).

120. Draft guideline 2.1.1 (Written form),[969] on the requirement that reservations have to be in writing, basically reproduces the text of the first part of paragraph 1 of article 23 of the 1969 and 1986 Vienna Conventions. As the Guide to Practice should be able to stand on its own, the provisions of the Vienna Conventions on reservations should be reproduced word for word therein. The Special Rapporteur recalled that, as the *travaux préparatoires* indicated, there had been practically unanimous agreement that reservations must be in writing. While "oral reservations" were a theoretical possibility, the confirmation at the time of the definitive consent to be bound must undoubtedly be in written form, as stated in guideline 2.1.2 (Form of formal confirmation).[970]

121. It remained to be seen whether those rules could be transposed to interpretative declarations. Practice, which is neither readily accessible nor well established, is not very helpful in that respect. But here too a distinction should probably be drawn between "simple" and conditional interpretative declarations, the former category not requiring any particular form (draft guideline 2.4.1: Formulation of interpretative declarations).[971]

122. On the other hand, in the case of conditional interpretative declarations, the interpretation that the declaring State wishes to set against that of the other parties must be known by those parties if they intend to react to it, exactly as in the case of reservations. It therefore seems logical that the same rule should apply (draft guideline 2.4.2: Formulation of conditional interpretative declarations).[972]

123. In that context, the Special Rapporteur wished to point out that, like other members of the Commission, he wondered whether it was really necessary to devote specific draft guidelines to conditional interpretative declarations, since the legal rules applying to them appeared to be identical to those on reservations. It seemed to him, however, that it would be better to wait until the Commission had considered the effects of reservations and of conditional interpretative declarations before taking a decision on whether or not it was desirable to retain the guidelines concerning the latter category. If it were found that the effects of both were identical, it might be possible to delete all the guidelines relating to conditional interpretative declarations except for a single general guideline stating that the guidelines relating to reservations applied, *mutatis mutandis*, to conditional interpretative declarations.

124. Concerning draft guideline 2.1.3 (Competence to formulate a reservation at the international level),[973] the

[969] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.1.1 *Written form*

"A reservation must be formulated in writing."

[970] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.1.2 *Form of formal confirmation*

"When formal confirmation of a reservation is necessary, it must be made in writing."

[971] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.4.1 *Formulation of interpretative declarations*

"An interpretative declaration must be formulated by a person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State or international organization to be bound by a treaty."

[972] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.4.2 *Formulation of conditional interpretative declarations*

"1. A conditional interpretative declaration must be formulated in writing.

"2. Where necessary, the formal confirmation of a conditional interpretative declaration must be effected in the same manner.

"3. A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ."

[973] The alternative formulations of the draft guideline read as follows:

"2.1.3 *Competenceto formulate a reservation at the international level*

"Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization.

"2.1.3 *Competenceto formulate a reservation at the international level*

"1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to formulate a reservation on behalf of a State or an international organization if:

"(*a*) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

"(*b*) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

"2. By virtue of their functions and without having to produce full powers, the following are competent to formulate a reservation at the international level on behalf of a State:

"(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs;

*(Continued on next page.)*

Special Rapporteur recalled that, in 1962, Sir Humphrey Waldock suggested specifying the kind of instruments in which reservations should appear and also the persons or organizations competent to make reservations. In his view, Sir Humphrey Waldock's attempted definition was somewhat tautological and repetitive. On the other hand, it seems necessary to specify the authorities competent to make reservations at the international level. For such purposes, the Commission might be guided by the provisions of the 1969 and 1986 Vienna Conventions concerning the authorities or persons considered as representing a State or an international organization for the purpose of expressing consent to be bound by a treaty (art. 7 of the Conventions). Practice, both that of the Secretary-General and that of other depositaries (the Council of Europe, OAS), also confirms that it is the rules set forth in those provisions that are followed, *mutatis mutandis*, with regard to competence to make reservations at the international level. The Special Rapporteur wondered whether the rules of article 7 should be made more flexible by adding to the three traditional authorities other categories, such as the permanent representative to an international organization which is a depositary. He finally decided on a hybrid solution, adding the phrase "subject to the customary practices in international organizations which are depositaries of treaties", so as not to challenge existing practices. However, both solutions had their merits and drawbacks and the advice of the Commission on the question would be valuable.

125. The Special Rapporteur also sought the Commission's advice as to which of the two versions of draft guideline 2.1.3 was preferable: the longer version (reproducing the relevant provisions of the 1969 Vienna Convention) or the shorter, more elliptical version.

126. Turning to another issue, the Special Rapporteur discussed the process of formulating reservations (and interpretative declarations) at the internal level. He questioned whether the Guide to Practice should contain guidelines on the wide variety of internal practices or should simply indicate that the whole process was a matter for internal law. Having opted for the latter solution, he had proposed two draft guidelines: 2.1.3 *bis* (Competence to formulate a reservation at the internal level)[974] and 2.4.1 *bis* (Competence to formulate an interpretative declaration at the internal level),[975] although he was not sure whether they were entirely necessary. He looked forward to hearing the Commission's view on that point.

127. Having examined draft guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations),[976] the Special Rapporteur wondered whether article 46 of the Vienna Conventions on "defective ratification", which was a pragmatic and balanced provision, should be transposed to reservations and interpretative declarations. He had concluded that that was not necessary either for practical reasons (it would be extremely difficult, if not impossible, to establish a clear-cut violation of internal law in respect of reservations) or for technical reasons (the internal procedure in respect of reservations is often empirical and difficult of access); there, too, the Commission's opinion would be valuable to him. Draft guideline 2.1.4 and paragraph 2 of draft guideline 2.4.1 *bis* on interpretative declarations are based on that position.

128. The Special Rapporteur then introduced draft guidelines 2.1.5 to 2.1.8, relating to procedures for the communication and publicity of reservations; and 2.4.2 (paragraph 3) and 2.4.9 (paragraph 2), relating to interpretative declarations.

129. The six draft guidelines were prompted solely by the concern to ensure that the partners of the reserving State or organization were aware of how they could respond, in due course. The relevant provision of the Vienna Conventions—article 23, paragraph 1—referred to "contracting States or international organizations" or those "entitled to become parties to the treaty". Whereas the first category was well defined, determining the second could prove very delicate in some cases, as the practice of certain depositaries also showed. The Special Rapporteur had not thought it appropriate to be more specific, however, unless the Commission decided otherwise, since the question related to the law of treaties in general and not to the more specialized law of reservations.

(*Footnote 973 continued.*)

"(*b*) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

"(*c*) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

"[(*d*) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.]"

[974] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.1.3 *bis* *Competence to formulate a reservation at the internal level*

"The determination of the competent body and the procedure to be followed for formulating a reservation at the internal level is a matter for the internal law of each State or international organization."

[975] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.4.1 *bis* *Competence to formulate an interpretative declaration at the internal level*

"1. The determination of the competent body and the procedure to be followed for formulating an interpretative declaration at the internal level is a matter for the internal law of each State or international organization.

"2. A State or international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration."

[976] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.1.4 *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*

"A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation."

130. Guideline 2.1.5 (Communication of reservations)[977] is thus based on article 23, paragraph 1, of the 1986 Vienna Convention. It also adds to it, however, by referring to reservations to constituent instruments of international organizations and by largely following current practice. In addition, the expression "deliberative organ" is used to cover the case of hybrid or doubtful international organizations which nonetheless set up such organs. The Commission's opinion on that point and on whether a reservation should be communicated both to the organization itself and to the member States or States entitled to become parties to the constituent instrument would be most useful. Moreover, the Special Rapporteur did not think it appropriate to require reservations to be communicated specifically to the heads of secretariats of international organizations, and questioned whether they should be so communicated to preparatory committees established before the entry into force of the constituent instrument of an international organization.

131. The same rules seemed to be transposable to conditional interpretative declarations, as provided for in paragraph 3 of draft guideline 2.4.2.[978] By contrast, simple interpretative declarations do not involve any formalities.

132. The role of the depositary was the focus of draft guidelines 2.1.6 (Procedure for communication of reservations)[979] and 2.1.7 (Functions of depositaries).[980] The former relates to the procedure for communicating reservations which have to be confirmed in writing if they are made in a way other than in writing, while the latter concerns the depositary's role with regard to reservations. The Special Rapporteur recalled the development of the depositary's role and the largely passive functions accorded to the depositary under the Vienna Conventions. The rules of article 78 (*b*) of the 1969 Vienna Convention, which became article 79 (*b*) of the 1986 Vienna Convention, are therefore reproduced almost in their entirety. Draft guideline 2.1.8 (Effective date of communications relating to reservations),[981] meanwhile, relates to the effective date of communications relating to reservations. It would be useful to transpose these rules (2.1.6, 2.1.7 and 2.1.8) to conditional interpretative declarations by the addition of a third paragraph to that effect in draft guideline 2.4.9 (Communication of conditional interpretative declarations),[982] which deals with the communication of conditional interpretative declarations.

133. In concluding his introduction, the Special Rapporteur expressed the hope that all the draft guidelines would be referred to the Drafting Committee.

(b) *Summary of the debate*

134. With regard to draft guidelines 2.1.1, 2.1.2, 2.4.1 and 2.4.2, the members who expressed their views said that they agreed to consider that the written form of reservations and conditional interpretative declarations guaranteed the stability and security of contractual relations.

135. As for draft guideline 2.1.3, several members said that they preferred the longer version for practical reasons having to do with facilitating its use and taking account of all the possibilities envisaged by the 1986 Vienna Convention, while others would have preferred a more simplified version. According to some members, the reference to heads of permanent missions to an international organization (draft guideline 2.1.3, paragraph 2 (*d*)) should be deleted.

136. The opinion was expressed that the term "competence" used in the title of draft guideline 2.1.3 could give rise to confusion since the text itself was taken from that of article 7 of the 1969 and 1986 Vienna Conventions dealing with "full powers". A distinction

[977] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.1.5 *Communication of reservations*

"1. A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

"2. A reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ."

[978] See footnote 972 above.

[979] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.1.6 *Procedure for communication of reservations*

"1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

"(*a*) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or,

"(*b*) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

"2. Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile]."

[980] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.1.7 *Functions of depositaries*

"1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

"2. "In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

"(*a*) The signatory States and organizations and the contracting States and contracting organizations; or

"(*b*) Where appropriate, the competent organ of the international organization concerned."

[981] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.1.8 *Effective date of communications relating to reservations*

"A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon its receipt by the State or organization to which it was transmitted."

[982] The draft guideline proposed by the Special Rapporteur reads as follows:

"2.4.9 *Communication of conditional interpretative declarations*

"1. A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty under the same conditions as a reservation.

"2. A conditional interpretative declaration to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ."

should be made between competence to make a reservation (under article 46 of the Conventions) and its "expression" at the international level. According to one point of view, competence to formulate reservations should belong to the organs empowered to express the consent of the State to be bound by the treaty.

137. As to the question of "deliberative organ" mentioned in draft guideline 2.1.5, certain members found the expression appropriate (particularly in view of disagreements about the capacity or otherwise of certain entities as international organizations), whereas others preferred the terms "treaty organs", "conventional organs", "competent organs" or quite simply "organs".

138. According to one opinion, draft guideline 2.4.1 seemed far too restrictive, since, in practice, a great variety of representatives of States made interpretative declarations. Furthermore, even simple interpretative declarations should be formulated in writing and it was the responsibility of depositaries to transmit them to the States and international organizations concerned in the same way as reservations.

139. According to another opinion, the question of procedures could not easily be dissociated from the questions of validity or permissibility.

140. As for draft guideline 2.1.4, the opinion was expressed that there could be cases where the violation of internal rules on the formulation of reservations could have consequences for the State's consent to be bound. That point deserved to be considered further in comparison with article 46, paragraph 1, of the 1969 Vienna Convention.

141. The question of the *communication* of reservations and conditional interpretative declarations (draft guidelines 2.1.5 and 2.4.9) involved problems of the definition of States and international organizations entitled to become parties to the treaty. In any case, all those States and organizations had the right to be informed of reservations made by other States. In the view of several members, it would not be appropriate to try to define the term "States or international organizations entitled to become parties to the treaty", a fairly general expression which could also include those which had taken part in the negotiations and which related to the law of treaties as a whole, not to the law of reservations.

142. Some members also shared the Special Rapporteur's opinion that reservations to the constituent instrument of an international organization should *also* be communicated to the contracting States and organizations. However, they were more hesitant when it came to preparatory committees, which might not have any competence in respect of reservations.

143. It was also emphasized that it is often very difficult to determine whether an international organization has treaty-making power, as is shown by the complex example of the European Union.

144. According to several members, communications by electronic mail had to be confirmed by another means, i.e. by post, which is usually in keeping with current depositary practice. According to one opinion, however, the use of electronic mail should be prohibited.

145. Several members expressed doubts about whether draft guidelines 2.1.3 *bis* and 2.4.1 *bis* should be retained. Some questioned, however, whether a link should not be established between internal and international competence.

146. Although draft guideline 2.1.7 presupposed a purely mechanical role on the part of the depositary, there was a case, in the view of certain members, for including the possibility of the depositary rejecting an instrument containing a prohibited reservation under article 19 (*a*) and (*b*) of the 1969 Vienna Convention. However, it was necessary to be very careful in that regard. In that case and if there was a difference of opinion between the depositary and the reserving State, the provision of article 77, paragraph 2, of the Convention could be transposed to the draft guideline in question.

147. The question of the communication of simple interpretative declarations was also raised. In fact, if the depositary received such a declaration from the declaring State, it must communicate it to the other States, which could thereby determine its real nature. One member pointed out that the depositary practice of OAS provided useful information on these two draft guidelines.

148. The view was expressed that draft guideline 2.1.8 ran counter to article 78 (*b*) of the 1969 Vienna Convention, which states that the date of receipt by the depositary must be accepted. On the other hand, the period during which a State may object to a reservation is determined as from the date of notification of the other States (art. 20, para. 5, of the Convention).

149. Several members said that they agreed with the Special Rapporteur that the Commission should wait until it had considered the effects of reservations and conditional interpretative declarations before deciding whether specific guidelines on the latter would be necessary. Others strongly emphasized that they were opposed to the draft guidelines dealing separately with conditional interpretative declarations.

150. Summing up the debate, the Special Rapporteur once again underlined the pedagogic and "utilitarian" nature of the Guide to Practice. That was why he had included such draft guidelines as 2.1.1, 2.1.3 *bis* and 2.4.1 *bis*, which seemed to be self-evident. In the same vein, he preferred to repeat provisions of the Vienna Conventions in the draft guidelines rather than refer to them. The transposition must, of course, not be selective, as some members seemed to want. Furthermore, the idea that the violation of internal rules for the formulation of reservations could have consequences for the State's (or international organization's) consent to be bound seemed interesting, although he was persuaded that the notion of an evident and formal violation was practically impossible to transpose to the formulation of reservations.

151. He further noted that there was no clear response to the question whether it was necessary to clarify the term "States or international organizations entitled to become parties to the treaty", a question which was all the more

complicated in that there were organizations having competence which was exclusive or concurrent with that of member States. It was therefore better not to try to rewrite the entire law of treaties.

152. The Special Rapporteur was also sceptical about the expression proposed for draft guideline 2.1.5, namely, "competent organ", given that it was not easy to define. As to the question whether the depositary must communicate reservations to constituent instruments of international organizations not only to the organization itself, but also to all States concerned, it seemed to him from the debate that the answer should be in the affirmative.

153. He was also in favour of the idea of reflecting the current depositary practice whereby the depositary refused to accept a reservation prohibited by the treaty itself.

154. He was, however, more sceptical about the communication at any time of simple interpretative declarations. With regard to the draft guidelines as a whole, he also reiterated the Commission's position that it would not depart from the letter or spirit of the Vienna Conventions, but would supplement them where necessary.

155. At its 2692nd meeting, on 19 July 2001, the Commission decided to refer to the Drafting Committee draft guidelines 2.1.1 (Written form), 2.1.2 (Form of formal confirmation), 2.1.3 (Competence to formulate a reservation at the international level), 2.1.3 *bis* (Competence to formulate a reservation at the internal level), 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations), 2.1.5 (Communication of reservations), 2.1.6 (Procedure for communication of reservations), 2.1.7 (Functions of depositaries), 2.1.8 (Effective date of communications relating to reservations), 2.4.1 (Formulation of interpretative declarations), 2.4.1 *bis* (Competence to formulate an interpretative declaration at the internal level), 2.4.2 (Formulation of conditional interpretative declarations) and 2.4.9 (Communication of conditional interpretative declarations).

## C. Draft guidelines on reservations to treaties provisionally adopted so far by the Commission

### 1. Text of the draft guidelines

156. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below. [983]

[983] See the commentaries to draft guidelines 1.1, 1.1.2, 1.1.3 [1.1.8], 1.1.4 [1.1.3] and 1.1.7 [1.1.1] in *Yearbook … 1998*, vol. II (Part Two), pp. 99–107; the commentaries to draft guidelines 1.1.1 [1.1.4], 1.1.5 [1.1.6], 1.1.6, 1.2, 1.2.1 [1.2.4], 1.2.2 [1.2.1], 1.3, 1.3.1, 1.3.2 [1.2.2], 1.3.3 [1.2.3], 1.4, 1.4.1 [1.1.5], 1.4.2 [1.1.6], 1.4.3 [1.1.7], 1.4.4 [1.2.5], 1.4.5 [1.2.6], 1.5, 1.5.1 [1.1.9], 1.5.2 [1.2.7], 1.5.3 [1.2.8] and 1.6 in *Yearbook … 1999*, vol. II (Part Two), pp. 93–126; and the commentaries to draft guidelines 1.1.8, 1.4.6 [1.4.6, 1.4.7], 1.4.7 [1.4.8], 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] and 1.7.2 [1.7.5] in *Yearbook … 2000*, vol. II (Part Two), pp. 108–123. The commentaries to draft guidelines 2.2.1, 2.2.2 [2.2.3], 2.2.3 [2.2.4], 2.3.1, 2.3.2, 2.3.3, 2.3.4, 2.4.3, 2.4.4 [2.4.5], 2.4.5 [2.4.4], 2.4.6 [2.4.7] and 2.4.7 [2.4.8] are listed in section 2 below.

**RESERVATIONS TO TREATIES**

GUIDE TO PRACTICE

**1** ***Definitions***

**1.1** ***Definition of reservations***

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

**1.1.1 [1.1.4][984]** ***Object of reservations***

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

**1.1.2** ***Instances in which reservations may be formulated***

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

**1.1.3 [1.1.8]** ***Reservations having territorial scope***

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

**1.1.4 [1.1.3]** ***Reservations formulated when notifying territorial application***

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

**1.1.5 [1.1.6]** ***Statements purporting to limit the obligations of their author***

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

**1.1.6** ***Statements purporting to discharge an obligation by equivalent means***

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

**1.1.7 [1.1.1]** ***Reservations formulated jointly***

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

[984] The numbers in square brackets refer to the numbering adopted in the reports of the Special Rapporteur.

**1.1.8** ***Reservations made under exclusionary clauses***

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

**1.2** ***Definition of interpretative declarations***

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

**1.2.1 [1.2.4]** ***Conditional interpretative declarations***

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

**1.2.2 [1.2.1]** ***Interpretative declarations formulated jointly***

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

**1.3** ***Distinction between reservations and interpretative declarations***

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

**1.3.1** ***Method of implementation of the distinction between reservations and interpretative declarations***

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

**1.3.2 [1.2.2]** ***Phrasing and name***

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

**1.3.3 [1.2.3]** ***Formulation of a unilateral statement when a reservation is prohibited***

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

**1.4** ***Unilateral statements other than reservations and interpretative declarations***

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

**1.4.1 [1.1.5]** ***Statements purporting to undertake unilateral commitments***

A unilateral statement formulated by a State or an international organization in relation to a treaty whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

**1.4.2 [1.1.6]** ***Unilateral statements purporting to add further elements to a treaty***

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

**1.4.3 [1.1.7]** ***Statements of non-recognition***

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

**1.4.4 [1.2.5]** ***General statements of policy***

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

**1.4.5 [1.2.6]** ***Statements concerning modalities of implementation of a treaty at the internal level***

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

**1.4.6. [1.4.6, 1.4.7]** ***Unilateral statements made under an optional clause***

1. A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

**1.4.7 [1.4.8]** ***Unilateral statements providing for a choice between the provisions of a treaty***

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

**1.5** ***Unilateral statements in respect of bilateral treaties***

**1.5.1 [1.1.9]** ***"Reservations" to bilateral treaties***

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its

final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

**1.5.2 [1.2.7]** ***Interpretative declarations in respect of bilateral treaties***

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

**1.5.3 [1.2.8]** ***Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party***

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

**1.6** ***Scope of definitions***

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

**1.7** ***Alternatives to reservations and interpretative declarations***

**1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4]** ***Alternatives to reservations***

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

(*a*) the insertion in the treaty of restrictive clauses purporting to limit its scope or application;

(*b*) the conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

**1.7.2 [1.7.5]** ***Alternatives to interpretative declarations***

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

(*a*) the insertion in the treaty of provisions purporting to interpret the same treaty;

(*b*) the conclusion of a supplementary agreement to the same end.

**2** ***Procedure***

…[985]

**2.2.1** ***Formal confirmation of reservations formulated when signing a treaty***

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

**2.2.2 [2.2.3]** ***Instances of non-requirement of confirmation of reservations formulated when signing a treaty***

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

[985] Section 2.2 as proposed by the Special Rapporteur deals with confirmation of reservations when signing.

**2.2.3 [2.2.4]** ***Reservations formulated upon signature when a treaty expressly so provides***

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

…[986]

**2.3.1** ***Late formulation of a reservation***

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

**2.3.2** ***Acceptance of late formulation of a reservation***

Unless the treaty provides otherwise, or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

**2.3.3** ***Objection to late formulation of a reservation***

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

**2.3.4** ***Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations***

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(*a*) interpretation of a reservation made earlier; or

(*b*) a unilateral statement made subsequently under an optional clause.

…[987]

**2.4.3** ***Time at which an interpretative declaration may be formulated***

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7] and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

**2.4.4 [2.4.5]** ***Non-requirement of confirmation of interpretative declarations made when signing a treaty***

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

**2.4.5 [2.4.4]** ***Formal confirmation of conditional interpretative declarations formulated when signing a treaty***

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case, the interpretative declaration shall be considered as having been made on the date of its confirmation.

[986] Section 2.3 as proposed by the Special Rapporteur deals with formulation of a reservation.

[987] Section 2.4 as proposed by the Special Rapporteur deals with procedure regarding interpretative declarations.

**2.4.6 [2.4.7]** ***Late formulation of an interpretative declaration***

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.

**2.4.7 [2.4.8]** ***Late formulation of a conditional interpretative declaration***

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.

## 2. Text of the draft guidelines with commentaries thereto adopted by the Commission at its fifty-third session

157. The text of the draft guidelines with commentaries thereto adopted by the Commission at its fifty-third session is reproduced below:

### 2.2 *Confirmation of reservations when signing*

Draft guidelines 2.2.1, 2.2.2 and 2.2.3 relate to the confirmation of reservations formulated when signing a treaty. Although this rule is provided for by article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions, it is not absolute. It would obviously be meaningless if a treaty entered into force merely as a result of its signature, as made clear in draft guideline 2.2.2. Requiring respect for it when the treaty itself contains a provision dealing expressly with the possibility of reservations when signing would, moreover, deprive this reservation clause of any useful purpose (see draft guideline 2.2.3).

### 2.2.1 *Formal confirmation of reservations formulated when signing a treaty*

**If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.**

*Commentary*

(1) Draft guideline 2.2.1 reproduces the exact wording of the text of article 23, paragraph 2, of the 1986 Vienna Convention. As the Commission indicated in the commentary to draft guideline 1.1,[988] it is consistent with the aim of the Guide to Practice to bring together in a single document all of the recommended rules and practices in respect of reservations.

(2) The text of article 23, paragraph 2, of the 1986 Vienna Convention is identical to the corresponding provision of the 1969 Vienna Convention, except that it refers to the procedure to be followed when an international organization is a party to a treaty. Because it is more complete, the 1986 wording was preferred to the 1969 wording.

(3) This provision originated in the proposal made by Sir Humphrey Waldock in his first report on the law of treaties for the inclusion of a provision (draft article 17, para. 3 (*b*)), based on the principle that "the reservation will be presumed to have lapsed unless some indication is given in the instrument of ratification that it is maintained".[989] The Special Rapporteur did not conceal that "[c]learly, different opinions may be held as to what exactly is the existing rule on the point, if indeed any rule exists at all"[990] and mentioned, in particular, article 14 (*d*)[991] of the Harvard Draft Convention on the Law of Treaties, which posited the contrary assumption.[992]

(4) The principle of the obligation to confirm a reservation formulated when signing was stated in article 18, paragraph 2, of the Commission's draft articles on the law of treaties, which were adopted without much discussion at the fourteenth session, in 1962,[993] and which related generally to reservations formulated before the adoption of the text.

(5) The 1962 commentary gives a concise explanation of the *raison d'être* of the rule adopted by the Commission:

> A statement of reservation is sometimes made during the negotiation and duly recorded in the *procès-verbaux*. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. It seems essential, however, that the State concerned should formally reiterate the statement in some manner in order that its intention actually to formulate a reservation should be clear.[994]

(6) On second reading, the wording of the draft provisions on the procedure in respect of reservations was considerably simplified at the urging of some Governments, which considered that many of them "would fit better into a code of recommended practices".[995] The new provision, which was adopted on the basis of the proposals by the Special Rapporteur, Sir Humphrey Waldock,[996] differs from the current text of article 23, paragraph 2, only by the inclusion of a reference to reservations formulated "on the occasion of the adoption of the text",[997] which was deleted at the United Nations Conference on the Law of Treaties under circumstances that have been described as

[988] *Yearbook … 1998*, vol. II (Part Two), p. 99, paragraph (2) of the commentary.

[989] *Yearbook … 1962*, vol. II, p. 66.

[990] *Ibid.*

[991] Waldock was citing article 15 (*d*) by mistake.

[992] "If a State has made a reservation when signing a treaty, its later ratification will give effect to the reservation in the relations of that State with other States which have become or may become parties to the treaty"; the Harvard draft is reproduced in *Yearbook … 1950*, vol. II, pp. 243–244.

[993] Cf. the summary records of the 651st to 656th meetings (25 May–4 June 1962), *Yearbook … 1962*, vol. I, pp. 139–179.

[994] *Yearbook … 1962*, vol. II, p. 180.

[995] Comments by Sweden, *Yearbook … 1965*, vol. II, p. 47.

[996] *Ibid.*, pp. 53–54.

[997] "If formulated on the occasion of the adoption of the text or upon signing the treaty ..." (*Yearbook … 1966*, vol. II, p. 208).

"mysterious".[998] The commentary to this provision reproduces the 1962 text[999] almost verbatim and adds:

> Paragraph 2 concerns reservations made at a later stage [after negotiation]: on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval. Here again the Commission considered it essential that, when definitely committing itself to be bound, the State should leave no doubt as to its final standpoint in regard to the reservation. The paragraph accordingly requires the State formally to confirm the reservation if it desires to maintain it. At the same time, it provides that in these cases the reservation shall be considered as having been made on the date of its confirmation, a point which is of importance for the operation of paragraph 5 of article [20 in the text of the Convention].[1000]

(7) The rule in article 23, paragraph 2, of the 1969 Vienna Convention was reproduced in the 1986 Vienna Convention with only the drafting changes made necessary by the inclusion of international organizations[1001] and the introduction of the concept of "formal confirmation" (with the risks of confusion which this implies between that concept and the concept of the formal confirmation of the reservation in article 23).[1002] The Vienna Conference on the Law of Treaties of 1986 adopted the text of the Commission[1003] without changing the French text.[1004]

(8) While there can be hardly any doubt that, at the time of its adoption, article 23, paragraph 2, of the 1969 Vienna Convention related more to progressive development than to codification in the strict sense,[1005] it may be considered that the obligation formally to confirm reservations formulated when treaties in solemn form are signed has become part of positive law. Crystallized by the 1969 Vienna Convention and confirmed in 1986, the rule is followed in practice (but not systematically)[1006] and seems to satisfy an *opinio necessitatis juris*, which allows a customary value to be assigned to it.[1007]

(9) In legal writings, the rule laid down in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions now appears to have met with general approval,[1008] even if that was not always true in the past.[1009] In any case, whatever arguments might be advanced against it, they would not be of such a nature as to call into question the clear-cut rule which is contained in the Vienna Conventions and which the Commission has decided to follow in principle, except in the event of an overwhelming objection.

(10) Although the principle embodied in that provision met with general approval, the Commission asked three questions about:

– The effect of State succession on the implementation of that principle;

– The incomplete list of cases in which a reservation when signing must be confirmed; and, above all,

– Whether reference should be made to the "embryo reservations"[1010] constituted by some statements made before the signing of the text of the treaty.

(11) It was, for example, asked whether the wording of article 23, paragraph 2, should not be supplemented to take account of the possibility afforded to a successor State to formulate a reservation when it makes a notifi-

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[998] "In paragraph 2, the phrase 'on the occasion of the adoption of the text' mysteriously disappeared from the Commission's text when it was finally approved by the Conference" (J. M. Ruda, "Reservations to treaties", *Recueil des cours…, 1975–III* (Leiden), Sijthoff, vol. 146 (1977), p. 195).

[999] See paragraph (5) of the commentary to this draft guideline.

[1000] *Yearbook … 1966*, vol. II, p. 208. Article 20 of the Convention relates to acceptance of and objection to reservations.

[1001] See the fourth and fifth reports of Special Rapporteur Paul Reuter, *Yearbook … 1975*, vol. II, p. 38, document A/CN.4/285, and *Yearbook … 1976*, vol. II (Part One), p. 146, document A/CN.4/290 and Add.1.

[1002] See the discussions on this subject at the 1434th meeting, on 6 June 1977 (*Yearbook … 1977*, vol. I, pp. 101–103). The Commission is aware of these risks, but did not believe that it should amend terminology that is now widely accepted.

[1003] *Yearbook … 1982*, vol. II (Part Two), p. 37.

[1004] The Chairman of the Drafting Committee, Mr. Al-Khasawneh, stated that a correction had been made to the English text (replacing "by a treaty" with "by the treaty" (*United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986, Official Records*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5, Vol. I)), fifth plenary meeting, 18 March 1986, p. 15, para. 63).

[1005] See the first report of Sir Humphrey Waldock (footnote 989 above). See also D. W. Greig, "Reservations: equity as a balancing factor?", *Australian Year Book of International Law*, 1995, vol. 16, p. 28, or F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague, T. M. C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, p. 41.

[1006] Thus, the practice of the Secretary-General of the United Nations does not draw all the necessary inferences from the 1976 note by the Legal Counsel (see the footnote below), since the former includes in the valuable publication entitled *Multilateral Treaties Deposited with the Secretary-General* reservations formulated when the treaty was signed, whether or not they were confirmed subsequently, even on the assumption that the State formulated other reservations when expressing its definitive consent to be bound; see, for example, United Nations, *Multilateral Treaties Deposited with the Secretary-General*: *Status as at 31 December 2000*, vol. I (United Nations publication, Sales No. E.01.V.5) (reservations by Turkey to the Customs Convention on Containers, 1972, p. 537; or reservations by the Islamic Republic of Iran and Peru to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, pp. 398–399); such practice probably reflects a purely mechanical approach to the role of the depositary and does not involve any value judgement about the validity or nature of the declarations in question.

[1007] See, for example, the *aide-memoire* of the United Nations Legal Counsel describing the "practice of the Secretary-General in his capacity as depositary of multilateral treaties regarding … reservations and objections to reservations relating to treaties not containing provisions in that respect", which relied on article 23, paragraph 2, of the 1969 Vienna Convention in concluding that: "If formulated at the time of signature subject to ratification, the reservation has only a declaratory effect, having the same legal value as the signature itself. It must be confirmed at the time of ratification; otherwise, it is deemed to have been withdrawn" (*United Nations Juridical Yearbook 1976* (United Nations publication, Sales No. E.78.V.5), pp. 209 and 211); the Council of Europe changed its practice in this regard in 1980 (cf. F. Horn, *op. cit.* (footnote 1005 above) and J. Polakiewicz, *Treaty-making in the Council of Europe* (Strasbourg, Council of Europe, 1999), pp. 95–96) and, in their answers to the Commission's questionnaire on reservations to treaties, the States which indicated that they usually confirmed reservations formulated when the treaty was signed at the time of ratification or accession.

[1008] See, in particular, D. W. Greig, *loc. cit.* (footnote 1005 above), and P. H. Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1978), p. 285.

[1009] See Imbert, *ibid*., pp. 253–254.

[1010] See paragraph (5) of the commentary to this draft guideline.

cation of succession in accordance with draft guideline 1.1,[1011] which thus rounds out the definition of reservations contained in article 2, paragraph 1 (*d*), of the 1986 Vienna Convention. In the Commission's opinion, the answer is not very simple. At first glance, the successor State can either confirm or invalidate an existing reservation made by the predecessor State[1012] or formulate a new reservation when it makes a notification of succession;[1013] in neither of these two cases is the successor State thus led to confirm a reservation when signing. Nevertheless, under article 18, paragraphs 1 and 2, of the 1978 Vienna Convention, a newly independent State may, under certain conditions, establish, through a notification of succession, its capacity as a contracting State or party to a multilateral treaty which was not in force on the date of the State's succession and to which the predecessor State was itself a contracting State. Under article 2, paragraph 1 (*f*) of the 1969 and 1986 Vienna Conventions, however, "'contracting State' means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force"—and not merely a signature. It follows, conversely, that there can be no "succession to the signing" of a treaty (subject to ratification or an equivalent procedure[1014])[1015] and that the concept of notification of succession should not be introduced into draft guideline 2.1.1.[1016]

(12) The Commission also questioned whether it should take account, in the preparation of this draft, of draft guideline 1.1.2 (Instances in which reservations may be formulated).[1017] The problem does not arise with regard to the designation of the moment when the confirmation should take place, since the formula contained in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions is equivalent to the one adopted by the Commission in draft guideline 1.1.2 ("when expressing its consent to be bound"). It might be thought, however, that the number of cases to which article 23, paragraph 2, seems to limit the possibility of subordinating definitive consent to be bound (ratification, act of formal confirmation, acceptance or approval) is too small and does not correspond to the one in article 11.

(13) However, although some of its members did not so agree, the Commission considered that such a concern was excessive; the differences in wording between article 11 and article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions lie in the omission from the latter of these provisions of two possibilities contemplated in the former: "exchange of instruments constituting a treaty" and "any other means if so agreed".[1018] The probability that a State or an international organization would subordinate the expression of its definitive consent to be bound by a multilateral treaty subject to reservations to one of these modalities is sufficiently low that it did not seem useful to overburden the wording of draft guideline 2.2.1 or to include a draft guideline equivalent to draft guideline 1.1.2 in chapter 2 of the Guide to Practice.

(14) Thirdly, several members of the Commission considered that account should be taken of the possible case where a reservation is formulated not at the time of signing the treaty, but before that. In their opinion, nothing prevents a State or an international organization from indicating formally to its partners the "reservations" which it has regarding the adopted text at the authentication stage[1019] or, for that matter, at any previous stage of negotiations.[1020]

(15) The Commission had, moreover, considered that possibility in draft article 18 (which became article 23 of the 1969 Vienna Convention), of which paragraph 2, as contained in the final text of the draft articles adopted at the eighteenth session, provided that:

> If formulated on the occasion of the adoption of the text … a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.[1021]

Commenting on this provision, the Commission stated that "statements of reservations are made in practice at various stages in the conclusion of the treaty" and explained the reasons why it considered it necessary to confirm reservations on signing when expressing consent to be bound,[1022] adding that:

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[1011] *Yearbook … 1998*, vol. II (Part Two), p. 99.

[1012] Cf. article 20, paragraph 1, of the 1978 Vienna Convention.

[1013] Cf. article 20, paragraph 2.

[1014] See draft guideline 2.2.2.

[1015] The publication *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. II (United Nations publication, Sales No. E.01.V.5) does, however, mention, in the footnotes and without special comment, reservations formulated when signing by a predecessor State and apparently not formally confirmed by the successor State or States; see, for example, reservations by Czechoslovakia to the United Nations Convention on the Law of the Sea, noted in connection with the Czech Republic and Slovakia (note 4, p. 237).

[1016] According to Claude Pilloud, "in applying by analogy the rule provided for in article 23, paragraph 2, of the Vienna Convention concerning reservations expressed at the time of signature, one might say that the States which have made a declaration of continuity [to the Geneva Conventions of 1949] should, if they had intended to assume on their own account the reservations expressed [by the predecessor State], have stated this specifically in their respective declarations of continuity" ("Reservations to the Geneva Conventions of 1949", *International Review of the Red Cross*, March 1976, p. 111). It is doubtful whether such an analogy can be made; the matter will be considered by the Commission when it carries out a more systematic study of the problems relating to succession to reservations.

[1017] "Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations" (*Yearbook … 1998*, vol. II (Part Two), p. 99).

[1018] For a similar comment concerning the comparison of article 2, paragraph 1 (*d*), and article 11, see paragraph (8) of the commentary to draft guideline 1.1.2, *ibid.*, p. 104.

[1019] In addition to signing, article 10 of the 1969 and 1986 Vienna Conventions mentions initialling and signing *ad referendum* as methods of authenticating the text of a treaty. On authentication "as a distinct part of the treaty-making process", see the commentary to article 9 of the Commission's draft articles on the law of treaties (which became article 10 at the Vienna Conference on the Law of Treaties), *Yearbook … 1966*, vol. II, p. 195.

[1020] See, in this connection, the reservation by Japan to article 2 of the Food Aid Convention, 1971, which was negotiated by that State during the negotiation of the text, announced at the time of signing and formulated at the time of the deposit of the instrument of ratification with the depositary, the Government of the United States, on 15 May 1972 (ILM, vol. 11, No. 5 (September 1972), p. 1179).

[1021] *Yearbook … 1966*, vol. II, p. 208.

[1022] See paragraph (3) of the commentary to this draft article (*ibid.*, p. 208).

Accordingly, a statement during the negotiations expressing a reservation is not, as such, recognized in article 16 [now article 19] as a method of formulating a reservation and equally receives no mention in the present article.[1023]

(16) As indicated above,[1024] the reference to the adoption of the text disappeared from the text of article 23, paragraph 2, of the 1969 Vienna Convention in "mysterious" circumstances during the Vienna Conference on the Law of Treaties, probably out of concern for consistency with the wording of the *chapeau* of article 19.

(17) However, a majority of members objected to the adoption of a draft guideline along those lines for fear of encouraging a growing number of statements which were intended to limit the scope of the text of the treaty, were formulated before the adoption of its text and were thus not in keeping with the definition of reservations.

### 2.2.2 [2.2.3] *Instances of non-requirement of confirmation of reservations formulated when signing a treaty*

**A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.**

*Commentary*

(1) The solution which was adopted for draft guideline 2.2.1 and which is faithful to the Vienna text obviously implies that the rule thus codified applies only to treaties in formal form, those that do not enter into force solely by being signed.[1025] With regard to treaties not requiring any post-signing formalities in order to enter into force and which are referred to as "agreements in simplified form",[1026] however, it is self-evident that, if formulated when the treaty is signed, a reservation becomes effective immediately without any formal confirmation being necessary or even conceivable.

(2) The Commission is not aware, however, of any clear-cut example of a reservation made at the time when a multilateral agreement in simplified form was signed. This eventuality certainly cannot be ruled out, however, if only because there are "mixed treaties", which can, if the parties so choose, enter into force solely upon signature or following ratification and which are subject to reservations or contain reservation clauses.[1027]

(3) In fact, this rule derives, *a contrario*, from the text of article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions reproduced in draft guideline 2.2.1. In view of the practical nature of the Guide to Practice, however, the Commission found that it would not be superfluous to clarify this expressly in draft guideline 2.2.2.

(4) Although some members of the Commission would have preferred the term "agreements in simplified form", which is commonly used in French writings, it seemed preferable not to use this term which was not used in the 1969 Vienna Convention.

(5) It may also be asked whether a reservation to a treaty provisionally entering into force or provisionally implemented pending its ratification[1028]—and hypothetically formulated when signing—must be confirmed at the time of its author's expression of definitive consent to be bound by the treaty. The Commission took the view that that was a different case than the one covered by draft guideline 2.2.2, and that there was no reason for a solution departing from the principle laid down in draft guideline 2.2.1. Accordingly, a separate draft guideline does not appear to be necessary.

### 2.2.3 [2.2.4] *Reservations formulated upon signature when a treaty expressly so provides*

**A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.**

*Commentary*

(1) Alongside the case provided for by draft guideline 1.2.1, there is another hypothetical case in which the confirmation of a reservation formulated when signing appears to be superfluous, namely, where the treaty itself provides expressly for such a possibility without requiring confirmation. For example, article 8, paragraph 1, of the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality provides that:

Any Contracting Party may, when *signing this Convention** or depositing its instrument of ratification, acceptance or accession, declare that it

[1023] *Ibid*.

[1024] See paragraph (6) of the commentary to this draft guideline.

[1025] On the distinction between treaties in formal form and agreements in simplified form, see, in particular, C. Chayet, "Les accords en forme simplifiée", *Annuaire français de droit international*, vol. 3 (1957), pp. 3–13; P. Dailler and A. Pellet, *op. cit.* (footnote 49 above), pp. 136–144; and P. F. Smets, *La conclusion des accords en forme simplifiée* (Brussels, Bruylant, 1969).

[1026] While the procedure involving agreements in simplified form is more commonly used for concluding bilateral rather than multilateral treaties, it is not at all unknown in the second case, and major multilateral agreements may be cited which have entered into force solely by being signed. This is true, for example, of the General Agreement on Tariffs and Trade of 1947 (at least in terms of the entry into force of the bulk of its provisions following the signing of the Protocol of Provisional Application of the General Agreement on Tariffs and Trade), the Declaration on the Neutrality of Laos and the Agreement establishing a Food and Fertiliser Technology Centre for the Asian and Pacific Region.

[1027] Cf. article XIX of the Agreement relating to the International Telecommunications Satellite Organization "INTELSAT"; see also the Convention on Psychotropic Substances (art. 32), the Convention on a Code of Conduct for Liner Conferences and the International Convention on Arrest of Ships, 1999 (art. 12, para. 2).

[1028] Cf. articles 24 and 25 of the 1969 and 1986 Vienna Conventions.

avails itself of one or more of the reservations provided for in the Annex to the present Convention.[1029]

(2) In a case of this kind, it seems that practice consists of not requiring a party which formulates a reservation when signing to confirm it when expressing definitive consent to be bound. Thus, France made a reservation when it signed this Convention and did not subsequently confirm it.[1030] Similarly, Hungary and Poland did not confirm their reservation to article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 28, paragraph 1, of which provides that such a reservation may be made when signing. Luxembourg also did not confirm the reservation it made to the Convention relating to the Status of Refugees, and Ecuador did not confirm its reservation to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[1031] It is true that other States[1032] nonetheless confirmed their reservation at the time of ratification.

(3) The members of the Commission had different opinions about this uncertain practice, although all agreed that a position should be adopted on this point in the Guide to Practice.

(4) Some members took the view that, in cases of this kind, the general rule laid down in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions should not be excluded because the reservation clauses in question, which mechanically reproduce the provisions of article 11, would then not actually have any particular scope.

(5) In the opinion of the majority of the members of the Commission, however, the rule embodied in article 23, paragraph 2, of the Vienna Conventions, which, like all their provisions, was only dispositive in nature, should be applicable only where a treaty was silent; otherwise, the provisions relating to the possibility of reservations when signing would serve no useful purpose. In their view, the uncertainties of practice may be explained by the fact that, if a formal confirmation in a case of this kind is not essential, it is also not ruled out: reservations made when signing a convention expressly authorizing reservations on signing are sufficient in and of themselves, it being understood, however, that nothing prevents reserving States from confirming them,[1033] even though nothing compels them to do so.

(6) Accordingly, the Commission endorsed the "minimum" practice, something that seems logical, since the treaty expressly provides for reservations when signing. According to the majority opinion, if this principle was not recognized, many unconfirmed reservations formulated when signing would have to be deemed without effect, even where the States which formulated them did so on the basis of the text of the treaty itself.

### 2.3 *Late formulation of a reservation*

(1) Chapter 2, section 3, of the Guide to Practice is devoted to the particularly sensitive issue of what are commonly called "late reservations". The Commission has preferred to speak of the "late formulation of a reservation", however, in order clearly to indicate that what is meant is not a new or separate category of reservations but, rather, declarations which are presented as reservations, but which are not in keeping with the time periods during which they may, in principle, be considered as such, since the moments at which reservations may be formulated are specified in the definition of reservations itself.[1034]

(2) In practice, however, it is not uncommon for a State[1035] to try to formulate a reservation at a different moment from those provided for by the Vienna definition and this possibility, which may have some definite advantages, has not been totally ruled out by practice.

(3) After the expression of its consent to be bound, a State cannot, by means of the interpretation of a reservation, shirk certain obligations established by a treaty. This principle is not to be sanctioned lightly and the primary objective of this section of the Guide to Practice is to indicate the rigorous conditions to which it is subject. Draft guideline 2.3.1 states the rule that the late formulation of a reservation is, in principle, excluded and the draft guidelines that follow it stipulate the basic conditions to which any exception to this principle is subject: the absence of objections within a 12-month period by all the other parties without exception (draft guidelines 2.3.1, 2.3.2 and 2.3.3). In addition, draft guideline 2.3.4 is designed to prevent the exclusion of the principle of the late formulation of reservations from being circumvented by means other than reservations.

[1029] See also, among many examples, article 17 of the Convention on the Reduction of Statelessness; article 30 of the Convention on Mutual Administrative Assistance on Tax Matters; article 29 of the European Convention on Nationality; and article 24 of the Convention on the Law Applicable to Succession to the Estates of Deceased Persons.

[1030] Council of Europe, European Committee on Legal Cooperation (CCJ), *CCJ Conventions and Reservations to those Conventions*, note by the secretariat, CCJ (99) 36, Strasbourg, 30 March 1999, p. 11; the same applied to reservations by Belgium to the Convention on Mutual Administrative Assistance on Tax Matters (p. 50).

[1031] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. I (see footnote 1006 above), p. 255; *ibid*., p. 311; and *ibid.*, vol. II (see footnote 1015 above), p. 115. The reservation by Hungary was subsequently withdrawn.

[1032] Belarus, Bulgaria (reservation subsequently withdrawn), Czechoslovakia (reservation subsequently withdrawn by the Czech Republic and Slovakia), Morocco, Tunisia and Ukraine (reservation subsequently withdrawn); see *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. I (footnote 1006 above), pp. 255–268.

[1033] And such "precautionary confirmations" are quite common (see, for example, the reservations by Belarus, Brazil (which nevertheless confirmed only two of its three initial reservations), Hungary, Poland, Turkey and Ukraine to the Convention on Psychotropic Substances, *ibid*., pp. 378–385).

[1034] Cf. article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions, article 2, paragraph 1 (*j*), of the 1978 Vienna Convention and draft guideline 1.1: "'Reservation' means a unilateral statement … made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty"(*Yearbook … 1998*, vol. II (Part Two), p. 99); see also draft guideline 1.1.2, *ibid*.

[1035] To the Commission's knowledge, there has to date been no example of the late formulation of a reservation by an international organization.

### 2.3.1 *Late formulation of a reservation*

**Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.**

*Commentary*

(1) Unless otherwise provided by a treaty, something which is always possible,[1036] the expression of definitive consent to be bound constitutes, for the contracting parties, the last (and in view of the requirement concerning formal confirmation of reservations formulated during negotiations and when signing, only) time when a reservation may be formulated. This rule, which is unanimously recognized in legal writings[1037] and which arose from the very definition of reservations[1038] and is also implied by the chapeau of article 19 of the 1969 and 1986 Vienna Conventions,[1039] is widely observed in practice.[1040] It was regarded as forming part of positive law by ICJ in its judgment in the *Border and Transborder Armed Actions* case:

> Article LV of the Pact of Bogotá enables the parties to make reservations to that instrument which "shall, with respect to the State that makes them, apply to all signatory States on the basis of reciprocity". In the absence of special procedural provisions, those reservations may, in accordance with the rules of general international law on the point as codified by the 1969 Vienna Convention on the Law of Treaties, be made only at the time of signature or ratification of the Pact or at the time of adhesion to that instrument.[1041]

(2) According to some members of the Commission, it was questionable whether this kind of declaration was compatible with the definition of reservation under guideline 1.1. Nevertheless, the principle that a reservation may not be formulated after expression of consent to be bound "is not absolute. It applies only if the contracting States do not authorize by agreement the formulation, in one form or another, of new reservations"[1042] or restrict still further the moments at which a reservation is possible.

(3) Although the possibility of late formulation of a reservation "has never been contemplated, either in the context of the International Law Commission or during the Vienna Conference",[1043] it is relatively frequent.[1044] Thus, for example:

– Article 29 of the Convention on Bills of Exchange and Promissory Notes of 1912 provided that:

> The State which desires to avail itself of the reservations in Article 1, paragraph 2, or in Article 22, paragraph 1, must specify the reservation in its instrument of ratification or adhesion ...
>
> The contracting State which *hereafter* desires to avail itself of the reservations[1045] above mentioned, must notify its intention in writing to the Government of the Netherlands.[1046]

– Likewise, under article 26 of the Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air:

> No reservation may be made to this Protocol except that a State may *at any time* declare by a notification addressed to the Government of the People's Republic of Poland that the Convention as amended by this Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities.

– Article 38 of the Convention concerning the International Administration of the Estates of Deceased Persons provides that:

> A Contracting State desiring to exercise one or more of the options envisaged in Article 4, the second paragraph of Article 6, the second and third paragraphs of Article 30 and Article 31, shall notify this to the Ministry of Foreign Affairs of the Netherlands, either at the time of the deposit of its instrument of ratification, acceptance, approval or accession or *subsequently*.[1047]

– Under article 30, paragraph 3, of the Convention on Mutual Administrative Assistance in Tax Matters:

> After the entry into force of the Convention in respect of a Party, that Party may make one or more of the *reservations* listed in paragraph 1

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[1036] Some reservation clauses specify, for example, that "reservations to one or more of the provisions of this Convention may be made at any time prior to ratification of or accession to this Convention" (Convention on Third Party Liability in the Field of Nuclear Energy, art. 18) or "at the latest at the moment of ratification or at adhesion, each State may make the reserves contemplated in articles 13, paragraph 3, and 15, paragraph 1, of this Convention" (Convention concerning the powers of authorities and the law applicable in respect of the protection of infants, art. 23; these examples are quoted by Imbert, *op. cit.* (footnote 1008 above), pp. 163–164); see also the examples given in paragraph (3) of this commentary.

[1037] It has been stated particularly forcefully by Giorgio Gaja: "The latest moment in which a State may make a reservation is when it expresses its consent to be bound by a treaty" ("Unruly treaty reservations", *Le droit international à l'heure de sa codification–Études en l'honneur de Roberto Ago* (Milan, Giuffrè, 1987), vol. I, p. 310).

[1038] See footnote 1034 above.

[1039] "A State [or an international organization] may, when signing, ratifying, [formally confirming], accepting, approving or acceding to a treaty, formulate a reservation."

[1040] Moreover, this explains why States sometimes try to get round the prohibition on formulating reservations after the entry into force of a treaty by calling unilateral statements "interpretative declarations", which actually match the definition of reservations (see paragraph (27) of the commentary to draft guideline 1.2 (Definition of interpretative declarations), *Yearbook … 1999*, vol. II (Part Two), p. 102).

[1041] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at p. 85.

[1042] J.-F. Flauss, "Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: requiem pour la déclaration interprétative relative à l'article 6, paragraphe 1", *Revue universelle des droits de l'homme*, vol. 5, No. 9 (December 1993), p. 302.

[1043] Imbert, *op. cit.* (see footnote 1008 above), p. 12.

[1044] In addition, see those examples given by Imbert (footnote 1008 above), pp. 164–165.

[1045] In fact, what is meant here is not *reservations*, but *reservation clauses*.

[1046] See also article 1 of the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes of 1930 and article 1 of the Convention providing a Uniform Law for Cheques: "[T]he reservations referred to in Articles ... may, however, be made after ratification or accession, provided that they are notified to the Secretary-General of the League of Nations ..."; "Each of the High Contracting Parties may, in urgent cases, make use of the reservations contained in Articles ... even after ratification or accession."

[1047] See also article 26 of the Convention on the Law Applicable to Matrimonial Property Regimes: "A Contracting State having at the date of the entry into force of the Convention for that State a complex system of national allegiance may specify *from time to time* by declaration how a reference to its national law shall be construed for the purposes of the Convention." This provision may refer to an interpretative declaration rather than to a reservation.

which it did not make at the time of ratification, acceptance or approval. Such reservations shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of the reservation by one of the Depositaries.[1048]

– Similarly, article 10, paragraph 1, of the International Convention on Arrest of Ships, 1999, provides that:

Any State may, at the time of signature, ratification, acceptance, approval or accession, *or at any time thereafter*, reserve the right to exclude the application of this Convention to any or all of the following.

(4) This is not especially problematic in itself and is in conformity with the idea that the Vienna rules are only of a residual nature (as the guidelines in the Guide to Practice will be, and with all the more reason). However, since what is involved is a derogation from a rule now accepted as customary and enshrined in the Vienna Conventions, it seems necessary that such a derogation should be expressly provided for in the treaty. The Commission wanted to clarify this principle in the text of draft guideline 2.3.1, although this was not legally indispensable in order to emphasize the exceptional character that the late formulation of reservations should have.

(5) It is true that the European Commission of Human Rights was flexible in this respect, having appeared to rule that a State party to the Rome Convention could invoke the amendment of national legislation covered by an earlier reservation to modify, at the same time, the scope of that reservation without violating the time limit placed on the option of formulating reservations by article 64 of the Convention. The scope of this precedent[1049] is not clear, however, and it may be that the Commission took this position because, in reality, the amendment of its legislation did not in fact result in an additional limitation on the obligations of the State concerned.[1050]

(6) Whatever the case, the requirement that there should be a clause expressly authorizing the formulation of a reservation after expression of consent to be bound seems all the more crucial given that it was necessary, for particularly pressing practical reasons, which the Commission set out in paragraph (3) of its commentary to draft guideline 1.1.2, to include a time limit in the definition of reservations itself: "The idea of including time limits on the possibility of making reservations in the definition of reservations itself had progressively gained ground, given the magnitude of the drawbacks in terms of stability of legal relations of a system which would allow parties to formulate a reservation at any moment. It is in fact the principle *pacta sunt servanda* itself which would be called into question, in that at any moment a party to a treaty could, by formulating a reservation, call its treaty obligations into question; in addition, this would excessively complicate the task of the depositary."[1051] Because the late formulation of reservations should be avoided as much as possible, the words "Unless the treaty provides otherwise" at the beginning of draft guideline 2.3.1 should be interpreted narrowly.

(7) This basic requirement of an express provision is not, however, the only exception to the rule that a reservation must, in principle, be made not later than the moment at which consent to be bound is expressed.

(8) It emerges from current practice that the other contracting parties may unanimously accept a late reservation and this consent (which may be tacit) can be seen as a collateral agreement extending *ratione temporis* the option of formulating reservations—if not reservations to the treaty concerned in general, then at least the reservation or reservations in question.

(9) This possibility has been seen as translating the principle that "the parties are the ultimate guardians of a treaty and may be prepared to countenance unusual procedures to deal with particular problems".[1052] In any event, as has been pointed out, "[t]he solution must be understood as dictated by pragmatic considerations. A party remains always[1053] at liberty to accede anew to the same treaty, this time by proposing certain reservations. As the result will remain the same whichever of these two alternative actions one might choose, it seemed simply more expedient to settle for the more rapid procedure".[1054]

(10) Initially, the Secretary-General of the United Nations, in keeping with his great caution in this area since the 1950s, had held to the position that "[i]n accordance with established international practice to which the Secretary-General conforms in his capacity as depositary, a reservation may be formulated only at the time of signature, ratification or accession" and, as a result, he had taken the view that a party to the International Convention on the Elimination of All Forms of Racial Discrimination which did not make any reservations at the time of ratification was not entitled to make any later.[1055] Two years later, however, he softened his position considerably in a letter to the Permanent Mission to the United Nations of

[1048] This Convention entered into force on 1 April 1995; it seems that no State party has exercised the option envisaged in this provision. See also article 5 of the Additional Protocol to the European Convention on Information on Foreign Law, "[a]ny Contracting Party which is bound by the provisions of both chapters I and II may at any time declare by means of a notification addressed to the Secretary General of the Council of Europe that it will only be bound by one or the other of chapters I and II. Such notification shall take effect six months after the date of the receipt of such notification".

[1049] See, for instance, *Association X* v. *Austria*, application No. 473/59, *Yearbook of the European Convention on Human Rights 1958-1959*, vols. 1 and 2 (1960), p. 400; *X* v. *Austria*, application No. 1731/62, *Yearbook of the European Convention on Human Rights 1964*, vol. 7 (1966), p. 192; or *X* v. *Austria*, application No. 8180/78, Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 20, p. 26.

[1050] In the case *X* v. *Austria*, application No. 1731/62, the Commission took the view that "the reservation made by Austria on 3 September 1958 ... covers the law of 5 July 1962, *the result of which was not to enlarge* a posteriori *the field removed from the control of the Commission**" (see the footnote above), p. 202.

[1051] *Yearbook … 1998*, vol. II (Part Two), p. 103.

[1052] D. W. Greig, *loc. cit.* (footnote 1005 above), pp. 28–29.

[1053] The author is referring to a specific treaty: the Convention providing a Uniform Law for Cheques (see paragraph (10) of the commentary to this draft guideline), in which article VIII expressly provides for the option of denunciation; but the practice also applies in the case of treaties that do not include a withdrawal clause (see paragraph (12) of the commentary to this draft guideline).

[1054] F. Horn, *op. cit.* (see footnote 1005 above), p. 43.

[1055] Memorandum to the Director of the Division of Human Rights, 5 April 1976, *United Nations Juridical Yearbook 1976* (see footnote 1007 above), p. 221.

France,[1056] which was considering the possibility of denouncing the Convention providing a Uniform Law for Cheques with a view to reacceding to it with new reservations. Taking as a basis "the general principle that the parties to an international agreement may, by unanimous decision, amend the provisions of an agreement or take such measures as they deem appropriate with respect to the application or interpretation of that agreement", the Legal Counsel states:

> Consequently, it would appear that your Government could address to the Secretary-General, over the signature of the Minister for Foreign Affairs, a letter communicating the proposed reservation together with an indication of the date, if any, on which it is decided that it should take effect. The proposed reservation would be communicated to the States concerned (States parties, Contracting States and signatory States) by the Secretary-General and, in the absence of any objection by States parties within 90 days from the date of that communication (the period traditionally set, according to the practice of the Secretary-General, for the purpose of tacit acceptance and corresponding, in the present case, to the period specified in the third paragraph of article I of the [1931] Convention for acceptance of the reservations referred to in articles 9, 22, 27 and 30 of annex II), the reservation would be considered to take effect on the date indicated.[1057]

(11) That is what happened: the French Government addressed to the Secretary-General, on 7 February 1979, a letter drafted in accordance with this information; the Secretary-General circulated this letter on 10 February and "[s]ince no objections by the Contracting States were received within 90 days from the date of circulation of this communication … the reservation was deemed accepted and took effect on 11 May 1979".[1058]

(12) Since then, the Secretary-General of the United Nations appears to have adhered continuously to this practice in the performance of his functions as depositary.[1059] It was formalized in a legal opinion of the Secretariat of 19 June 1984 to the effect that "the parties to a treaty may always decide, *unanimously*, at any time, to accept a reservation in the absence of, or even contrary to, specific provisions in the treaty" and irrespective of whether the treaty contains express provisions as to when reservations may be formulated.[1060]

(13) This practice is not limited to the treaties of which the Secretary-General is the depositary. In the above-mentioned 1978 legal opinion (paragraph (10) above), the Legal Counsel of the United Nations referred to a precedent involving a late reservation to the Customs Convention on the Temporary Importation of Packings, which was deposited with the Secretary-General of the Customs Cooperation Council and article 20 of which provides that "any Contracting Party may, at the time of signing and ratifying the Convention, declare that it does not consider itself bound by article 2 of the Convention. Switzerland, which had ratified the Convention on 30 April 1963, made a reservation on 21 December 1965 which was submitted by the depositary to the States concerned and, in the absence of any objection, was considered accepted with retroactive effect to 31 July 1963".[1061]

(14) Several States parties to the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention), which entered into force on 2 October 1983, have widened the scope of their earlier reservations[1062] or added new ones after expressing their consent to be bound.[1063] Likewise, late reservations to certain conventions of the Council of Europe have been formulated without any objection being raised.[1064]

(15) As these examples show, it is not out of the question that late reservations should be deemed to have been legitimately made, in the absence of any objection by the other contracting parties consulted by the depositary. But they also show that the cases involved have almost always been fairly borderline ones: either the delay in communicating the reservation was minimal or the notification occurred after ratification, but before the entry into force

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[1056] F. Horn, *op. cit.* (see footnote 1005 above), p. 42.

[1057] Letter to the Permanent Mission of a Member State to the United Nations, 14 September 1978, *United Nations Juridical Yearbook 1978* (United Nations publication, Sales No. E.80.V.1), pp. 199–200.

[1058] *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. II (see footnote 1015 above), p. 424, note 4; curiously, the Government of the Federal Republic of Germany expressly stated, on 20 February 1980, that it "raise[d] no objections thereto", *ibid*.

[1059] In addition to the examples given by Giorgio Gaja, *loc. cit.* (footnote 1037 above), p. 311, see, for instance, the reservation by Belgium (which in fact amounts to a general objection to the reservations formulated by other parties) to the 1969 Vienna Convention: while this country had acceded to the Convention on 1 September 1992, "[o]n 18 February 1993, the Government of Belgium notified the Secretary-General that its instrument of accession should have specified that the said accession was made subject to the said reservation. None of the Contracting Parties to the Agreement having notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its circulation (23 March 1993), the reservation is deemed to have been accepted" (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. II (footnote 1015 above), p. 273, note 9).

[1060] Letter to governmental official in a Member State, *United Nations Juridical Yearbook 1984* (United Nations publication, Sales No. E.91.V.1), p. 183.

[1061] See the footnote above.

[1062] France (ratification 25 September 1981; amendment 11 August 1982: IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 December 1999*, p. 77).

[1063] Liberia (ratification 28 October 1980, new reservations 27 July 1983, subject of a *procès-verbal* of 31 August 1983), *ibid*., p. 81; Romania (accession 8 March 1993, rectified subsequently, in the absence of any objection, to include reservations adopted by Parliament), p. 83; United States of America (ratification 12 August 1980, reservations communicated 27 July 1983, subject of a *procès-verbal* of rectification of 31 August 1983), p. 86. In the case of Liberia and the United States, the French Government stated that, in view of their nature, it had no objection to those rectifications, but such a decision could not constitute a precedent.

[1064] See, for example, the reservation by Greece to the European Convention on the Suppression of Terrorism of 27 January 1977 (ratification 4 August 1988; rectification communicated to the Secretary-General 6 September 1988; Greece invoked an error; the reservation expressly formulated in the act authorizing ratification had not been transmitted). The reservations by Portugal to the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (deposit of the instrument of ratification 27 September 1994; entry into force of the Convention for Portugal 26 December 1994; notification of reservations and declarations 19 December 1996; (in this case, too, Portugal invoked an error due to the non-transmission of the reservations contained in the Assembly resolution and the decree of the President of the Republic published in the official gazette of the Portuguese Republic)); or the "declaration" by the Netherlands of 14 October 1987 restricting the scope of its ratification (on 14 February 1969) of the European Convention on Extradition (http://conventions.coe.int). See also the example of the late reservations by Belgium and Denmark to the European Agreement on the Protection of Television Broadcasts cited by Giorgio Gaja, *loc. cit.* (footnote 1037 above), p. 311.

of the treaty for the reserving State,[1065] or else the planned reservation was duly published in the official publications, but "forgotten" at the time of the deposit of the instrument of notification, something which can, at a pinch, be regarded as "rectification of a material error".

(16) A pamphlet published by the Council of Europe emphasizes the exceptional nature of the derogations permitted within that organization from the agreed rules on formulating reservations: "Accepting the belated formulation of reservations may create a dangerous precedent which could be invoked by other States in order to formulate new reservations or to widen the scope of existing ones. Such practice would jeopardize legal certainty and impair the uniform implementation of European treaties."[1066] For the same reasons, some authors are reluctant to acknowledge the existence of such a derogation from the principle of the limitation *ratione temporis* of the possibility of formulating reservations.[1067]

(17) These are also the considerations that led the members of the Commission to consider that particular caution should be shown in sanctioning a practice which ought to remain exceptional and narrowly circumscribed. For that reason, the Commission decided to give a negative formulation to the rule contained in draft guideline 2.3.1: the *principle is, and must remain, that the late formulation of a reservation is not lawful; it may become so, in the most exceptional cases, only if none of the other contracting parties objects*.[1068]

(18) Yet, it is a fact that "[a]ll the instances of practice here recalled point to the existence of a rule that allows States to make reservations even after they have expressed their consent to be bound by a treaty, provided that the other contracting States acquiesce to the making of reservations at that stage".[1069] In fact, it is difficult to imagine what might prevent all the contracting States from agreeing to such a derogation, whether this agreement is seen as an amendment to the treaty or as the mark of the "collectivization" of control over the permissibility of reservations.[1070]

(19) It is this requirement of unanimity, be it passive or tacit,[1071] that makes the exception to the principle acceptable and limits the risk of abuse. It is an indissociable element of this derogation, observable in current practice and consistent with the role of "guardian" of the treaty, that States parties may collectively assume.[1072] But this requirement is not meaningful, nor does it fulfil its objectives, unless a single objection renders the reservation impossible. Failing this, the very principle established in the first phrase of article 19 of the 1969 and 1986 Vienna Conventions would be reduced to nothing: any State could add a new reservation to its acceptance of a treaty at any time because there would always be one other contracting State that would not object to such a reservation and the situation would revert to that in which States or international organizations find themselves at the time of becoming parties, when they enjoy broad scope for formulating reservations, subject only to the limits set in articles 19 and 20.

(20) The caution demonstrated in practice and the clarifications provided on several occasions by the Secretary-General, together with doctrinal considerations and concerns relating to the maintenance of legal certainty, justify, in this particular instance, the strict application of the rule of unanimity, it being understood that, contrary to the traditional rules applicable to all reservations (except in Latin America), this unanimity concerns the acceptance of (or at least the absence of any objection to) late reservations. It is without effect, however, on the participation of the reserving State (or international organization) in the treaty itself: in the event of an objection, it remains bound, in accordance with the initial expression of its consent; and it can opt out (with a view to reacceding subsequently and formulating anew the rejected reservations) only in conformity with either the provisions of the treaty itself or the general rules codified in articles 54 to 64 of the Vienna Conventions.

(21) The question also arises whether a distinction should not be made between, on the one hand, objections in principle to the formulation of late reservations and, on the other hand, traditional objections, such as those that can be made to reservations pursuant to article 20, paragraph 4 (*b*), of the 1969 and 1986 Vienna Conventions. This distinction appears to be necessary, for it is hard to see why co-contracting States or international organizations should not have a choice between all or nothing, that is to say, either accepting both the reservation itself and its lateness or preventing the State or organization which formulated it from doing so, whereas they may have reasons that are acceptable to their partners. Furthermore, in the absence of such a distinction, States and international organizations which are not parties when the late reservation is formulated, but which become parties subsequently through accession or other means, would be confronted with a *fait accompli*. Paradoxically, they could not object to a late reservation, whereas they are permitted to do so under article 20,

[1065] In this connection, Giorgio Gaja cites two reservations added on 26 October 1976 by the Federal Republic of Germany to its instrument of ratification (dated 2 August 1976) of the Convention relating to the Status of Stateless Persons of 1954 (cf. *Multilateral Treaties Deposited with the Secretary-General*: *Status as at 31 December 2000*, vol. I (footnote 1006 above), p. 332, note 4).

[1066] J. Polakiewicz, *op. cit.* (see footnote 1007 above), p. 94.

[1067] Cf. R. W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law*, vol. 10, No. 2 (1989), p. 383; and R. Baratta, *Gli effeti delle riserve ai trattati* (Milan, Giuffrè, 1999), p. 27, footnote 65.

[1068] On the problems to which the word "object" gives rise, see paragraph (23) of the commentary to this draft guideline.

[1069] G. Gaja, *loc. cit.* (see footnote 1037 above), p. 312.

[1070] This "control" must, of course, be exercised in conjunction with the "organs of control", where they exist. In the *Metropolitan Chrysostomos, Archimandrite Georgios Papachrysostomou and Titina Loizidou* v. *Turkey* case (application Nos. 15299/89, 15300/89 and 15318/89, Council of Europe, *Yearbook of the European Convention on Human Rights, 1991*, vol. 34 (1995), p. 35), control by States over the permissibility *ratione temporis* of reservations (introduced by Turkey by means of an optional statement accepting individual petitions) was superseded by the organs of the European Convention on Human Rights (see paragraphs (5) and (6) of the commentary to draft guideline 2.3.4).

[1071] Draft guidelines 2.3.2 and 2.3.3 explain the terms and conditions concerning the acceptance of the late formulation of a reservation.

[1072] See paragraph (9) of the commentary to this draft guideline.

paragraph 5,[1073] relating to reservations formulated when the reserving State expresses its consent to be bound.[1074]

(22) The unanimous consent of the other contracting parties should therefore be regarded as necessary for the *late formulation* of reservations. On the other hand, the normal rules regarding acceptance of and objections to reservations, as codified in articles 20 to 23 of the Vienna Conventions, should be applicable with regard to the actual content of late reservations, to which the other parties should be able to object "as usual", a point to which the Commission intends to return in the section of the Guide to Practice on objections to reservations.

(23) In view of this possibility, which cannot be ruled out, at least intellectually (even if it does not seem to have been used in practice to date[1075]), some members of the Commission wondered whether it was appropriate to use the word "objects" in draft guideline 2.3.1 to refer to the opposition of a State not to the planned reservation, but to its very formulation.[1076] Nevertheless, most members took the view that it was inadvisable to introduce the distinction formally, since in practice the two operations are indistinguishable.

### 2.3.2 *Acceptance of late formulation of a reservation*

**Unless the treaty provides otherwise, or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.**

*Commentary*

(1) The purpose of draft guideline 2.3.2 is to clarify and supplement the last part of draft guideline 2.3.1 which rules out any possibility of the late formulation of a reservation "except if none of the other contracting Parties objects to the late formulation of the reservation".

(2) Some members of the Commission who were concerned to restrict the practice of the late formulation of reservations as far as possible believed that such a practice should require express acceptance.

(3) According to the dominant opinion, it appeared, however, that, just as reservations formulated within the set periods may be accepted tacitly,[1077] it should likewise be possible for late reservations to be accepted in that manner (whether their late formulation or their content is at issue) and for the same reasons. It seems fairly clear that to require an express unanimous consent would rob of any substance the (at least incipient) rule that late reservations are possible under certain conditions (which must be strict), for, in practice, the express acceptance of reservations at any time is rare indeed. In fact, requiring such acceptance would be tantamount to ruling out any possibility of the late formulation of a reservation. It is hardly conceivable that all the contracting States to a universal treaty would expressly accept such a request within a reasonable period of time.

(4) Moreover, that would call into question the practice followed by the Secretary-General of the United Nations and by the Secretaries-General of the Customs Cooperation Council of WCO, IMO and the Council of Europe,[1078] all of whom considered that certain reservations which had been formulated late had entered into force in the absence of objections from the other contracting parties.

(5) It remains to be determined, however, how much time the other contracting parties have to oppose the late formulation of a reservation. There are two conflicting sets of considerations in this regard. On the one hand, it must be left to the other contracting States to examine the planned reservation and respond to it; on the other, a long period of time extends the period of uncertainty about the fate of the reservation (and therefore of contractual relations) correspondingly.

(6) Practice in this respect is ambiguous. It seems that the Secretaries-General of IMO, the Council of Europe and WCO proceeded in an empirical manner and did not set any specific periods when they consulted the other contracting parties.[1079] That was not true for the Secretary-General of the United Nations.

(7) In the first place, when the Secretary-General's current practice was inaugurated in the 1970s, the parties were given a period of 90 days in which "to object" to a late reservation, where appropriate. Nevertheless, the choice of this period seems to have been somewhat circumstantial: it happens to have coincided with the period provided for in the relevant provisions of the Convention for the Settlement of Certain Conflicts of Laws in connec-

[1073] "A reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation *or by the date on which it expressed its consent to be bound by the treaty, whichever is later*"*.

[1074] It would be equally paradoxical to allow States or international organizations which become parties to the treaty after the reservation is entered to object to it under article 20, paragraph 4 (*b*), whereas the original parties cannot do so.

[1075] Some late reservations have, however, been expressly accepted (for an example, see footnote 1058 above).

[1076] In that case, the words "except if none of the other contracting Parties *objects to the late formulation of the reservation*" at the end of the draft guideline could have been replaced by the words "if none of the other contracting Parties *is opposed to* the late formulation of the reservation".

[1077] Cf. article 20, paragraph 5, of the Vienna Conventions (in the 1986 text): "unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of the period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty".

[1078] See paragraphs (10) to (14) of the commentary to draft guideline 2.3.1.

[1079] It would appear, however, that the Secretary-General of IMO considers that, in the absence of a response within one month following notification, the reservation becomes effective (cf. footnote 1063 above and IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 December 1999*, concerning the reservation of Liberia, p. 81, and that of the United States, p. 86).

tion with Cheques, to which France wanted to make a new reservation.[1080] That notwithstanding, the 90-day period was adopted whenever a State availed itself thereafter of the opportunity to formulate a new reservation, or modify an existing one, after the entry into force with respect to that State of a new treaty of which the Secretary-General was the depositary.[1081]

(8) In practice, however, this 90-day period proved to be too short; owing to the delays in transmission of the communication by the Office of the Legal Counsel to States, the latter had very little time in which to examine these notifications and respond to them, whereas such communications are likely to raise "complex questions of law" for the parties to a treaty, requiring "consultations among them, in deciding what, if any, action should be taken in respect of such a communication".[1082] It is significant, moreover, that, in the few situations in which parties took action, such actions were formulated well after the 90-day period that had theoretically been set for them.[1083] For this reason, following a note verbale from Portugal reporting, on behalf of the European Union, on difficulties linked to the 90-day period, the Secretary-General announced, in a circular addressed to all Member States, a change in the practice in that area. From then on, "if a State which had already expressed its consent to be bound by a treaty formulated a reservation to that treaty, the other parties would have a period of 12 months after the Secretary-General had circulated the reservation to inform him that they wished to object to it".

(9) In taking this decision, which will also apply to the amendment of an existing reservation, "the Secretary-General [was] guided by article 20, paragraph 5, of the [Vienna] Convention, which indicates a period of 12 months to be appropriate for Governments to analyse and assess a reservation that has been formulated by another State and to decide upon what action, if any, should be taken in respect of it".[1084]

(10) Some members of the Commission expressed some concerns about the length of that period, which has the drawback that, during the 12 months following notification by the Secretary-General,[1085] total uncertainty prevails as to the fate of the reservation that has been formulated and, if a single State objects to it at the last minute, that is sufficient to consider it as not having been made. These members then wondered whether an intermediate solution (six months, for example) would not have been wiser. Nevertheless, taking into account the provisions of article 20, paragraph 5, of the Vienna Conventions and the recent announcement of the Secretary-General of his intentions, the Commission considered that it made more sense to bring its own position—which, in any event, has to do with progressive development and not with codification in the strict sense—into line with those intentions.

(11) Likewise, in view of the different practices followed by other international organizations acting as depositaries,[1086] the Commission took the view that it would be wise to reserve the possibility for a depositary to maintain its usual practice, provided that it has not elicited any particular objections. In practice, that is of little concern save to international depositary organizations; some members of the Commission nevertheless thought that it was inadvisable to rule out such a possibility *a priori* when the depositary was a State or Government.

(12) The wording of draft guideline 2.3.2, which tries not to call into question the practice actually followed, while at the same time guiding it, is based on the provisions of article 20, paragraph 5, of the 1986 Vienna Convention,[1087] but adapts them to the specific case of the late formulation of reservations.

### 2.3.3 *Objection to late formulation of a reservation*

**If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.**

*Commentary*

(1) Draft guideline 2.3.3 draws the consequences of an objection made by a contracting State or international organization to the late formulation of a reservation: it follows from draft guideline 2.3.1 that such a reservation is in principle impossible and that a single "objection" is sufficient to prevent it from producing any effect. That is what is necessarily implied by the expression "except if none of the other Contracting Parties objects".

(2) Given the strict interpretation the Commission intends to give to this rule,[1088] it seemed useful to explain its consequences, i.e. that conventional relations remain unaffected by the declaration made by the State or the international organization which is its author and that this declaration may not be considered a reservation, which is the meaning of the expression "without the reservation being established", borrowed from article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions.[1089]

(3) On the other hand, the objection, which its author does not have to justify, produces its full effects when lodged within the 12-month period indicated in draft

[1080] See the commentary to draft guideline 2.3.1, paras (10) and (11).

[1081] *Ibid*., para. (12).

[1082] See footnote 9 above.

[1083] Cf. the response by Germany to the French reservation to the Convention providing a Uniform Law for Cheques, issued one year following the date of the French communication (see footnote 1058 above).

[1084] See footnote 9 above.

[1085] In other words, not the communication from the State announcing its intention to formulate a late reservation. This may seem debatable, for the fate of the reservation depends on how fast the depositary acts.

[1086] See paragraph (6) of the commentary to this draft guideline.

[1087] See footnote 1073 above.

[1088] See commentary to draft guideline 2.3.1, especially paras. (6), (16) and (17).

[1089] "A reservation established with regard to another party in accordance with articles 19, 20 and 23."

guideline 2.3.2. This is why the Commission uses the word "objects", as opposed to "formulates", for an intended reservation.

(4) The Commission is aware of the fact that, by including this provision in the section of the Guide to Practice relating to the late formulation of reservations, it seems to be departing from the rule it established that it would deal in chapter 2 of the Guide only with questions of procedure, to the exclusion of the effects which irregularities marring that procedure might produce. However, it seems to the Commission that this apparent breach of the rule is justified by the fact that, in the present case, an objection not only prevents the declaration of the author of the intended reservation from producing effects, but also creates an obstacle to it being deemed a reservation.

(5) It is therefore advisable not to equate the "objections" in question here with those which are the subject of articles 20 to 23 of the Vienna Conventions: while these prevent a genuine reservation from producing all its effects in the relations between its author and the State or international organization which is objecting to it, an "objection" to the late formulation of a reservation "destroys" the latter as a reservation. It was to avoid such confusion that some members of the Commission wanted to use different terminology in draft guidelines 2.3.1 to 2.3.3.[1090] However, a majority of members considered such a distinction pointless.[1091]

(6) The Commission also debated the particular procedures which should be followed for objecting to the late formulation of a reservation to the constituent instrument of an international organization. According to article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions:

> When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

Applying as it does to reservations formulated "in time", this rule applies *a fortiori* when the formulation is late. This appears to be so obvious that it is not deemed useful to state it formally in a draft guideline, on the understanding that the principle established in this provision will be taken up in the relevant section of the Guide to Practice.

### 2.3.4 *Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations*

**A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:**

**(*a*) interpretation of a reservation made earlier; or**

**(*b*) a unilateral statement made subsequently under an optional clause.**

*Commentary*

(1) The Commission intends to expand on and clarify the consequences of the principle stated in draft guideline 2.3.1 when it considers problems relating to effects and the permissibility of reservations (since the fundamental questions are clearly how to determine the consequences produced, on the one hand, by the late formulation of a reservation and, on the other hand, by its possible entry into force when it has not given rise to any objection). It nevertheless seemed to the Commission that the exclusion in principle of "late reservations" should be made even stricter by the adoption of draft guideline 2.3.4, the purpose of which is to indicate that a party to a treaty may not get round this prohibition by means which have the same purpose as reservations, but do not meet the definition of reservations. Otherwise, the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions[1092] would be deprived of any specific scope.

(2) To this end, draft guideline 2.3.4 targets two means in particular: the (extensive) interpretation of reservations made earlier, on the one hand, and statements made under an optional clause appearing in a treaty, on the other. The selection of these two means of "circumvention" may be explained by the fact that they have both been used in practice and that this use has given rise to jurisprudence that is accepted as authoritative. One cannot, however, rule out the possibility that States or international organizations might have recourse in the future to other means of getting round the principle stated by draft guideline 2.3.1; it goes without saying that the reasoning which justifies the express prohibitions enunciated in draft guideline 2.3.4 should therefore be applied *mutatis mutandis*.

(3) The principle that a reservation may not be formulated after the expression of definitive consent to be bound appeared to be sufficiently established at the Inter-American Court of Human Rights for the Court to consider, in its advisory opinion concerning *Restrictions to the death penalty*, that, once made,[1093] a reservation "escapes" from its author and may not be interpreted outside the context of the treaty itself. The Court adds the following:

> A contrary approach might ultimately lead to the conclusion that the State is the sole arbiter of the extent of its international obligations on all matters to which its reservation relates, including even all such matters which the State might subsequently declare that it intended the reservation to cover.
>
> The latter result cannot be squared with the Vienna Convention, which provides that a reservation can be made only when signing, ratifying, accepting, approving or acceding to a treaty (Vienna Convention, art. 19).[1094]

[1090] See paragraphs (21) to (23) of the commentary to draft guideline 2.3.1 and especially footnote 1076.

[1091] See paragraph (23) of the commentary to draft guideline 2.3.1.

[1092] For the text of this provision, see footnote 1039 above. The Commission has not considered it necessary formally to reproduce in the Guide to Practice the rule enunciated in this provision: that would overlap with the definition set out in draft guidelines 1.1 and 1.1.2.

[1093] The word "made" is probably more appropriate here than "formulated", since the Inter-American Court of Human Rights considers (perhaps questionably) that "a reservation becomes an integral part of the treaty", which is conceivable only if it is "in effect".

[1094] *Restrictions to the Death Penalty* (see footnote 216 above), paras. 63–64. On the interpretation of this advisory opinion, see G. Gaja, *loc. cit.* (footnote 1037 above), p. 310.

(4) In the same way, following the *Belilos* case,[1095] the Swiss Government initially revised its 1974 "interpretative declaration", which the European Court of Human Rights regarded as an impermissible reservation, by adding a number of clarifications to its new "declaration".[1096] The permissibility of this new declaration, which was criticized by the relevant doctrine,[1097] was challenged before the Federal Court, which, in its decision *Elisabeth B.* v. *Council of State of Thurgau Canton* of 17 December 1992, declared the declaration invalid on the ground that it was a new reservation[1098] that was incompatible with article 64, paragraph 1, of the European Convention on Human Rights.[1099] *Mutatis mutandis*, the limit on the formulation of reservations imposed by article 64 of the Convention is similar to the limit resulting from article 19 of the Vienna Conventions, and the judgement of the Swiss Federal Court should certainly be regarded as a reaffirmation of the prohibition in principle on reservations formulated following the definitive expression of consent to be bound, but it goes further and establishes the impossibility of formulating a new reservation in the guise of an interpretation of an existing reservation.

(5) The decision of the European Commission of Human Rights in the *Chrysostomos* case leads to the same conclusion, but provides an additional lesson. In the case in question, the Commission believed that it followed from the "clear wording" of article 64, paragraph 1, of the European Convention on Human Rights "that a High Contracting Party may not, in subsequent recognition of the individual right of appeal, make a major change in its obligations arising from the Convention for the purposes of procedures under article 25".[1100] Here again, the decision of the European Commission of Human Rights may be interpreted as a confirmation of the rule resulting from the introductory wording of the provision in question, with the important clarification that a State may not circumvent the prohibition on reservations following ratification by adding to a declaration made under an opting-in clause (which does not in itself constitute a reservation)[1101] conditions or limitations with effects identical to those of a reservation, at least in cases where the optional clause in question does not make any corresponding provision.

(6) Although, in the *Loizidou* judgment of 23 March 1995, the European Court of Human Rights was not as precise, the following passage can be regarded as a reaffirmation of the position in question:

> The Court further notes that article 64 of the Convention enables States to enter reservations when signing the Convention or when depositing their instruments of ratification. The power to make reservations under article 64 is, however, a limited one, being confined to particular provisions of the Convention.[1102]

(7) The decisions of the Inter-American Court of Human Rights, the European Court of Human Rights and the Swiss Federal Court reaffirm the stringency of the rule set out at the beginning of article 19 of the 1969 and 1986 Vienna Conventions and in draft guideline 2.3.1, and draw very direct and specific consequences therefrom, as is made explicit in draft guideline 2.3.4.

(8) Subparagraph (*b*) of this draft guideline refers implicitly to draft guideline 1.4.6 and, less directly, to draft guideline 1.4.7 relating to unilateral statements made under an optional clause and providing for a choice between the provisions of a treaty, which the Commission has clearly excluded from the scope of the Guide to Practice. However, the purpose of draft guideline 2.3.4 is not to regulate these procedures as such, but to act as a reminder that they cannot be used to circumvent the rules relating to reservations themselves.

(9) Some members of the Commission expressed doubts on the inclusion of this guideline because it used terms that lacked exactitude.

### 2.4.3 *Time at which an interpretative declaration may be formulated*

**Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7] and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.**

*Commentary*

(1) As a result *a contrario* of guideline 1.2, which defines interpretative declarations independently of any time element,[1103] a "simple" interpretative declaration (as opposed to a conditional interpretative declaration) may, unlike a reservation, be formulated at any time. It is therefore enough to refer to the Commission's commentaries to that provision,[1104] and draft guideline 1.4.3

[1095] *Belilos* v. *Switzerland, Eur. Court H.R., Series A, No. 132*, judgement of 29 April 1988.

[1096] http://conventions.coe.int.

[1097] See, in particular, G. Cohen-Jonathan, "Les réserves à la Convention européenne des droits de l'homme (à propos de l'arrêt Belilos du 29 avril 1988)", RGDIP, vol. 93 (1989), p. 314. Also see the other references made by J.-F. Flauss, *loc. cit.* (footnote 1042 above), p. 300, footnote 28.

[1098] The European Court of Human Rights would have declared the 1974 "declaration" as a whole invalid: "The interpretative declaration concerning article 6, paragraph 1, of the European Convention on Human Rights, formulated by the Federal Council at the time of ratification could therefore not have a full effect in either the field of criminal law or in that of civil law. As a result, the 1988 interpretative declaration cannot be regarded as a restriction, a new formulation or a clarification of the reservation that existed previously. Rather, it represents a reservation formulated subsequently" (*Journal des Tribunaux*, 1995, p. 536; German text in *Europäische Grundrechte-Zeitschrift*, vol. 20 (1993), p. 72).

[1099] "Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article."

[1100] Decision of 4 March 1991, *Revue universelle des droits de l'homme*, vol. 3, No. 5 (July 1991), p. 200, para. 15. See also footnote 1070 above.

[1101] See draft guidelines 1.4.6 and 1.4.7 and the commentaries thereto, *Yearbook … 2000*, vol. II (Part Two), pp. 112–116, document A/55/10.

[1102] *Loizidou, Preliminary Objections* (see footnote 160 above), p. 28, para. 76.

[1103] *Yearbook … 1999*, vol. II (Part Two), p. 97.

[1104] *Ibid*., pp. 101–103, paras. (21) to (32) of the commentary.

follows specifically therefrom. This option is, however, not absolute and involves three exceptions.

(2) The first relates to the relatively frequent case of treaties providing expressly that interpretative declarations to them can be formulated only at a specified time or times, as in the case, for example, of article 310 of the United Nations Convention on the Law of the Sea.[1105] It is clear that, in a case of this kind, the contracting parties may make interpretative declarations such as those referred to in the relevant provision only at the time or times restrictively indicated in the treaty.

(3) The Commission questioned whether this exception, which actually seems quite obvious, should be mentioned in draft guideline 2.4.3, but it found that it was not necessary to be so specific: the Guide to Practice is intended to be exclusively residual in nature and it goes without saying that the provisions of a treaty must be applicable as a matter of priority if they are contrary to the guidelines contained in the Guide.[1106] It seemed advisable, however, to provide for the very specific case of the late formulation of an interpretative declaration when a treaty provision expressly limits the option of formulating such a reservation *ratione temporis*. This case is covered by draft guideline 2.4.6, to which draft guideline 2.4.3 refers.

(4) The existence of an express treaty provision limiting the option of formulating interpretative declarations is not the only instance in which a State or an international organization is prevented *ratione temporis* from formulating an interpretative declaration. The same applies in cases where the State or organization has already formulated an interpretation which its partners have taken as a basis or were entitled to take as a basis (estoppel). In such a case, the author of the initial declaration is prevented from modifying it. This hypothesis will be considered in connection with the draft guidelines relating to the modification of reservations and interpretative declarations.[1107]

(5) The third exception relates to conditional interpretative declarations, which, unlike simple interpretative declarations, cannot be formulated at any time, as stated in draft guideline 1.2.1 on the definition of such instruments,[1108] to which draft guideline 2.4.3 expressly refers.

(6) It also provides for the case covered by draft guideline 2.4.7 relating to the late formulation of a conditional interpretative declaration.

(7) Lastly, it appeared to be obvious that only an existing instrument could be interpreted and that it was therefore not necessary to specify that a declaration could be made only after the text of the treaty had been finally adopted.

### 2.4.4 [2.4.5] *Non-requirement of confirmation of interpretative declarations made when signing a treaty*

**An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.**

*Commentary*

(1) The rule that it is not necessary to confirm interpretative declarations made when signing a treaty in fact derives inevitably from the principle embodied in draft guideline 2.4.3. Since interpretative declarations may be made at any time, save in exceptional cases, it would be illogical and paradoxical to require that they should be confirmed when a State or an international organization expressed its final consent to be bound by the treaty.

(2) In this connection, there is a marked contrast between the rules applicable to reservations[1109] and those relating to interpretative declarations, since the principle is the exact opposite: reservations formulated when signing a treaty must in principle be confirmed, but interpretative declarations do not have to be.

(3) In the light of the very broad wording of draft guideline 2.4.4, the transposition to interpretative declarations of the principle established in draft guideline 2.2.2,[1110] according to which it is not necessary to confirm a reservation formulated when signing a treaty not subject to ratification (agreement in simplified form), would be pointless: the principle stated in draft guideline 2.4.4 is applicable to all categories of treaties, whether they enter into force solely as a result of their signature or are subject to ratification, approval, acceptance, formal confirmation or accession.

(4) In practice, the opposition between the rules applicable to reservations, on the one hand, and to interpretative declarations, on the other, is nonetheless not as clear-cut as it may seem: first, nothing prevents a State or an international organization which has made a declaration when signing from confirming it when expressing its final consent to be bound; secondly, the principle stated in draft guideline 2.4.4 is not applicable to conditional

[1105] "Article 309 [excluding reservations] does not preclude a State, *when signing, ratifying or acceding to this Convention**, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and its regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of this Convention in their application to that State." Also see, for example, article 26, paragraph 2, of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and article 43 of 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.

[1106] The Commission nevertheless departed from this principle in a few cases when it decided to place the emphasis on the exceptional and derogative nature of the guidelines it was proposing (see, in particular, guideline 2.3.1 and paragraph (6) of the commentary thereto, above).

[1107] See also paragraph (31) of the commentary to draft guideline 1.2, *Yearbook … 1999*, vol. II (Part Two), p. 102.

[1108] "A unilateral statement formulated by a State or an international organization *when signing, ratifying, formally confirming, accepting, approving, or acceding to a treaty, or by a State when making a notification of succession to a treaty** ... shall constitute a conditional interpretative declaration" (*ibid.*); see paragraphs (15) to (18) of the commentary to this draft guideline, *ibid*., pp. 105–106.

[1109] See draft guideline 2.2.1 and commentary.

[1110] See the commentary to this draft guideline.

interpretative declarations, as clearly stated in draft guideline 2.4.5.

### 2.4.5 [2.4.4] *Formal confirmation of conditional interpretative declarations formulated when signing a treaty*

**If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case, the interpretative declaration shall be considered as having been made on the date of its confirmation.**

*Commentary*

(1) Draft guideline 2.4.5 makes an important exception to the principle set out in draft guideline 2.4.4 whereby an interpretative declaration formulated when signing the treaty does not need to be confirmed by the author. This rule cannot apply to conditional interpretative declarations.

(2) In the case of the latter, the Commission noted in the commentary to draft guideline 1.2 that, if the conditional interpretative declaration had been formulated at the time of signature of the treaty, it should "probably" be "confirmed at the time of the expression of definitive consent to be bound".[1111] There would appear to be no logical reason for a different solution as between reservations and conditional interpretative declarations, to which the other parties must be in a position to react where necessary.

(3) It will be noted that in practice States wishing to make their participation in a treaty subject to a specified interpretation of the treaty generally confirm their interpretation at the time of expression of definitive consent to be bound, when it has been formulated at the time of signature or at any earlier point in the negotiations.[1112]

(4) As a departure from the principle set out in draft guideline 2.4.4 for "simple" interpretative declarations, the rules concerning formal confirmation of reservations formulated on signature, contained in draft guideline 2.2.1, should therefore be transposed to conditional interpretative declarations.

### 2.4.6 [2.4.7] *Late formulation of an interpretative declaration*

**Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.**

*Commentary*

(1) Draft guideline 2.4.6 is the counterpart, for interpretative declarations, of draft guideline 2.3.1, relating to reservations.

(2) Despite the principle enunciated in draft guideline 2.4.3, whereby interpretative declarations may be made at any time after the adoption of the text of the treaty, interpretative declarations, like reservations, may be late. This is obviously true for conditional interpretations, which, like reservations themselves, can be formulated (or confirmed) only at the time of the expression of definitive consent to be bound, as specified in draft guidelines 1.2.1[1113] and 2.4.5. But this may also be so in the case of simple interpretative declarations, particularly when the treaty itself establishes the period within which they may be made.[1114] The object of draft guideline 2.4.6 is to cover this situation, which is expressly allowed for in draft guideline 2.4.3.

(3) The Commission wishes to emphasize that this is not an academic question. For example, the Government of Egypt had in 1993 ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal without attaching any particular declarations to its instrument of ratification, but on 31 January 1995 it formulated declarations interpreting certain provisions of the treaty,[1115] which limited such a possibility solely to the time of expression by a party of its consent to be bound.[1116] Since certain parties to the Convention contested the admissibility of the Egyptian declarations, either because, in their view, the declarations were really reservations (prohibited by article 26, paragraph 1) or because they were late,[1117] the Secretary-General, the depositary of the Basel Convention, "in

[1111] *Yearbook … 1999*, vol. II (Part Two), p. 106, footnote 371.

[1112] Cf. the confirmation by Germany and the United Kingdom of their declarations formulated upon signing the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. II (footnote 1015 above), pp. 356–357); see also the practice followed by Monaco upon signing and then ratifying the International Covenant on Civil and Political Rights (*ibid.*, vol. I (footnote 1006 above), p. 180); by Austria in the case of the European Convention on the Protection of the Archaeological Heritage (http://conventions.coe.int); or by the European Community in regard to the Convention on Environmental Impact Assessment in a Transboundary Context (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. II, pp. 379–380). See further the declarations by Italy and the United Kingdom concerning the Convention on Biological Diversity (*ibid*., pp. 381–382).

[1113] *Yearbook … 1999*, vol. II (Part Two), p. 103.

[1114] See paragraphs (2) and (3) of the commentary to draft guideline 2.4.3.

[1115] See *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000*, vol. II (footnote 1015 above), pp. 358–359.

[1116] Under article 26, paragraph 2, of the Convention, a State may, within certain limits, formulate such declarations, but only "when signing, ratifying, accepting, approving or formally confirming or acceding to this Convention".

[1117] See the observations by the United Kingdom, Finland, Italy, the Netherlands and Sweden (*Multilateral Treaties Deposited with the*

keeping with the depositary practice followed in similar cases, … proposed to receive the declarations in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of their circulation".[1118] Subsequently, in view of the objections received from certain contracting States, he "[took] the view that he [was] not in a position to accept these declarations [formulated by Egypt] for deposit"[1119] and declined to include them in the section entitled "Declarations and Reservations" and reproduce them only in the section entitled "Notes", accompanied by the objections concerning them.

(4) It will be inferred from this example, which was not protested by any of the States parties to the Basel Convention, that, in the particular, but not exceptional, case in which a treaty specifies the times at which interpretative declarations may be made, the same rules should be followed as those set out in draft guideline 2.3.1. The commentaries to that provision are therefore transposable, *mutatis mutandis*, to draft guideline 2.4.6.

(5) It is self-evident that the approaches laid down in draft guidelines 2.3.2 and 2.3.3 can also be transposed to acceptances of interpretative declarations formulated late and objections to such formulation. Nevertheless, the Commission considered that it was not useful to overburden the Guide to Practice by including express draft guidelines in this respect.

*Secretary-General: Status as at 31 December 1995* (United Nations publication, Sales No. E.96.V.5), p. 897.

[1118] *Ibid.*

[1119] *Ibid.*

### 2.4.7 [2.4.8] *Late formulation of a conditional interpretative declaration*

**A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.**

*Commentary*

(1) The considerations which led the Commission to adopt draft guideline 2.4.6 apply in all respects to draft guideline 2.4.7.

(2) It follows from draft guideline 1.2.1 that, like a reservation, a conditional interpretative declaration is "A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty".[1120] Any conditional interpretative declaration not made at any of these times is therefore late and can be envisaged only if all the contracting parties consent, at least tacitly, to do so.

(3) The commentaries to draft guidelines 2.3.1 and 2.4.6 can therefore be fully transposed to draft guideline 2.4.7.

[1120] See footnote 1108 above.

# Chapter VII

# DIPLOMATIC PROTECTION

## A. Introduction

158. The Commission at its forty-eighth session, in 1996, identified the topic of "Diplomatic protection" as one of three topics appropriate for codification and progressive development.[1121] In the same year, the General Assembly, in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above Assembly resolution, established at its 2477th meeting a Working Group on the topic.[1122] The Working Group submitted a report at the same session which was endorsed by the Commission.[1123] The Working Group attempted to (*a*) clarify the scope of the topic to the extent possible; and (*b*) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.[1124]

159. At its 2510th meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.[1125]

160. The General Assembly, in paragraph 8 of its resolution 52/156 of 15 December 1997, endorsed the decision of the Commission to include in its agenda the topic "Diplomatic protection".

161. At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur.[1126] At the same session, the Commission established an open-ended working group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic.[1127]

162. At its fifty-first session, in 1999, the Commission appointed Mr. Christopher John Robert Dugard Special Rapporteur for the topic,[1128] after Mr. Bennouna was elected judge to the International Tribunal for the Former Yugoslavia.

163. At its fifty-second session, in 2000, the Commission had before it the Special Rapporteur's first report (A/CN.4/506 and Add.1). The Commission deferred its consideration of document A/CN.4/506/Add.1 to the next session, due to a lack of time. At the same session, the Commission established open-ended informal consultations, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.[1129] The Commission subsequently decided, at its 2635th meeting, on 9 June 2000, to refer draft articles 1, 3, 5, 6, 7 and 8 to the Drafting Committee together with the report of the informal consultations.

## B. Consideration of the topic at the present session

164. At the present session, the Commission had before it the remainder of the Special Rapporteur's first report (A/CN.4/506/Add.1), as well as his second report (A/CN.4/514). The Commission considered chapter III (Continuous nationality and the transferability of claims) at its 2680th and 2685th to 2687th meetings, held on 25 May and 9 to 11 July 2001, respectively. The Commission also considered the second report of the Special Rapporteur at its 2688th to 2690th meetings, held on 12 to 17 July 2001. Due to a lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11, and deferred consideration of the remainder of the report, concerning draft articles 12 and 13, to the next session.

165. The Commission decided to refer draft article 9 to the Drafting Committee, at its 2688th meeting, held on 12 July 2001, as well as draft articles 10 and 11, at its 2690th meeting, held on 17 July 2001.

166. At its 2688th meeting, the Commission established open-ended informal consultations on article 9, chaired by the Special Rapporteur.

[1121] *Yearbook ... 1996*, vol. II (Part Two), pp. 97–98, document A/51/10, para. 248, and annex II, addendum 1.

[1122] *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 169.

[1123] *Ibid*., para. 171.

[1124] *Ibid*., pp. 62–63, paras. 189–190.

[1125] *Ibid*., p. 63, para. 190.

[1126] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/484.

[1127] For the conclusions of the working group, *ibid*., vol. II (Part Two), p. 49, para. 108.

[1128] *Yearbook ... 1999*, vol. II (Part Two), p. 17, document A/54/10, para. 19.

[1129] The report of the informal consultations is reproduced in *Yearbook ... 2000*, vol. II (Part Two), p. 85, document A/55/10, para. 495.

### 1 Article 9[1130]

#### (a) *Introduction by the Special Rapporteur*

167. The Special Rapporteur, in introducing chapter III of his first report, dealing with draft article 9 on continuous nationality, observed that while the law of diplomatic protection was an area in which there was a substantial body of State practice, jurisprudence and doctrine, those sources of law all seemed to point in different directions. In large measure, the task facing the Commission was less one of formulating new rules than of choosing among them. The question of continuous nationality was a good illustration of that.

168. According to the traditional view, a State could exercise diplomatic protection only on behalf of a person who had been a national of that State at the time of the injury on which the claim was based and who had continued to be a national up to and including the time of the presentation of the claim. That traditional view was supported by State practice and was to be found in many agreements. The rationale for the traditional view was, *inter alia*, to prevent individuals from seeking the State offering the most advantageous protection, thus preventing powerful States from becoming "claims agencies".

169. However, the traditional rule had been criticized on several grounds: it was difficult to reconcile with the Vattelian fiction that an injury to the national was an injury to the State itself; several judicial pronouncements existed questioning its validity as a general rule; its content was uncertain as there was no clarity regarding key notions such as "date of injury" (the *dies a quo*) and the date until which nationality must have continued (the *dies ad quem*); its rationale was no longer valid in that States were very cautious about conferring nationality, and ICJ noted in the *Nottebohm* case[1131] a claimant State had to demonstrate an effective link with the national on whose behalf it submitted a claim; the rule was unjust in that it could lead to the denial of diplomatic protection to individuals who had changed nationality involuntarily, whether as a result of succession of States or for other reasons, such as marriage or adoption; and it failed to acknowledge that the individual was the ultimate beneficiary of diplomatic protection. In the light of such criticism, it seemed necessary that the Commission reconsider the traditional position and adopt a more flexible rule, giving greater recognition to the individual as the ultimate beneficiary of diplomatic protection.

170. The Special Rapporteur stated further that, while it was possible to retain the rule with an exception made in the case of involuntary change of nationality, that would be insufficient. He thus proposed abandoning the traditional rule in favour of a new approach whereby a State would be allowed to bring a claim on behalf of a person who had acquired its nationality in good faith after the date of the injury attributable to a State other than the previous State of nationality, provided that the original State had not exercised or was not exercising diplomatic protection in respect of that injury. Several safeguards against abuse were retained: the original State of nationality would still have priority; the requirements of acquisition of nationality in good faith and the existence of an effective link between the claimant State and its national would apply; and a claim could not be brought against the previous State of nationality for an injury that had occurred while the individual had been a national of that State—a safeguard that avoided the difficulties raised by, *inter alia*, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act)[1132], which allowed Cubans who had become naturalized United States citizens to bring proceedings against the Government of Cuba for losses incurred at the hands of that Government while they had still been nationals of Cuba. Paragraph 2 extended the new rule to the transfer of claims.

#### (b) *Summary of the debate*

171. The Special Rapporteur was commended for his even-handed treatment of the topic in his report. At the same time, it was pointed out that the Special Rapporteur had set himself the difficult task of challenging an established rule of customary international law. Indeed, strong support was expressed in the Commission for the view that the rule of continuous nationality enjoyed the status of customary international law.

172. Support was also expressed for maintaining the traditional rule, particularly since the reasons in its favour, *inter alia*, the concern to avoid abuse on the part of individuals or States, were still applicable. Others pointed out that the main rationale for the continuity rule was not only the danger of abuse through "forum shopping", but rather the *Mavrommatis*[1133] approach to diplomatic protection, i.e. that the State was "in reality asserting its own rights". That implied that at the time of the breach the individual must have had the nationality of the State which brings the claim. In addition, the strength of State practice and the lack of evidence of an emergent principle or new practice militated against changing the rule.

173. Furthermore, it was suggested that, if the Commission were to follow the suggestion of the Special Rapporteur, one condition would have to be added: that the

[1130] Article 9 proposed by the Special Rapporteur reads as follows:

"*Article 9*

"1. Where an injured person has undergone a *bona fide* change of nationality following an injury, the new State of nationality may exercise diplomatic protection on behalf of that person in respect of the injury, provided that the State of original nationality has not exercised or is not exercising diplomatic protection in respect of the injured person at the date on which the change of nationality occurs.

"2. This rule applies where the claim has been transferred *bona fide* to a person or persons possessing the nationality of another State.

"3. The change of nationality of an injured person or the transfer of the claim to a national of another State does not affect the right of the State of original nationality to bring a claim on its own behalf for injury to its general interests suffered through harm done to the injured person while he or she was still a national of that State.

"4. Diplomatic protection may not be exercised by a new State of nationality against any previous State of nationality in respect of an injury suffered by a person when he or she was a national of the previous State of nationality."

[1131] *Nottebohm, Second Phase* (see footnote 207 above).

[1132] ILM, vol. 35, No. 2 (March 1996), p. 359.

[1133] See footnote 236 above.

obligation should have been in force at the time of the breach between the respondent State and the State bringing the claim on behalf of the individual which had subsequently acquired its nationality, since it was possible that the claimant State could bring a claim for infringement of an obligation which occurred at a time when that obligation was not owed to it.

174. Conversely, there was support for the Special Rapporteur's proposal on article 9. While it was conceded that such a customary rule existed, reference was made to the doubts about the rule that had emerged over time, as expressed in numerous judgements and by several writers. It was stated that even well-established rules could be changed when they no longer conformed to developments in international society, and that it was within the Commission's mandate on the progressive development of international law to propose such changes. From a practical point of view, therefore, there was an interest in the positive evolution of the institution so that it could ensure better protection of the interests of people and citizens than before. Likewise, it was disputed that States would allow themselves to be abused easily as many had adopted complex procedures for the acquisition of nationality.

175. A key issue in the debate was the relationship between diplomatic protection and the protection of individuals under international law. Those members supporting the new approach of the Special Rapporteur agreed with his evaluation that the rule of continuing nationality had outlived its usefulness in a world where individual rights were recognized by international law. It was pointed out that the State, in exercising diplomatic protection, was not ensuring its own rights. Instead, it was seeking respect for the individual's rights. It was stated that in fact only the nationality at the time of the claim mattered.

176. Others were of the view that the general trend in international law of protecting individuals did not provide a justification for changing the rule of continuous nationality. It was emphasized that, while, in exercising such protection the State must take into consideration the human rights of the injured person, diplomatic protection was not a human rights institution *per se*. Nor was diplomatic protection the best mechanism for the protection of human rights, given its inherently discretionary nature. It was also pointed out that modern diplomatic protection, based largely on treaties, was highly dependent upon processes of negotiation between States in which the role of the State as "legislator" of a relationship could not be separated from the role of the State as the ultimate insurer of the rights concerned. The problem was how to provide for the rights of the individual and those of the State without upsetting the delicate balance between them.

177. At the same time, there was agreement that the rule needed to be made more flexible so as to avoid inequitable results. While those supporting the Special Rapporteur's proposal were of the view that this required revising the rule itself, most members preferred a middle course whereby the traditional rule would be retained, albeit subject to certain exceptions aimed at those situations where the individual would otherwise have no possibility of obtaining protection by a State. It was proposed that the basic exceptions should relate to involuntary changes of nationality of the protected person, arising from succession of States, marriage and adoption. It was also proposed to extend this rule to other cases where different nationalities were involved as a result of changes to the claim arising from, for example, inheritance and subrogation. It was also suggested that further exceptions could be provided for stateless persons and for the situation where it would be impossible to apply the rule of continuity owing to, for example, the disappearance of the State of original nationality through dissolution or dismemberment. However, doubts were expressed as to, for example, the distinction between cases of "involuntary" and "voluntary" change of nationality.

178. Concerning paragraph 1 of the Special Rapporteur's proposal, it was suggested that it be recast so as to enunciate the traditional rule. Furthermore, the view was expressed that the requirement of bona fide change of nationality was too subjective and presented problems, particularly in the context of changes in nationality by legal persons. It was proposed that the requirement of an "effective" link, as espoused in the *Nottebohm* case,[1134] would be sufficient guard against abuse. It was also proposed that the reference to "change of nationality" be clarified by indicating that the original nationality had been lost, so as to avoid possible competing claims. It was also observed that the phrase was inadequate because it did not specify the applicable law or the conditions under which such "change" occurred.

179. With regard to paragraph 2, it was suggested that a distinction be drawn between transfer of claims between legal persons and those between natural persons, and that legal persons be excluded from the scope of the draft articles. However, it was recalled that the Commission had, at its previous session, taken the view that it might at a later stage wish to reconsider the question whether to include the protection of legal persons in the draft articles at all.[1135] The Special Rapporteur confirmed his understanding that the scope of his mandate extended to the treatment of legal persons, but not to protection offered by international organizations. He indicated that he intended to prepare specific provisions on the rule of continuing nationality and the transferability of claims in the context of legal persons. Serious doubts were also expressed on whether the concept of assignment was well founded.

180. It was stated that the issue of transferability of claims required more consideration than that provided in the report. The view was expressed that paragraph 2 needed to be more restrictive so as to allow for the rule of continuity to be set aside only in regard to the situation of involuntary transfer of claims, e.g. death of the person injured, and not as regards voluntary transfers. It was also suggested that the words "international claim" be clarified.

181. Concerning paragraph 3, the view was expressed that it was undesirable to disassociate the general interest

[1134] *Nottebohm, Second Phase* (see footnote 207 above).

[1135] *Yearbook ... 2000*, vol. II (Part Two), p. 85, document A/55/10, para. 495.

of the claimant State from that of the particular individual injured. Similarly, it was maintained that the paragraph could create confusion since it seemed to relate as much to the responsibility of States for internationally wrongful acts as to diplomatic protection.

182. While support was expressed for paragraph 4, it was proposed that it be formulated in broader terms. It was also pointed out that the provision could be problematic since under the domestic legislation of some States it was not possible for nationals to lose their nationality. As to the question of the Helms-Burton Act, the view was expressed that the possible wrongful nature of the Act had more to do with its extraterritorial application than with any inconsistency with the rule expressed in the paragraph.

183. It was suggested that the Commission consider the following additional issues relating to the nationality of claims: (*a*) the case of international organizations, exercising both functional protection and diplomatic protection for one of its officials (as per the advisory opinion on *Reparation for Injuries*[1136]); (*b*) the right that the State of nationality of a ship or aircraft has to prefer a claim on behalf of the crew and possibly also of the passengers of the ship or aircraft, irrespective of the nationality of the individuals concerned;[1137] (*c*) the case where one State exercises diplomatic protection of a national of another State because the latter has delegated to the former State its right to do so; and (*d*) the case where a State or an international organization administers or controls a territory.

### (c) *Special Rapporteur's concluding remarks*

184. The Special Rapporteur reiterated his view that the Vattelian legal fiction, according to which the State protected its own interest when it acted on behalf of its national, was *not* the foundation of the rule of continuous nationality because it implied that only the State of nationality at the time of injury could be the claimant State, regardless of whether the injured individual still retained that State's nationality at the time the claim was presented. He admitted that his proposal for draft article 9 was innovative and although support had been expressed for his proposal by some speakers, they were in the minority. However, there had been unanimous agreement that flexibility and change in some form were necessary. This was to be brought about by way of the inclusion of reasonable exceptions to the rule, particularly in the context of State succession and marriage. The Drafting Committee would also have to consider whether naturalization after a long period of residence could constitute an exception to the rule. He also recalled that several valid criticisms had been voiced, *inter alia*, in relation to the notion of a bona fide change of nationality, and that some speakers had felt that insufficient attention had been paid to the question of transfer of claims. He also observed that further consideration would have to be given to questions of the *dies a quo* and the *dies ad quem*.

[1136] See footnote 38 above.

[1137] *M/V "Saiga"* case (see footnote 515 above), para. 172.

## 2. Article 10[1138]

### (a) *Introduction by the Special Rapporteur*

185. The Special Rapporteur, in introducing draft article 10 and the rule of exhaustion of local remedies generally, stated that it was clear that the rule was a customary rule of international law, as affirmed by ICJ in the *Interhandel*[1139] and *ELSI*[1140] cases. It was founded on respect for sovereignty of the host State as well as for its judicial organs. He recalled that a draft article on the exhaustion of local remedies rule had been included in the draft articles on State responsibility (draft article 22) as adopted at the forty-eighth session on first reading,[1141] but that the Commission had since decided to leave the matter to the draft articles on diplomatic protection.

186. Draft article 10 was meant to establish the context for the subsequent articles on the exhaustion of local remedies. Paragraph 1 affirmed the existence of the rule and its application both to natural and legal persons. However, it did not apply in cases involving diplomats or State enterprises engaged in *acta jure imperii*, which involved direct injury to the State and hence would not require exhaustion of local remedies.

187. The Special Rapporteur observed further that it was not always possible to maintain the distinction between primary and secondary rules throughout the draft articles on diplomatic protection. The distinction had been important for the draft articles on responsibility of States for internationally wrongful acts, but was less so in respect of diplomatic protection. This was because the concept of denial of justice had featured prominently in most attempts at codification of the local remedies rule. Although he had previously been of the view that the question of denial of justice involved a primary rule and should not be dealt with, he had since come to think that the matter should be considered.

188. Paragraph 2 dealt with the content of the local remedies rule. All legal remedies had to be exhausted before a claim was brought at the international level. However, difficulties existed concerning the definition of the term "legal remedies". It clearly included all judicial remedies available under the municipal system, as well as administrative remedies, where they were available as of right but not where they were discretionary or available as a matter of grace. He observed further that the *Ambatielos* case had raised difficulties by requiring that the claimant exhaust

[1138] Article 10 proposed by the Special Rapporteur reads as follows:

"*Article 10*

"1. A State may not bring an international claim arising out of an injury to a national, whether a natural or legal person, before the injured national has, subject to article 14, exhausted all available local legal remedies in the State alleged to be responsible for the injury.

"2. 'Local legal remedies' means the remedies which are as of right open to natural or legal persons before judicial or administrative courts or authorities whether ordinary or special."

[1139] See footnote 684 above.

[1140] See footnote 85 above.

[1141] *Yearbook ... 1996*, vol. II (Part Two), p. 58, document A/51/10, para. 65.

the "procedural facilities" available in municipal courts.[1142] The decision constituted a warning that a claimant who failed to present his or her case properly at the municipal level could not reopen the matter at the international level. He also referred to the principle that the alien was required to raise before the domestic courts all the arguments that he or she intended to raise at the international level. Finally, paragraph 2 required that, for the rule to apply, the remedies in question had to be "available", both in theory and in practice.

(b) *Summary of the debate*

189. Support was expressed for the exhaustion of local remedies rule as being a well-established rule of customary international law. Support was also expressed for the Special Rapporteur's approach of dealing with the topic in several articles, instead of one lengthy article, although it was suggested that article 10 could be reformulated as a synthetic definition of the rule to be followed by more specific provisions. At the same time, it was observed that there was a limit to which specificity should be required, since the application of the local remedies rule was highly contextual.

190. Regarding paragraph 1, it was suggested that the reference to "international claim" be clarified and that the words "available … remedies" required closer scrutiny. In addition, it was observed that the criterion of effectiveness, which had traditionally been a facet of the rule, was missing. The view was expressed that without the addition of the qualifier "effective", the reference to "all" available local legal remedies would be too broad and would impose an excessive burden on the injured person. Conversely, doubts were expressed concerning the inclusion of an "effectiveness" requirement, since such criterion could prove highly subjective, and would inevitably lead to a discussion on the question of a fair trial—a controversial issue in international law. Furthermore, it was suggested that the reference to "natural or legal person" be deleted on the understanding that the draft articles applied both to natural and legal persons, unless expressly stated otherwise.

191. Concerning the definition of "local legal remedies" in paragraph 2, it was observed that each State regulated its remedies in accordance with its own procedures and, in many cases, constitutional law. It was suggested that the paragraph could state the purpose of the remedies to be exhausted: in some cases local remedies were available so as to prevent an injury, while in others, only in order to provide reparation.

192. As to the word "legal", it was suggested that it could include all legal institutions from which the individual had a right to expect a decision, a judgement or an administrative ruling. In terms of a further view, the word "legal" was superfluous. While support was expressed for the position of the Special Rapporteur that non-legal or discretionary remedies should be excluded from the ambit of the local remedies rule, it was observed that what was important was the result and not the means by which that result was obtained. It was queried whether the word "local" could include instituting a complaint before a regional human rights mechanism, such as the European Court of Human Rights.

193. The view was expressed that the Special Rapporteur had given an overly narrow interpretation of "administrative remedies". A clarification was sought regarding the reference in his report (para. 14) to administrative remedies being obtained from a tribunal, since many such remedies were not obtainable from tribunals. It was also queried whether recourse to an ombudsman would be considered an administrative "local remedy".

194. Support was expressed for the Special Rapporteur's view that the distinction between primary and secondary rules was not necessary in all cases, and that a rigid adherence to the distinction could result in the exclusion of the concept of denial of justice. Conversely, it was stated that there was no need to introduce a provision on denial of justice, since it was an example, among others, of cases in which local remedies were not "effective".

195. Doubts were expressed regarding the "rule" in the *Finnish Shipowners* case,[1143] whereby the litigant was required to raise in municipal proceedings all the arguments he or she intended to raise in international proceedings. It was observed that the rule had to be applied flexibly so as to recognize that while an argument may be sufficient to substantiate a claim at the local level, it might not do so at the international level.

(c) *Special Rapporteur's concluding remarks*

196. The Special Rapporteur noted that, while article 10 had largely been accepted by speakers, a number of drafting suggestions had been made which would be considered by the Drafting Committee. He accepted the criticism concerning the inclusion of the phrase "natural or legal persons". He also noted that it had been his intention to deal with the question of effectiveness in a separate article. However, he recognized that it would still be necessary to indicate in article 10 that the remedy should be both available and effective, so as to reflect the prevailing view in international law. While it was true that in many instances the availability test was adequate, examples existed (as in the *Robert E. Brown* case[1144]) of situations where it was necessary to consider the effectiveness of the local remedy in the context of the judicial system of the respondent State, which did mean questioning the standards of justice employed in that State.

197. He explained further that paragraph 2 had been an attempt at producing a broad definition of local remedies so as to indicate that the individual should exhaust the entire range of available legal remedies. The crucial point was not the ordinary or extraordinary character of the legal remedy, but whether it provided the possibility of an effective means of redress.

198. Furthermore, he noted that there had been some criticism of the "rule" that the foreign litigant was required

[1142] UNRIAA, vol. XII (Sales No. 63.V.3), p. 120.

[1143] *Finnish Shipowners* (see footnote 103 above), p. 1484.

[1144] See footnote 295 above.

to raise in the municipal proceedings all the arguments he or she intended to raise in the international proceedings. He admitted that it was not without difficulties and it was for that reason that he had not included it in the provision itself.

199. On the question of maintaining a distinction between primary and secondary rules and the advisability of including a provision on denial of justice, he noted that different views had been expressed regarding the inclusion of such a concept.

### 3. Article 11[1145]

#### (a) *Introduction by the Special Rapporteur*

200. The Special Rapporteur explained that draft article 11 dealt with the distinction between "direct" and "indirect" claims for the purpose of the exhaustion of local remedies rule. Such a provision was necessary in the draft articles so as to ascertain which cases fell within the scope of the draft articles. The basic principle was that the rule applied only where there had been an injury to a national of the State, i.e. where it had been "indirectly" injured through its national. It did not apply where there had been a direct injury to the State itself.

201. Two criteria were proposed for determining the type of injury involved: (*a*) a preponderance test; and (*b*) a *sine qua non* test. He suggested that it might be sufficient to adopt only one of the tests. Under the first test, the issue was whether the injury had been preponderantly to the national of the claimant State, in which case it would be indirect and the exhaustion of local remedies rule would apply. Alternatively, under the *sine qua non* test, it would be necessary to establish whether the claim would have been brought but for the injury to the national of the claimant State. He observed that other criteria had also been proposed in the literature, including: the "subject" of the dispute; the "nature" of the claim; and the nature of the remedy sought. For example, if a State only claimed declaratory relief, this could be an indication that the injury was direct. However, in cases where a State sought a declaratory order as well as compensation for injury to the individual, it would be up to the Court to decide which was the preponderant factor. Furthermore, he remarked that it was necessary to guard against the possibility of a State seeking a declaratory order simply to avoid the exhaustion of local remedies rule. In his view, the additional three factors were to be considered in deciding whether the claim was "preponderantly" direct or indirect. As such, they did not require separate mention in the draft article. However, they were left in between brackets with a view to obtaining guidance from the Commission on their inclusion.

[1145] Article 11 proposed by the Special Rapporteur reads as follows:

"*Article 11*

"Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national and where the legal proceedings in question would not have been brought but for the injury to the national. [In deciding on this matter, regard shall be had to such factors as the remedy claimed, the nature of the claim and the subject of the dispute.]"

#### (b) *Summary of the debate*

202. While support was expressed for article 11, which was considered to reflect prevailing practice, it was also suggested that it required further reflection. Proposals included merging articles 10 and 11 and deleting article 11 entirely, as going beyond the scope of diplomatic protection.

203. It was observed that the terms "direct" and "indirect" injury were misleading. Reference was made to the distinction made in the French-speaking world between *dommage médiat* and *dommage immédiat* ("mediate" and "immediate" injury). "Immediate" injury was that suffered directly by the State. "Mediate" or remote injury was that suffered by the State in the person of its nationals.

204. The view was expressed that the main difficulties in the provision related to the evaluation of the "preponderance" in a situation of a mixed claim. It was further pointed out that cases could arise where a test of preponderance could not be applied because the injury suffered by the State was equivalent to that suffered by the individual. The view was also expressed that the two tests should not be seen as applying cumulatively, nor should it be required that the preponderance test be applied before the *sine qua non* test. It was further pointed out that while there was some support in the *ELSI*[1146] case for a subjective test, what was found to be relevant in that case, as well as in the *Interhandel*[1147] case, was whether in substance there was one and the same dispute, and whether it related to an injury to a national.

205. On the question of resort to declaratory relief, it was observed that an injured State had the right to demand the cessation of the violation of the agreement, without having to first resort to local remedies.

206. Concerning the list of additional factors to be considered, the view was expressed that it might be deleted since it was not established practice to include illustrative examples in a codification text. Conversely, it was suggested that since the sentence in brackets set out criteria, rather than examples, and as any decision on the matter was inherently subjective, it would be useful to keep the sentence in brackets.

#### (c) *Special Rapporteur's concluding remarks*

207. The Special Rapporteur recalled that various drafting suggestions had been made and pointed to some further issues which would have to be considered by the Drafting Committee, including the possibility that only the preponderance test be employed. He observed that there had been a difference of opinion as to the additional factors included in brackets, and also took note of the criticism of the terms "direct" and "indirect" injury. He pointed out that while they were used in his report, they had not been used in the draft article itself.

[1146] See footnote 85 above.

[1147] See footnote 684 above.

# Chapter VIII

# UNILATERAL ACTS OF STATES

## A. Introduction

208. In its report on the work of its forty-eighth session, in 1996, the Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.[1148]

209. The General Assembly, in paragraph 13 of its resolution 51/160, *inter alia*, invited the Commission to further examine the topic "Unilateral acts of States" and to indicate its scope and content.

210. At its forty-ninth session, in 1997, the Commission established a Working Group on this topic which reported to the Commission on the admissibility and facility of a study on the topic, its possible scope and content and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group.[1149]

211. Also at its forty-ninth session, the Commission appointed Mr. Víctor Rodríguez Cedeño Special Rapporteur on the topic.[1150]

212. The General Assembly, in paragraph 8 of its resolution 52/156 of 15 December 1997, endorsed the Commission's decision to include the topic in its agenda.

213. At its fiftieth session, in 1998, the Commission had before it and considered the Special Rapporteur's first report on the topic.[1151] As a result of its discussion, the Commission decided to reconvene the Working Group on unilateral acts of States.

214. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of unilateral act and the future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group.[1152]

215. At its fifty-first session, in 1999, the Commission had before it and considered the Special Rapporteur's second report on the topic.[1153] As a result of its discussion, the Commission decided to reconvene the Working Group on unilateral acts of States.

216. The Working Group reported to the Commission on issues related to (*a*) the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice; (*b*) the setting of general guidelines according to which the practice of States should be gathered; and (*c*) the direction that the work of the Special Rapporteur should take in the future. In connection with point (*b*) above, the Working Group set the guidelines for a questionnaire to be sent to States by the Secretariat in consultation with the Special Rapporteur, requesting materials and enquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission's study of the topic.

217. At its fifty-second session, in 2000, the Commission considered the third report of the Special Rapporteur on the topic,[1154] along with the text of the replies received from States[1155] to the questionnaire on the topic circulated on 30 September 1999. The Commission at its 2633rd meeting, on 7 June 2000, decided to refer revised draft articles 1 to 4 to the Drafting Committee and revised draft article 5 to the Working Group on the topic.

## B. Consideration of the topic at the present session

218. At the present session the Commission had before it the fourth report by the Special Rapporteur (A/CN.4/519).

219. The Commission considered the fourth report of the Special Rapporteur at its 2693rd, 2695th and 2696th meetings, on 20, 25 and 26 July 2001, respectively.

### 1. Introduction by the Special Rapporteur of his fourth report

220. The Special Rapporteur indicated that his fourth report dealt with two fundamental issues: the elaboration of criteria upon which to proceed with a classification of

[1148] *Yearbook ... 1996*, vol. II (Part Two), pp. 97–98, document A/51/10, para. 248, and annex II.

[1149] *Yearbook ... 1997*, vol. II (Part Two), pp. 64–65, paras. 194 and 196–210.

[1150] *Ibid*., p. 66, para. 212 and p. 71, para. 234.

[1151] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486.

[1152] *Ibid*., vol II (Part Two), p. 58, paras. 192–201.

[1153] *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1.

[1154] *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/505.

[1155] *Ibid*., document A/CN.4/511.

unilateral acts and the interpretation of unilateral acts, in the context of the rules applicable to all unilateral acts, regardless of their material content.

221. The Special Rapporteur noted that his report had been prepared on the basis of a wide range of literature, comments by members of the Commission and by Governments, as well as jurisprudence and some State practice referred to therein. It was stressed that, after an initial period of scepticism, most Governments had viewed the work undertaken on the topic more favourably. Furthermore, he indicated that it was important to reach agreements on the general part of the topic, particularly as regards the structure; it did not seem, for the time being, feasible nor convenient to elaborate draft articles on special categories of unilateral acts.

222. The Special Rapporteur noted that guidance was requested of the Commission on the issues relating to the causes of invalidity of unilateral acts, and the determination of the moment when the legal effects of a unilateral act come into being, which would in turn lead to determining the moment when it is opposable or enforceable. He explained that it was of fundamental importance to distinguish the moment at which the act came into being, producing legal effects while retaining its unilateral nature, from the moment at which it materialized, thus taking on a bilateral element while never losing its strictly unilateral nature.

223. As regards the issue of silence in relation to unilateral acts, the Special Rapporteur noted that silence cannot be defined as a legal act in the sense being dealt with by the Commission.

224. As regards interpretative declarations, the Special Rapporteur indicated that, in general, they were linked to a prior text, but was of the view that in cases where the declarations went beyond the obligations contained in the treaty, the declarations would become independent acts whereby a State could assume international commitments; these interpretative declarations would thus be included among the unilateral acts falling within the scope of the topic.

225. On the contrary, countermeasures, in the view of the Special Rapporteur, could not be considered within the same context because they constitute a reaction by a State, thus lacking the necessary autonomy, and because they are not expressly formulated with the intention of producing legal effects.

226. The Special Rapporteur indicated that the classification of unilateral acts was difficult; an act may be qualified in different ways and fall under one or more categories of the classical unilateral acts. He proposed to proceed with a classification based on the legal effects criterion. Consequently, there would be two major categories: acts whereby a State undertakes obligations and acts whereby a State reaffirms a right. Examples of the former include promises, waivers and even recognitions, while the latter category is exemplified by protests. He also proposed that the Commission focus itself on the acts falling under the first category previously indicated.

227. With regard to the interpretation of unilateral acts and their applicable rules, in the view of the Special Rapporteur, the rules of interpretation contained in the 1969 Vienna Convention can constitute a valid reference in the elaboration of rules for the interpretation of unilateral acts, as was evidenced by some arbitral awards. He also affirmed that such rules of interpretation would be common to all unilateral acts. In this regard, he noted that the interpretation of an act in good faith and in relation to the context in which it took place would certainly be applicable to unilateral acts. The context would also include, for the purposes of interpretation, the preambular part of a declaration and annexes. Subsequent practice could also, according to the Special Rapporteur, be important in the interpretation of unilateral acts.

228. On the contrary, he was of the view that the object and purpose of a treaty could not be resorted to in order to interpret a unilateral act, the reasoning being that it dealt with terms specifically applicable to treaty relations. The Special Rapporteur was of the view that the supplementary means of interpretation, such as the preparatory work and the circumstances under which a unilateral act takes place, could be considered when interpreting the act. In the case of the preparatory work, though difficult to obtain in many cases, it could nonetheless be useful as a subsidiary recourse of interpretation, as jurisprudence cited in the report indicated. There was also practice by international tribunals of resort to the circumstances in order to interpret the intent of a State making a unilateral act.

229. Finally, the Special Rapporteur indicated that the two draft articles he proposed,[1156] on a general rule of interpretation and on supplementary means of interpretation, were based on the Vienna provisions yet had been modified to the specificity of the unilateral act.

### 2. Summary of the debate

230. Some members reiterated the importance of the topic and expressed satisfaction with references made in the report to doctrine and judicial decisions on unilateral acts, though it was also stated that additional factual infor-

[1156] Draft article (*a*) reads as follows:

"*Article (*a*). General rule of interpretation*

"1. A unilateral act shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the declaration in their context and in the light of the intention of the author State.

"2. The context for the purpose of the interpretation of a unilateral act shall comprise, in addition to the text, its preamble and annexes.

"3. There shall be taken into account, together with the context, any subsequent practice followed in the application of the act and any relevant rules of international law applicable in the relations between the author State or States and the addressee State or States."

Draft article (*b*) reads as follows:

"*Article (*b*). Supplementary means of interpretation*

"Recourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of the formulation of the act, in order to confirm the meaning resulting from the application of article (*a*), or to determine the meaning when the interpretation according to article (*a*):

"(*a*) Leaves the meaning ambiguous or obscure; or

"(*b*) Leads to a result which is manifestly absurd or unreasonable."

mation on the cases cited would be most helpful in analysing the legal validity and effects of unilateral acts.

231. It was said that more attention could be given to the incidence of unilateral acts, though it was acknowledged that this could prove rather complicated since tribunals resort to unilateral acts when there is not much else for them to rely on.

232. Some members were of the view that the topic of unilateral acts was unfit for codification, especially in the light of the difficulties encountered in defining and classifying the acts. They felt that the emphasis placed on the autonomy of the acts and the concept of the "act" continued to pose difficulties; in this connection preference was voiced to speak of a "matrix of State conduct" which requires some kind of reaction by another State.

233. It was also stated that continued discussion on highly theoretical issues related to the topic tended to diminish the relative and fragile clarity which had been achieved and, in this connection, the point was made that approaching the topic in more practical terms could be more conducive to making progress on it.

234. As regards the scope of the topic, the point was made that it remained too narrow and that it should be expanded to include non-autonomous unilateral acts. In addition, hope was expressed that the issues of estoppel, particularly its relationship with waivers, and silence could be elaborated upon further. Nonetheless, support was also voiced for maintaining a restrictive definition of unilateral acts encompassing acts which create rights and obligations as a source of international law.

235. Attention was drawn to the fact that in some cases, such as effective occupation, a series of unilateral acts was needed in order for legal effects to occur, while the fourth report seemed to restrict itself to single unilateral acts. Doubts were also expressed regarding the relevance of referring to interpretative declarations and to countermeasures in the context of unilateral acts.

236. Different views were expressed regarding the classification of unilateral acts proposed by the Special Rapporteur. According to one view, there were acts which could fall under both categories, such as a declaration of neutrality according to which a State assumed not only obligations but also reaffirmed its rights, or a declaration of war. Another view considered that the second category proposed, that of unilateral acts by which a State reaffirmed rights, needed to be expanded so as to encompass acts which create or affirm rights. Still another view expressed serious doubts about the classification proposed, particularly the second category where additional light was needed on the concept of reaffirmation of rights; for example whether this category would include reaffirmation of rights over territories. It was also stated that the jurisprudence did not reflect the categories of unilateral acts which tend to feature in doctrine.

237. The point was also made that it would be possible to elaborate additional criteria for classification of unilateral acts, as suggested by some States. This could, in turn, serve to draw up a set of draft articles on the basis of the jurisprudence of ICJ and State practice; the Special Rapporteur could then consider drafting separate guidelines showing to which category a general rule may or may not be applicable.

238. A contrary view was expressed in the sense that classification itself was not all that important and even created unnecessary confusion; in this connection, it was noted that the jurisprudence on the topic had attached much greater importance to determining whether the act was binding in nature, not the type of act involved.

239. Divergent views were expressed on the proposal by the Special Rapporteur for draft articles on the interpretation of unilateral acts. According to one view, it was premature to deal with the issue of interpretation since such an endeavour could wait until a comprehensive set of draft articles has been prepared.

240. It was also noted that the word "interpretation" was used in two ways in chapter II of the fourth report: both as signifying the methodology of inquiring into whether an act was unilateral and only secondarily in its usual sense. The point was also made that the report seemed to mix the determination of criteria used to establish whether an act was indeed of a unilateral nature with the interpretation *stricto senso* of a unilateral act.

241. While some members shared the view of the Special Rapporteur that the provisions of the 1969 and 1986 Vienna Conventions could serve as a basis for developing rules of interpretation for unilateral acts, others felt that the said provisions were too general to be of use for that purpose. The provisions of the Conventions could not be followed by analogy due to the rather unique nature of unilateral acts; for example, the preparatory work in the case of unilateral acts could go back several decades. Hence any reliance on the said provisions should be minimal.

242. It was stated that, among the rules for interpretation, one analogous to the basic rule established with regard to treaties by article 31, paragraph 1, of the 1969 Vienna Convention could be drafted to the effect that an act should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the act in their context and in the light of its object.

243. The point was made that a reference to the object and purpose of a unilateral act should not be omitted for the purposes of interpretation. In this regard, it was noted that a State's intention when engaging in a unilateral act was relevant in two situations: in determining the existence of a unilateral act, a question that had been central to the *Nuclear Tests*[1157] case, and in determining how the act was to be interpreted, although a clear distinction between the two questions cannot always be made.

244. It was stated that the suggested draft articles contained some contradictory elements in that they posed intention as a primary criterion yet placed among the supplementary means of interpretation the main ways in which intention could be asserted in connection with a

[1157] See footnote 196 above.

unilateral act, namely preparatory work and the circumstances at the time of the formulation of the act. Some doubts were expressed on giving paramount importance to intention in the interpretation of unilateral acts and consequently preference was voiced for the approach of ICJ to give due regard to intention without interpreting unilateral acts in the light of intention. States other than the author State were entitled to rely on the act *per se*, not on the intention which might be subjective and, in many cases, quite elusive. However, according to one view, the real will of the author State should constitute the decisive factor in the interpretation of unilateral acts since, in many cases, the contents of the unilateral act did not correspond to the State's real will, since it was adopted under strong pressure by other States or international public opinion and committed the State in a manner that went beyond what it might really consider necessary. There was thus a dichotomy between the real will and the declared will of the State, a matter which favoured adopting a restrictive interpretation of the unilateral act.

245. It was noted that draft article 1 on unilateral acts does not restrict such acts to a written form and that, subject to maintaining the said definition, the rules for interpretation would need to be tailored accordingly since the provisions of the 1969 Vienna Convention are limited to written agreements. It was also indicated that, unlike the case of treaties, greater emphasis should be given to subjective interpretation in the case of unilateral acts.

246. Some doubts were expressed regarding the application of the concept of a preamble to unilateral acts. With regard to the context as a means of interpretation of a unilateral act, it was stated that the concept should be broadened in the case of unilateral acts taken in relation to treaties.

247. Some members were of the view that the preparatory work as a complementary means to interpret a unilateral act was acceptable with the proviso that it be reasonably accessible to the State entitled to rely on the act.

248. Several drafting suggestions were made regarding the two draft articles proposed. Several members supported the preparation by the Special Rapporteur of a report containing a consolidated text of the draft articles he had proposed so far and revisions of the two new draft articles on interpretation, taking into account the views expressed in the Commission.

### 3. Special Rapporteur's concluding remarks

249. In summarizing the debate, the Special Rapporteur noted that, although some doubts remained in the context of the complexities entailed in developing the topic, most members were convinced of the importance of unilateral acts and felt that the topic could be pursued.

250. On the issue of classification of unilateral acts, the Special Rapporteur expressed his preference for the proposal put forward in his fourth report, though he did not exclude the possibility of studying, at a future time, the classical unilateral acts referred to in the doctrine. The structure of the set of draft articles should be based on the classification of the acts and a criterion of legal effects seemed valid; this would not, however, exclude an analysis of the effects of each unilateral act.

251. As regards the issue of State practice, his view was that some of it had been reflected in the jurisprudence, but agreed on the need to obtain additional evidence of such practice. In this connection, he indicated that the Working Group was considering the preparation of questions inviting States to provide additional information on State practice on unilateral acts.

252. Concerning the rules for the interpretation of unilateral acts, the Special Rapporteur reiterated his view that they were applicable to all kinds of unilateral acts and could therefore be included in the general part of the set of draft articles. He agreed with the need to differentiate between the declared will and the real will of a State, but emphasized that the former gave much more legal certainty and security to international legal relations.

253. As regards the fact that the preparatory work was not necessarily accessible to all but the author State, thus placing other States in a disadvantaged position, the Special Rapporteur suggested that the preparatory work be considered as part of the relevant circumstances under which the unilateral act took place.

### 4. The Working Group

254. At its 2695th meeting, on 25 July 2001, the Commission established an open-ended Working Group. The Working Group on unilateral acts of States, chaired by the Special Rapporteur, held two meetings, on 25 July and 1 August 2001. The Commission, at its 2701st meeting on 3 August 2001, took note of the oral report of the Chairman of the Working Group. On the recommendation of the Working Group, the Commission requested that the Secretariat circulate a questionnaire to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts.

# Chapter IX

# OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

## A. Programme, procedures and working methods of the Commission, and its documentation

255. At its 2676th meeting, on 15 May 2001, the Commission established a Planning Group for the entire session.[1158]

256. The Planning Group held three meetings. It discussed section F, "Other decisions and conclusions of the Commission" (A/CN.4/513), of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session.

257. At its 2695th meeting, on 25 July 2001, the Commission took note of the oral report of the Planning Group.

258. The Planning Group considered a proposal on elections to the Commission. The Planning Group was unable to take a decision on the proposal at the present session because it was of the opinion that the matter warranted more in-depth consideration.

259. Having taken note of paragraph 8 of General Assembly resolution 55/152 and in order to use the available time more efficiently, the Commission decided, on the recommendation of the Planning Group, to give priority during the first week of the first part of its fifty-fourth session to the appointment of two Special Rapporteurs on two of the five topics included in its long-term programme of work.[1159]

260. In response to the request made by the General Assembly in paragraph 13 of its resolution 55/152, the Commission made an effort to implement cost-saving measures by organizing its programme of work in such a way as to set aside the first week of the second part of its session for the Working Group on the commentaries to the draft articles on State responsibility. The Working Group, chaired by Mr. Melescanu, was composed of only 12 members of the Commission and engaged in useful preliminary review of commentaries on the topic of State responsibility.

[1158] For the composition of the Planning Group, see paragraph 5 above.

[1159] *Yearbook ... 2000*, vol. II (Part Two), p. 131, document A/55/10, para. 729.

## B. Date and place of the fifty-fourth session

261. The Commission decided to hold a 10-week split session, which will take place at the United Nations Office at Geneva from 29 April to 7 June and from 22 July to 16 August 2002.

## C. Cooperation with other bodies

262. At its 2698th meeting, on 30 July 2001, Mr. Gilbert Guillaume, President of ICJ, addressed the Commission and informed it of the Court's recent activities and of the cases currently before it. An exchange of views followed. The Commission finds this ongoing exchange of views with the Court very useful and rewarding.

263. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Gerardo Trejos Salas. Mr. Trejos Salas addressed the Commission at its 2673rd meeting, on 4 May 2001, and his statement is recorded in the summary record of that meeting.

264. The European Committee on Legal Cooperation and the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe were represented at the present session of the Commission by Mr. Rafael Benítez. Mr. Benítez addressed the Commission at its 2700th meeting, on 2 August 2001, and his statement is recorded in the summary record of that meeting.

265. The Asian-African Legal Consultative Organization was represented at the present session of the Commission by its Secretary-General, Mr. Wafik Kamil. Mr. Kamil addressed the Commission at its 2703rd meeting, on 6 August 2001, and his statement is recorded in the summary record of that meeting.

266. On 2 August 2001, an informal exchange of views was held between members of the Commission and members of the legal services of ICRC on topics of mutual interest to the two institutions.

## D. Representation at the fifty-sixth session of the General Assembly

267. The Commission decided that it should be represented at the fifty-sixth session of the General Assembly by its Chairman, Mr. Peter Kabatsi.

268. Moreover, at its 2710th meeting, on 10 August 2001, the Commission requested Mr. James Crawford, Special Rapporteur on the topic of State responsibility, to attend the fifty-sixth session of the General Assembly under the terms of paragraph 5 of Assembly resolution 44/35 of 4 December 1989.

### E. International Law Seminar

269. Pursuant to General Assembly resolution 55/152, the thirty-seventh session of the International Law Seminar was held at the Palais des Nations from 2 to 20 July 2001, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing a diplomatic or academic career or posts in the civil service in their country.

270. Twenty-four participants of different nationalities, mostly from developing countries, were able to take part in the session.[1160] The participants in the Seminar observed plenary meetings of the Commission, attended specially arranged lectures and participated in working groups on specific topics.

271. The Seminar was opened by the Commission's Second Vice-President, Mr. Enrique Candioti. Mr. Ulrich von Blumenthal, Senior Legal Officer of the United Nations Office at Geneva, was responsible for the administration, organization and conduct of the Seminar.

272. The following lectures were given by members of the Commission: Mr. Víctor Rodríguez Cedeño: "Unilateral acts of States"; Mr. Ian Brownlie: "The work of the International Court of Justice"; Mr. Gerhard Hafner: "The International Criminal Court"; Mr. Bruno Simma: "Human rights and the International Law Commission"; Mr. Pemmaraju Sreenivasa Rao: "International liability for injurious consequences arising out of acts not prohibited by international law"; and Mr. James Crawford: "State responsibility".

273. Lectures were also given by Mr. Georges Abi-Saab: "WTO dispute settlement mechanism compared with other jurisdictions"; and Mr. Arnold Pronto, Associate Legal Officer, Office of Legal Affairs: "The work of the International Law Commission". A whole day was devoted to a visit to the European Organization for Nuclear Research (CERN), at the invitation of its Legal Counsel, Mr. Jean-Marie Dufour. The discussion focused on legal matters related to CERN. The participants in the Seminar had the opportunity to attend the opening of the High-Level Segment of the Economic and Social Council and to listen to the statement by the Secretary-General of the United Nations.

274. The participants in the Seminar were assigned to one of three working groups for the study of particular topics under the guidance of members of the Commission, as follows: "Shared natural resources" (Mr. Hafner); "Diplomatic protection of corporations" (Mr. Dugard); and "Responsibility of international organizations and member States" (Mr. Gaja). Each group presented its findings to the Seminar. The participants were also assigned to other working groups, whose main task was to prepare the discussions following each lecture and submit written summary reports on those lectures. A collection of the reports was compiled and distributed to the participants.

275. The participants were also given the opportunity to make use of the facilities of the United Nations Library.

276. The Republic and Canton of Geneva offered its traditional hospitality to the participants, with a guided visit of the Alabama and Grand Council rooms, followed by a reception.

277. Mr. Peter Kabatsi, Chairman of the Commission, Mr. Ulrich von Blumenthal, on behalf of the United Nations Office at Geneva, and Ms. Elana Geddis (New Zealand), on behalf of the participants, addressed the Commission and the participants at the close of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the thirty-seventh session of the Seminar.

278. The Commission noted with particular appreciation that the Governments of Austria, Finland, Germany, Switzerland and the United Kingdom had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. This year, full fellowships (travel and subsistence allowance) were awarded to 16 participants and partial fellowships (covering either the subsistence allowance or travel) to 6 participants.

279. Of the 831 participants, representing 150 nationalities, who have taken part in the Seminar since 1965, the year of its inception, 483 have received a fellowship.

280. The Commission stresses the importance it attaches to the sessions of the Seminar, which enable young lawyers, especially from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2002 with as broad a participation as possible. It should be emphasized that, as

[1160] The list of participants in the thirty-seventh session of the International Law Seminar is as follows: Ms. Minerva Acosta (Dominican Republic); Ms. Simona Alexova (Bulgaria); Ms. Uma Sekkar Balasighamani (India); Mr. Alvaro Henry Campos Solorzano (El Salvador); Ms. Sandra Charris Rebellon (Colombia); Mr. José Luis Fernandez Valoni (Argentina); Ms. Tatyana Friedrich (Brazil); Ms. Elana Geddis (New Zealand); Ms. Tira Greene (Trinidad and Tobago); Ms. Idil Isil Gul (Turkey); Ms. Xiaomei Guo (China); Mr. Guy Martial Hangui (Cameroon); Mr. Lauri Mälksoo (Estonia); Mr. Zéphyrin Maniratanga (Burundi); Mr. Yuri Marchenko (Belarus); Mr. Ivon Mingashang (Congo); Mr. Duc Pham Huu (Viet Nam); Mr. Rajesh Poudyal (Nepal); Mr. Phenyo Rakate (South Africa); Ms. Marie-Gisèle Ranampy (Madagascar); Mr. Ilia Ratchkov (Russian Federation); Mr. Nouhoum Sangare (Mali); Mr. Barita Saragih (Indonesia); and Mr. Stephan Wittich (Austria). A Selection Committee, under the Chairmanship of Professor Georges Abi-Saab (Honorary Professor, Graduate Institute of International Studies, Geneva), met on 9 May 2001 and selected 24 candidates out of 108 applications for participation in the Seminar.

there are fewer and fewer contributions, the organizers of the Seminar have had to draw on the reserve of the Fund this year. Should this trend continue, it is to be feared that the resources of the Fund will no longer allow as many fellowships to be awarded.

281. The Commission noted with satisfaction that, in 2001, comprehensive interpretation services were made available to the Seminar. It expressed the hope that the same services would be provided for the Seminar at the next session, despite financial constraints.

## CHECKLIST OF DOCUMENTS OF THE FIFTY-THIRD SESSION

| *Documents* | *Title* | *Observations and references* |
|---|---|---|
| A/CN.4/512 | Provisional agenda | Mimeographed. For agenda as adopted, see p. 16, para. 10 above. |
| A/CN.4/513 | Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-fifth session of the General Assembly | Mimeographed. |
| A/CN.4/514 [and Corr.1] | Second report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur | Reproduced in *Yearbook … 2001*, vol. II (Part One). |
| A/CN.4/515 and Add.1–3 | State responsibility: comments and observations received from Governments | *Idem.* |
| A/CN.4/516 | International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities): comments and observations received from Governments | *Idem.* |
| A/CN.4/517 and Add.1 | Fourth report on State responsibility, by Mr. James Crawford, Special Rapporteur | *Idem.* |
| A/CN.4/518 and Add.1–3 | Sixth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur | *Idem.* |
| A/CN.4/519 | Fourth report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur | *Idem.* |
| A/CN.4/L.601 [and Corr.1 and 2] | International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities). Draft preamble and draft articles adopted by the Drafting Committee on second reading | Reproduced in *Yearbook … 2001*, vol. I, summary record of the 2675th meeting (para. 3). |
| A/CN.4/L.602/Rev.1 | State responsibility. Titles and texts of the draft articles adopted by the Drafting Committee on second reading | Mimeographed. For the final text, see p. 26 above. |
| A/CN.4/L.603 [and Corr.1 and 2] | Reservations to treaties. Titles and texts of the draft guidelines adopted by the Drafting Committee: guidelines 2.2.1, 2.2.2 [2.2.3], 2.2.3 [2.2.4], 2.3.1, 2.3.2, 2.3.3, 2.3.4, 2.4.3, 2.4.4 [2.4.5], 2.4.5 [2.4.4], 2.4.6 [2.4.7] and 2.4.7 [2.4.8] | Reproduced in *Yearbook … 2001*, vol. I, summary record of the 2694th meeting (para. 1). |
| A/CN.4/L.604 | Draft report of the International Law Commission on the work of ts fifty-third session: chapter I (Organization of the session) | Mimeographed. For the adopted text, see *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10). For the final text, see p. 15 above. |
| A/CN.4/L.605 | *Idem*: chapter II (Summary of the work of the Commission at its fifty-third session) | *Idem*, see p. 17 above. |
| A/CN.4/L.606 and Add.1–2 | *Idem*: chapter III (Specific issues on which comments would be of particular interest to the Commission) | *Idem*, see p. 18 above. |

| *Documents* | *Title* | *Observations and references* |
|---|---|---|
| A/CN.4/L.607 and Add.1 [and Corr.1] | *Idem*: chapter IV (International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)) | *Idem*, see p. 144 above. |
| A/CN.4/L.608 [and Corr.1] and Add.1 [and Corr.1] and Add. 2–10 | *Idem*: chapter V (State responsibility) | *Idem*, see p. 20 above. |
| A/CN.4/L.609 and Add.1–5 | *Idem*: chapter VI (Reservations to treaties) | *Idem*, see p.171 above. |
| A/CN.4/L.610 | *Idem*: chapter VII (Diplomatic protection) | *Idem*, see p. 196 above. |
| A/CN.4/L.611 | *Idem*: chapter VIII (Unilateral acts of States) | *Idem*, see p. 202 above. |
| A/CN.4/L.612 | *Idem*: chapter IX (Other decisions and conclusions of the Commission) | *Idem*, see p. 206 above. |
| A/CN.4/SR.2665 A/CN.4/SR.2710 | Provisional summary records of the 2665th to 2710th meetings | Mimeographed. The final text appears in *Yearbook … 2001*, vol. I. |

# Annex 23

COUR INTERNATIONALE DE JUSTICE

# RECUEIL DES ARRÊTS, AVIS CONSULTATIFS ET ORDONNANCES

# 1980

INTERNATIONAL COURT OF JUSTICE

# REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN

(UNITED STATES OF AMERICA *v.* IRAN)

**JUDGMENT OF 24 MAY 1980**

# 1980

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE RELATIVE AU PERSONNEL DIPLOMATIQUE ET CONSULAIRE DES ÉTATS-UNIS À TÉHÉRAN

(ÉTATS-UNIS D'AMÉRIQUE c. IRAN)

**ARRÊT DU 24 MAI 1980**

Official citation :

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JUDGMENT

# CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN (UNITED STATES OF AMERICA *v.* IRAN)

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24 MAI 1980

ARRÊT

INTERNATIONAL COURT OF JUSTICE

1980
24 May
General List
No. 64

YEAR 1980

**24 May 1980**

# CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN

(UNITED STATES OF AMERICA *v.* IRAN)

*Article 53 of the Statute — Proof of Facts — Admissibility of Proceedings — Existence of wider political dispute no bar to legal proceedings — Security Council proceedings no restriction on functioning of the Court — Fact-finding commission established by Secretary-General.*

*Jurisdiction of the Court — Optional Protocols to Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations — 1955 Treaty of Amity, Economic Relations and Consular Rights (USA / Iran) — Provision for recourse to Court unless parties agree to "settlement by some other pacific means" — Right to file unilateral Application — Whether counter-measures a bar to invoking Treaty of Amity.*

*State responsibility for violations of Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations — Action by persons not acting on behalf of State — Non-imputability thereof to State — Breach by State of obligation of protection — Subsequent decision to maintain situation so created on behalf of State — Use of situation as means of coercion.*

*Question of special circumstances as possible justification of conduct of State — Remedies provided for by diplomatic law for abuses.*

*Cumulative effect of successive breaches of international obligations — Fundamental character of international diplomatic and consular law.*

## JUDGMENT

*Present :* *President* Sir Humphrey WALDOCK ; *Vice-President* ELIAS ; *Judges* FORSTER, GROS, LACHS, MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, TARAZI, ODA, AGO, EL-ERIAN, SETTE-CAMARA, BAXTER ; *Registrar* AQUARONE.

In the case concerning United States Diplomatic and Consular Staff in Tehran,

*between*

the United States of America,

represented by

The Honorable Roberts B. Owen, Legal Adviser, Department of State,

as Agent,

H.E. Mrs. Geri Joseph, Ambassador of the United States of America to the Netherlands,

as Deputy Agent,

Mr. Stephen M. Schwebel, Deputy Legal Adviser, Department of State,

as Deputy Agent and Counsel,

Mr. Thomas J. Dunnigan, Counsellor, Embassy of the United States of America,

as Deputy Agent,

assisted by

Mr. David H. Small, Assistant Legal Adviser, Department of State,
Mr. Ted L. Stein, Attorney-Adviser, Department of State,
Mr. Hugh V. Simon, Jr., Second Secretary, Embassy of the United States of America,

as Advisers,

*and*

the Islamic Republic of Iran,

THE COURT,

composed as above,

*delivers the following Judgment :*

1. On 29 November 1979, the Legal Adviser of the Department of State of the United States of America handed to the Registrar an Application instituting proceedings against the Islamic Republic of Iran in respect of a dispute concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals.

2. Pursuant to Article 40, paragraph 2, of the Statute and Article 38, paragraph 4, of the Rules of Court, the Application was at once communicated to the Government of Iran. In accordance with Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, the Secretary-General of the United Nations, the Members of the United Nations, and other States entitled to appear before the Court were notified of the Application.

3. On 29 November 1979, the same day as the Application was filed, the

Government of the United States filed in the Registry of the Court a request for the indication of provisional measures under Article 41 of the Statute and Article 73 of the Rules of Court. By an Order dated 15 December 1979, and adopted unanimously, the Court indicated provisional measures in the case.

4. By an Order made by the President of the Court dated 24 December 1979, 15 January 1980 was fixed as the time-limit for the filing of the Memorial of the United States, and 18 February 1980 as the time-limit for the Counter-Memorial of Iran, with liberty for Iran, if it appointed an Agent for the purpose of appearing before the Court and presenting its observations on the case, to apply for reconsideration of such time-limit. The Memorial of the United States was filed on 15 January 1980, within the time-limit prescribed, and was communicated to the Government of Iran ; no Counter-Memorial was filed by the Government of Iran, nor was any agent appointed or any application made for reconsideration of the time-limit.

5. The case thus became ready for hearing on 19 February 1980, the day following the expiration of the time-limit fixed for the Counter-Memorial of Iran. In circumstances explained in paragraphs 41 and 42 below, and after due notice to the Parties, 18 March 1980 was fixed as the date for the opening of the oral proceedings ; on 18, 19 and 20 March 1980, public hearings were held, in the course of which the Court heard the oral argument of the Agent and Counsel of the United States ; the Government of Iran was not represented at the hearings. Questions were addressed to the Agent of the United States by Members of the Court both during the course of the hearings and subsequently, and replies were given either orally at the hearings or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court.

6. On 6 December 1979, the Registrar addressed the notifications provided for in Article 63 of the Statute of the Court to the States which according to information supplied by the Secretary-General of the United Nations as depositary were parties to one or more of the following Conventions and Protocols :

*(a)* the Vienna Convention on Diplomatic Relations of 1961 ;
*(b)* the Optional Protocol to that Convention concerning the Compulsory Settlement of Disputes ;
*(c)* the Vienna Convention on Consular Relations of 1963 ;
*(d)* the Optional Protocol to that Convention concerning the Compulsory Settlement of Disputes ;
*(e)* the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973.

7. The Court, after ascertaining the views of the Government of the United States on the matter, and affording the Government of Iran the opportunity of making its views known, decided pursuant to Article 53, paragraph 2, of the Rules of Court that copies of the pleadings and documents annexed should be made accessible to the public with effect from 25 March 1980.

8. In the course of the written proceedings the following submissions were presented on behalf of the Government of the United States of America :

in the Application :

"The United States requests the Court to adjudge and declare as follows :

*(a)* That the Government of Iran, in tolerating, encouraging, and failing to prevent and punish the conduct described in the preceding Statement of Facts, violated its international legal obligations to the United States as provided by
- Articles 22, 24, 25, 27, 29, 31, 37 and 47 of the Vienna Convention on Diplomatic Relations,
- Articles 28, 31, 33, 34, 36 and 40 of the Vienna Convention on Consular Relations,
- Articles 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and
- Articles II (4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, and
- Articles 2 (3), 2 (4) and 33 of the Charter of the United Nations ;

*(b)* That pursuant to the foregoing international legal obligations, the Government of Iran is under a particular obligation immediately to secure the release of all United States nationals currently being detained within the premises of the United States Embassy in Tehran and to assure that all such persons and all other United States nationals in Tehran are allowed to leave Iran safely ;

*(c)* That the Government of Iran shall pay to the United States, in its own right and in the exercise of its right of diplomatic protection of its nationals, reparation for the foregoing violations of Iran's international legal obligations to the United States, in a sum to be determined by the Court ; and

*(d)* That the Government of Iran submit to its competent authorities for the purpose of prosecution those persons responsible for the crimes committed against the premises and staff of the United States Embassy and against the premises of its Consulates" ;

in the Memorial :

"The Government of the United States respectfully requests that the Court adjudge and declare as follows :

*(a)* that the Government of the Islamic Republic of Iran, in permitting, tolerating, encouraging, adopting, and endeavouring to exploit, as well as in failing to prevent and punish, the conduct described in the Statement of the Facts, violated its international legal obligations to the United States as provided by :
- Articles 22, 24, 25, 26, 27, 29, 31, 37, 44 and 47 of the Vienna Convention on Diplomatic Relations ;
- Articles 5, 27, 28, 31, 33, 34, 35, 36, 40 and 72 of the Vienna Convention on Consular Relations ;

- Article II (4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran ; and
- Articles 2, 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents ;

*(b)* that, pursuant to the foregoing international legal obligations :

(i) the Government of the Islamic Republic of Iran shall immediately ensure that the premises at the United States Embassy, Chancery and Consulates are restored to the possession of the United States authorities under their exclusive control, and shall ensure their inviolability and effective protection as provided for by the treaties in force between the two States, and by general international law ;

(ii) the Government of the Islamic Republic of Iran shall ensure the immediate release, without any exception, of all persons of United States nationality who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or who are or have been held as hostages elsewhere, and afford full protection to all such persons, in accordance with the treaties in force between the two States, and with general international law ;

(iii) the Government of the Islamic Republic of Iran shall, as from that moment, afford to all the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled under the treaties in force between the two States, and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran ;

(iv) the Government of the Islamic Republic of Iran shall, in affording the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled, including immunity from any form of criminal jurisdiction, ensure that no such personnel shall be obliged to appear on trial or as a witness, deponent, source of information, or in any other role, at any proceedings, whether formal or informal, initiated by or with the acquiescence of the Iranian Government, whether such proceedings be denominated a 'trial', 'grand jury', 'international commission' or otherwise ;

(v) the Government of the Islamic Republic of Iran shall submit to its competent authorities for the purpose of prosecution, or extradite to the United States, those persons responsible for the crimes committed against the personnel and premises of the United States Embassy and Consulates in Iran ;

*(c)* that the United States of America is entitled to the payment to it, in its own right and in the exercise of its right of diplomatic protection of its nationals held hostage, of reparation by the Islamic Republic of Iran for

the violations of the above international legal obligations which it owes to the United States, in a sum to be determined by the Court at a subsequent stage of the proceedings."

9. At the close of the oral proceedings, written submissions were filed in the Registry of the Court on behalf of the Government of the United States of America in accordance with Article 60, paragraph 2, of the Rules of Court ; a copy thereof was transmitted to the Government of Iran. Those submissions were identical with the submissions presented in the Memorial of the United States.

10. No pleadings were filed by the Government of Iran, which also was not represented at the oral proceedings, and no submissions were therefore presented on its behalf. The position of that Government was, however, defined in two communications addressed to the Court by the Minister for Foreign Affairs of Iran ; the first of these was a letter dated 9 December 1979 and transmitted by telegram the same day (the text of which was set out in full in the Court's Order of 15 December 1979, *I.C.J. Reports 1979*, pp. 10-11) ; the second was a letter transmitted by telex dated 16 March 1980 and received on 17 March 1980, the text of which followed closely that of the letter of 9 December 1979 and reads as follows :

*[Translation from French]*

"I have the honour to acknowledge receipt of the telegram concerning the meeting of the International Court of Justice to be held on 17 March 1980 at the request of the Government of the United States of America, and to set forth for you below, once again, the position of the Government of the Islamic Republic of Iran in that respect :

The Government of the Islamic Republic of Iran wishes to express its respect for the International Court of Justice, and for its distinguished Members, for what they have achieved in the quest for a just and equitable solution to legal conflicts between States, and respectfully draws the attention of the Court to the deep-rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters, the examination of whose numerous repercussions is essentially and directly a matter within the national sovereignty of Iran.

The Government of the Islamic Republic of Iran considers that the Court cannot and should not take cognizance of the case which the Government of the United States of America has submitted to it, and in the most significant fashion, a case confined to what is called the question of the 'hostages of the American Embassy in Tehran'.

For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, *inter alia,* more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.

The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon

which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years.

With regard to the request for provisional measures, as formulated by the United States, it in fact implies that the Court should have passed judgment on the actual substance of the case submitted to it, which the Court cannot do without breach of the norms governing its jurisdiction. Furthermore, since provisional measures are by definition intended to protect the interest of the parties, they cannot be unilateral, as they are in the request submitted by the American Government."

The matters raised in those two communications are considered later in this Judgment (paragraphs 33-38 and 81-82).

* * *

11. The position taken up by the Iranian Government in regard to the present proceedings brings into operation Article 53 of the Statute, under which the Court is required *inter alia* to satisfy itself that the claims of the Applicant are well founded in fact. As to this article the Court pointed out in the *Corfu Channel* case that this requirement is to be understood as applying within certain limits :

"While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details ; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded." (*I.C.J. Reports 1949,* p. 248.)

In the present case, the United States has explained that, owing to the events in Iran of which it complains, it has been unable since then to have access to its diplomatic and consular representatives, premises and archives in Iran ; and that in consequence it has been unable to furnish detailed factual evidence on some matters occurring after 4 November 1979. It mentioned in particular the lack of any factual evidence concerning the treatment and conditions of the persons held hostage in Tehran. On this point, however, without giving the names of the persons concerned, it has submitted copies of declarations sworn by six of the 13 hostages who had been released after two weeks of detention and returned to the United States in November 1979.

12. The essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries.

They have been presented to the Court by the United States in its Memorial, in statements of its Agent and Counsel during the oral proceedings, and in written replies to questions put by Members of the Court. Annexed or appended to the Memorial are numerous extracts of statements made by Iranian and United States officials, either at press conferences or on radio or television, and submitted to the Court in support of the request for provisional measures and as a means of demonstrating the truth of the account of the facts stated in the Memorial. Included also in the Memorial is a "Statement of Verification" made by a high official of the United States Department of State having "overall responsibility within the Department for matters relating to the crisis in Iran". While emphasizing that in the circumstances of the case the United States has had to rely on newspaper, radio and television reports for a number of the facts stated in the Memorial, the high official concerned certifies that to the best of his knowledge and belief the facts there stated are true. In addition, after the filing of the Memorial, and by leave of the Court, a large quantity of further documents of a similar kind to those already presented were submitted by the United States for the purpose of bringing up to date the Court's information concerning the continuing situation in regard to the occupation of the Embassy and detention of the hostages.

13. The result is that the Court has available to it a massive body of information from various sources concerning the facts and circumstances of the present case, including numerous official statements of both Iranian and United States authorities. So far as newspaper, radio and television reports emanating from Iran are concerned, the Court has necessarily in some cases relied on translations into English supplied by the Applicant. The information available, however, is wholly consistent and concordant as to the main facts and circumstances of the case. This information, as well as the United States Memorial and the records of the oral proceedings, has all been communicated by the Court to the Iranian Government without having evoked from that Government any denial or questioning of the facts alleged before the Court by the United States. Accordingly, the Court is satisfied that, within the meaning of Article 53 of the Statute, the allegations of fact on which the United States bases its claims in the present case are well founded.

* * *

14. Before examining the events of 4 November 1979, directly complained of by the Government of the United States, it is appropriate to mention certain other incidents which occurred before that date. At about 10.45 a.m. on 14 February 1979, during the unrest in Iran following the fall of the Government of Dr. Bakhtiar, the last Prime Minister appointed by the Shah, an armed group attacked and seized the United States Embassy in Tehran, taking prisoner the 70 persons they found there, including the Ambassador. Two persons associated with the Embassy staff were killed ; serious damage was caused to the Embassy and there were some acts of

pillaging of the Ambassador's residence. On this occasion, while the Iranian authorities had not been able to prevent the incursion, they acted promptly in response to the urgent appeal for assistance made by the Embassy during the attack. At about 12 noon, Mr. Yazdi, then a Deputy Prime Minister, arrived at the Embassy accompanied by a member of the national police, at least one official and a contingent of Revolutionary Guards ; they quelled the disturbance and returned control of the compound to American diplomatic officials. On 11 March 1979 the United States Ambassador received a letter dated 1 March from the Prime Minister, Dr. Bazargan, expressing regrets for the attack on the Embassy, stating that arrangements had been made to prevent any repetition of such incidents, and indicating readiness to make reparation for the damage. Attacks were also made during the same period on the United States Consulates in Tabriz and Shiraz.

15. In October 1979, the Government of the United States was contemplating permitting the former Shah of Iran, who was then in Mexico, to enter the United States for medical treatment. Officials of the United States Government feared that, in the political climate prevailing in Iran, the admission of the former Shah might increase the tension already existing between the two States, and *inter alia* result in renewed violence against the United States Embassy in Tehran, and it was decided for this reason to request assurances from the Government of Iran that adequate protection would be provided. On 21 October 1979, at a meeting at which were present the Iranian Prime Minister, Dr. Bazargan, the Iranian Minister for Foreign Affairs, Dr. Yazdi, and the United States Chargé d'affaires in Tehran, the Government of Iran was informed of the decision to admit the former Shah to the United States, and of the concern felt by the United States Government about the possible public reaction in Tehran. When the United States Chargé d'affaires requested assurances that the Embassy and its personnel would be adequately protected, assurances were given by the Foreign Minister that the Government of Iran would fulfil its international obligation to protect the Embassy. The request for such assurances was repeated at a further meeting the following day, 22 October, and the Foreign Minister renewed his assurances that protection would be provided. The former Shah arrived in the United States on 22 October. On 30 October, the Government of Iran, which had repeatedly expressed its serious opposition to the admission of the former Shah to the United States, and had asked the United States to permit two Iranian physicians to verify the reality and the nature of his illness, requested the United States to bring about his return to Iran. Nevertheless, on 31 October, the Security Officer of the United States Embassy was told by the Commander of the Iranian National Police that the police had been instructed to provide full protection for the personnel of the Embassy.

16. On 1 November 1979, while a very large demonstration was being held elsewhere in Tehran, large numbers of demonstrators marched to and fro in front of the United States Embassy. Under the then existing security arrangements the Iranian authorities normally maintained 10 to 15 uni-

formed policemen outside the Embassy compound and a contingent of Revolutionary Guards nearby ; on this occasion the normal complement of police was stationed outside the compound and the Embassy reported to the State Department that it felt confident that it could get more protection if needed. The Chief of Police came to the Embassy personally and met the Chargé d'affaires, who informed Washington that the Chief was "taking his job of protecting the Embassy very seriously". It was announced on the radio, and by the prayer leader at the main demonstration in another location in the city, that people should not go to the Embassy. During the day, the number of demonstrators at the Embassy was around 5,000, but protection was maintained by Iranian security forces. That evening, as the crowd dispersed, both the Iranian Chief of Protocol and the Chief of Police expressed relief to the Chargé d'affaires that everything had gone well.

17. At approximately 10.30 a.m. on 4 November 1979, during the course of a demonstration of approximately 3,000 persons, the United States Embassy compound in Tehran was overrun by a strong armed group of several hundred people. The Iranian security personnel are reported to have simply disappeared from the scene ; at all events it is established that they made no apparent effort to deter or prevent the demonstrators from seizing the Embassy's premises. The invading group (who subsequently described themselves as "Muslim Student Followers of the Imam's Policy", and who will hereafter be referred to as "the militants") gained access by force to the compound and to the ground floor of the Chancery building. Over two hours after the beginning of the attack, and after the militants had attempted to set fire to the Chancery building and to cut through the upstairs steel doors with a torch, they gained entry to the upper floor ; one hour later they gained control of the main vault. The militants also seized the other buildings, including the various residences, on the Embassy compound. In the course of the attack, all the diplomatic and consular personnel and other persons present in the premises were seized as hostages, and detained in the Embassy compound ; subsequently other United States personnel and one United States private citizen seized elsewhere in Tehran were brought to the compound and added to the number of hostages.

18. During the three hours or more of the assault, repeated calls for help were made from the Embassy to the Iranian Foreign Ministry, and repeated efforts to secure help from the Iranian authorities were also made through direct discussions by the United States Chargé d'affaires, who was at the Foreign Ministry at the time, together with two other members of the mission. From there he made contact with the Prime Minister's Office and with Foreign Ministry officials. A request was also made to the Iranian Chargé d'affaires in Washington for assistance in putting an end to the seizure of the Embassy. Despite these repeated requests, no Iranian secu-

rity forces were sent in time to provide relief and protection to the Embassy. In fact when Revolutionary Guards ultimately arrived on the scene, despatched by the Government "to prevent clashes", they considered that their task was merely to "protect the safety of both the hostages and the students", according to statements subsequently made by the Iranian Government's spokesman, and by the operations commander of the Guards. No attempt was made by the Iranian Government to clear the Embassy premises, to rescue the persons held hostage, or to persuade the militants to terminate their action against the Embassy.

19. During the morning of 5 November, only hours after the seizure of the Embassy, the United States Consulates in Tabriz and Shiraz were also seized ; again the Iranian Government took no protective action. The operation of these Consulates had been suspended since the attack in February 1979 (paragraph 14 above), and therefore no United States personnel were seized on these premises.

20. The United States diplomatic mission and consular posts in Iran were not the only ones whose premises were subjected to demonstrations during the revolutionary period in Iran. On 5 November 1979, a group invaded the British Embassy in Tehran but was ejected after a brief occupation. On 6 November 1979 a brief occupation of the Consulate of Iraq at Kermanshah occurred but was brought to an end on instructions of the Ayatollah Khomeini ; no damage was done to the Consulate or its contents. On 1 January 1980 an attack was made on the Embassy in Tehran of the USSR by a large mob, but as a result of the protection given by the Iranian authorities to the Embassy, no serious damage was done.

21. The premises of the United States Embassy in Tehran have remained in the hands of militants ; and the same appears to be the case with the Consulates at Tabriz and Shiraz. Of the total number of United States citizens seized and held as hostages, 13 were released on 18-20 November 1979, but the remainder have continued to be held up to the present time. The release of the 13 hostages was effected pursuant to a decree by the Ayatollah Khomeini addressed to the militants, dated 17 November 1979, in which he called upon the militants to "hand over the blacks and the women, if it is proven they did not spy, to the Ministry of Foreign Affairs so that they may be immediately expelled from Iran".

22. The persons still held hostage in Iran include, according to the information furnished to the Court by the United States, at least 28 persons having the status, duly recognized by the Government of Iran, of "member of the diplomatic staff" within the meaning of the Vienna Convention on Diplomatic Relations of 1961; at least 20 persons having the status, similarly recognized, of "member of the administrative and technical staff" within the meaning of that Convention ; and two other persons of United States nationality not possessing either diplomatic or consular status. Of the persons with the status of member of the diplomatic staff, four are members of the Consular Section of the Mission.

23. Allegations have been made by the Government of the United States of inhumane treatment of hostages ; the militants and Iranian authorities have asserted that the hostages have been well treated, and have allowed special visits to the hostages by religious personalities and by representatives of the International Committee of the Red Cross. The specific allegations of ill-treatment have not however been refuted. Examples of such allegations, which are mentioned in some of the sworn declarations of hostages released in November 1979, are as follows : at the outset of the occupation of the Embassy some were paraded bound and blindfolded before hostile and chanting crowds ; at least during the initial period of their captivity, hostages were kept bound, and frequently blindfolded, denied mail or any communication with their government or with each other, subjected to interrogation, threatened with weapons.

24. Those archives and documents of the United States Embassy which were not destroyed by the staff during the attack on 4 November have been ransacked by the militants. Documents purporting to come from this source have been disseminated by the militants and by the Government-controlled media.

25. The United States Chargé d'affaires in Tehran and the two other members of the diplomatic staff of the Embassy who were in the premises of the Iranian Ministry of Foreign Affairs at the time of the attack have not left the Ministry since ; their exact situation there has been the subject of conflicting statements. On 7 November 1979, it was stated in an announcement by the Iranian Foreign Ministry that "as the protection of foreign nationals is the duty of the Iranian Government", the Chargé d'affaires was "staying in" the Ministry. On 1 December 1979, Mr. Sadegh Ghotbzadeh, who had become Foreign Minister, stated that

> "it has been announced that, if the U.S. Embassy's chargé d'affaires and his two companions, who have sought asylum in the Iranian Ministry of Foreign Affairs, should leave this ministry, the ministry would not accept any responsibility for them".

According to a press report of 4 December, the Foreign Minister amplified this statement by saying that as long as they remained in the ministry he was personally responsible for ensuring that nothing happened to them, but that "as soon as they leave the ministry precincts they will fall back into the hands of justice, and then I will be the first to demand that they be arrested and tried". The militants made it clear that they regarded the Chargé and his two colleagues as hostages also. When in March 1980 the Public Prosecutor of the Islamic Revolution of Iran called for one of the three diplomats to be handed over to him, it was announced by the Foreign Minister that

> "Regarding the fate of the three Americans in the Ministry of Foreign Affairs, the decision rests first with the imam of the nation [i.e., the Ayatollah Khomeini] ; in case there is no clear decision by the

imam of the nation, the Revolution Council will make a decision on this matter."

26. From the outset of the attack upon its Embassy in Tehran, the United States protested to the Government of Iran both at the attack and at the seizure and detention of the hostages. On 7 November a former Attorney-General of the United States, Mr. Ramsey Clark, was instructed to go with an assistant to Iran to deliver a message from the President of the United States to the Ayatollah Khomeini. The text of that message has not been made available to the Court by the Applicant, but the United States Government has informed the Court that it thereby protested at the conduct of the Government of Iran and called for release of the hostages, and that Mr. Clark was also authorized to discuss all avenues for resolution of the crisis. While he was en route, Tehran radio broadcast a message from the Ayatollah Khomeini dated 7 November, solemnly forbidding members of the Revolutionary Council and all the responsible officials to meet the United States representatives. In that message it was asserted that "the U.S. Embassy in Iran is our enemies' centre of espionage against our sacred Islamic movement", and the message continued :

> "Should the United States hand over to Iran the deposed shah . . . and give up espionage against our movement, the way to talks would be opened on the issue of certain relations which are in the interest of the nation."

Subsequently, despite the efforts of the United Sates Government to open negotiations, it became clear that the Iranian authorities would have no direct contact with representatives of the United States Government concerning the holding of the hostages.

27. During the period which has elapsed since the seizure of the Embassy a number of statements have been made by various governmental authorities in Iran which are relevant to the Court's examination of the responsibility attributed to the Government of Iran in the submissions of the United States. These statements will be examined by the Court in considering these submissions (paragraphs 59 and 70-74 below).

* *

28. On 9 November 1979, the Permanent Representative of the United States to the United Nations addressed a letter to the President of the Security Council, requesting urgent consideration of what might be done to secure the release of the hostages and to restore the "sanctity of diplomatic personnel and establishments". The same day, the President of the Security Council made a public statement urging the release of the hostages, and the President of the General Assembly announced that he was sending a personal message to the Ayatollah Khomeini appealing for their

release. On 25 November 1979, the Secretary-General of the United Nations addressed a letter to the President of the Security Council referring to the seizure of the United States Embassy in Tehran and the detention of its diplomatic personnel, and requesting an urgent meeting of the Security Council "in an effort to seek a peaceful solution to the problem". The Security Council met on 27 November and 4 December 1979 ; on the latter occasion, no representative of Iran was present, but the Council took note of a letter of 13 November 1979 from the Supervisor of the Iranian Foreign Ministry to the Secretary-General. The Security Council then adopted resolution 457 (1979), calling on Iran to release the personnel of the Embassy immediately, to provide them with protection and to allow them to leave the country. The resolution also called on the two Governments to take steps to resolve peacefully the remaining issues between them, and requested the Secretary-General to lend his good offices for the immediate implementation of the resolution, and to take all appropriate measures to that end. It further stated that the Council would "remain actively seized of the matter" and requested the Secretary-General to report to it urgently on any developments with regard to his efforts.

29. On 31 December 1979, the Security Council met again and adopted resolution 461 (1979), in which it reiterated both its calls to the Iranian Government and its request to the Secretary-General to lend his good offices for achieving the object of the Council's resolution. The Secretary-General visited Tehran on 1-3 January 1980, and reported to the Security Council on 6 January. On 20 February 1980, the Secretary-General announced the setting up of a commission to undertake a "fact-finding mission" to Iran. The Court will revert to the terms of reference of this commission and the progress of its work in connection with a question of admissibility of the proceedings (paragraphs 39-40 below).

* *

30. Prior to the institution of the present proceedings, in addition to the approach made by the Government of the United States to the United Nations Security Council, that Government also took certain unilateral action in response to the actions for which it holds the Government of Iran responsible. On 10 November 1979, steps were taken to identify all Iranian students in the United States who were not in compliance with the terms of their entry visas, and to commence deportation proceedings against those who were in violation of applicable immigration laws and regulations. On 12 November 1979, the President of the United States ordered the discontinuation of all oil purchases from Iran for delivery to the United States. Believing that the Government of Iran was about to withdraw all Iranian funds from United States banks and to refuse to accept payment in dollars for oil, and to repudiate obligations owed to the United States and to United States nationals, the President on 14 November 1979 acted to block the very large official Iranian assets in the United States or in United

States control, including deposits both in banks in the United States and in foreign branches and subsidiaries of United States banks. On 12 December 1979, after the institution of the present proceedings, the United States informed the Iranian Chargé d'affaires in Washington that the number of personnel assigned to the Iranian Embassy and consular posts in the United States was to be restricted.

31. Subsequently to the indication by the Court of provisional measures, and during the present proceedings, the United States Government took other action. A draft resolution was introduced into the United Nations Security Council calling for economic sanctions against Iran. When it was put to the vote on 13 January 1980, the result was 10 votes in favour, 2 against, and 2 abstentions (one member not having participated in the voting) ; as a permanent member of the Council cast a negative vote, the draft resolution was not adopted. On 7 April 1980 the United States Government broke off diplomatic relations with the Government of Iran. At the same time, the United States Government prohibited exports from the United States to Iran – one of the sanctions previously proposed by it to the Security Council. Steps were taken to prepare an inventory of the assets of the Government of Iran frozen on 14 November 1979, and to make a census of outstanding claims of American nationals against the Government of Iran, with a view to "designing a program against Iran for the hostages, the hostage families and other U.S. claimants" involving the preparation of legislation "to facilitate processing and paying of these claims" and all visas issued to Iranian citizens for future entry into the United States were cancelled. On 17 April 1980, the United States Government announced further economic measures directed against Iran, prohibited travel there by United States citizens, and made further plans for reparations to be paid to the hostages and their families out of frozen Iranian assets.

32. During the night of 24-25 April 1980 the President of the United States set in motion, and subsequently terminated for technical reasons, an operation within Iranian territory designed to effect the rescue of the hostages by United States military units. In an announcement made on 25 April, President Carter explained that the operation had been planned over a long period as a humanitarian mission to rescue the hostages, and had finally been set in motion by him in the belief that the situation in Iran posed mounting dangers to the safety of the hostages and that their early release was highly unlikely. He stated that the operation had been under way in Iran when equipment failure compelled its termination ; and that in the course of the withdrawal of the rescue forces two United States aircraft had collided in a remote desert location in Iran. He further stated that preparations for the rescue operations had been ordered for humanitarian reasons, to protect the national interests of the United States, and to alleviate international tensions. At the same time, he emphasized that the operation had not been motivated by hostility towards Iran or the Iranian people. The texts of President Carter's announcement and of certain other

official documents relating to the operation have been transmitted to the Court by the United States Agent in response to a request made by the President of the Court on 25 April. Amongst these documents is the text of a report made by the United States to the Security Council on 25 April, "pursuant to Article 51 of the Charter of the United Nations". In that report, the United States maintained that the mission had been carried out by it "in exercise of its inherent right of self-defence with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our Embassy". The Court will refer further to this operation later in the present Judgment (paragraphs 93 and 94 below).

* * *

33. It is to be regretted that the Iranian Government has not appeared before the Court in order to put forward its arguments on the questions of law and of fact which arise in the present case ; and that, in consequence, the Court has not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. Nevertheless, in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, *proprio motu,* any preliminary question, whether of admissibility or of jurisdiction, that appears from the information before it to arise in the case and the decision of which might constitute a bar to any further examination of the merits of the Applicant's case. The Court will, therefore, first address itself to the considerations put forward by the Iranian Government in its letters of 9 December 1979 and 16 March 1980, on the basis of which it maintains that the Court ought not to take cognizance of the present case.

34. The Iranian Government in its letter of 9 December 1979 drew attention to what it referred to as the "deep rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters". The examination of the "numerous repercussions" of the revolution, it added, is "a matter essentially and directly within the national sovereignty of Iran". However, as the Court pointed out in its Order of 15 December 1979,

> "a dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one which by its very nature falls within international jurisdiction" (*I.C.J. Reports 1979,* p. 16, para. 25).

In its later letter of 16 March 1980 the Government of Iran confined itself to repeating the observations on this point which it had made in its letter of 9 December 1979, without putting forward any additional arguments or explanations. In these circumstances, the Court finds it sufficient here to recall and confirm its previous statement on the matter in its Order of 15 December 1979.

35. In its letter of 9 December 1979 the Government of Iran maintained that the Court could not and should not take cognizance of the present case for another reason, namely that the case submitted to the Court by the United States, is "confined to what is called the question of the 'hostages of the American Embassy in Tehran' ". It then went on to explain why it considered this to preclude the Court from taking cognizance of the case :

> "For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, *inter alia,* more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.
>
> The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years. This dossier includes, *inter alia,* all the crimes perpetrated in Iran by the American Government, in particular the *coup d'état* of 1953 stirred up and carried out by the CIA, the overthrow of the lawful national government of Dr. Mossadegh, the restoration of the Shah and of his régime which was under the control of American interests, and all the social, economic, cultural and political consequences of the direct interventions in our internal affairs, as well as grave, flagrant and continuous violations of all international norms, committed by the United States in Iran."

36. The Court, however, in its Order of 15 December 1979, made it clear that the seizure of the United States Embassy and Consulates and the detention of internationally protected persons as hostages cannot be considered as something "secondary" or "marginal", having regard to the importance of the legal principles involved. It also referred to a statement of the Secretary-General of the United Nations, and to Security Council resolution 457 (1979), as evidencing the importance attached by the international community as a whole to the observance of those principles in the present case as well as its concern at the dangerous level of tension between Iran and the United States. The Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important. It further underlined that, if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of

the United States' Application, it was open to that Government to present its own arguments regarding those activities to the Court either by way of defence in a Counter-Memorial or by way of a counter-claim.

37. The Iranian Government, notwithstanding the terms of the Court's Order, did not file any pleadings and did not appear before the Court. By its own choice, therefore, it has forgone the opportunities offered to it under the Statute and Rules of Court to submit evidence and arguments in support of its contention in regard to the "overall problem". Even in its later letter of 16 March 1980, the Government of Iran confined itself to repeating what it had said in its letter of 9 December 1979, without offering any explanations in regard to the points to which the Court had drawn attention in its Order of 15 December 1979. It has provided no explanation of the reasons why it considers that the violations of diplomatic and consular law alleged in the United States' Application cannot be examined by the Court separately from what it describes as the "overall problem" involving "more than 25 years of continual interference by the United States in the internal affairs of Iran". Nor has it made any attempt to explain, still less define, what connection, legal or factual, there may be between the "overall problem" of its general grievances against the United States and the particular events that gave rise to the United States' claims in the present case which, in its view, precludes the separate examination of those claims by the Court. This was the more necessary because legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court ; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.

38. It follows that the considerations and arguments put forward in the Iranian Government's letters of 9 December 1979 and 16 March 1980 do not, in the opinion of the Court, disclose any ground on which it should conclude that it cannot or ought not to take cognizance of the present case.

* *

39. The Court, however, has also thought it right to examine, *ex officio,* whether its competence to decide the present case, or the admissibility of the present proceedings, might possibly have been affected by the setting up of the Commission announced by the Secretary-General of the United

Nations on 20 February 1980. As already indicated, the occupation of the Embassy and detention of its diplomatic and consular staff as hostages was referred to the United Nations Security Council by the United States on 9 November 1979 and by the Secretary-General on 25 November. Four days later, while the matter was still before the Security Council, the United States submitted the present Application to the Court together with a request for the indication of provisional measures. On 4 December, the Security Council adopted resolution 457 (1979) (the terms of which have already been indicated in paragraph 28 above), whereby the Council would "remain actively seized of the matter" and the Secretary-General was requested to report to it urgently on developments regarding the efforts he was to make pursuant to the resolution. In announcing the setting up of the Commission on 20 February 1980, the Secretary-General stated its terms of reference to be "to undertake a fact-finding mission to Iran to hear Iran's grievances and to allow for an early solution of the crisis between Iran and the United States" ; and he further stated that it was to complete its work as soon as possible and submit its report to him. Subsequently, in a message cabled to the President of the Court on 15 March 1980, the Secretary-General confirmed the mandate of the Commission to be as stated in his announcement of 20 February, adding that the Governments of Iran and the United States had "agreed to the establishment of the Commission on that basis". In this message, the Secretary-General also informed the Court of the decision of the Commission to suspend its activities in Tehran and to return to New York on 11 March 1980 "to confer with the Secretary-General with a view to pursuing its tasks which it regards as indivisible". The message stated that while, in the circumstances, the Commission was not in a position to submit its report, it was prepared to return to Tehran, in accordance with its mandate and the instructions of the Secretary-General, when the situation required. The message further stated that the Secretary-General would continue his efforts, as requested by the Security Council, to search for a peaceful solution of the crisis, and would remain in contact with the parties and the Commission regarding the resumption of its work.

40. Consequently, there can be no doubt at all that the Security Council was "actively seized of the matter" and that the Secretary-General was under an express mandate from the Council to use his good offices in the matter when, on 15 December, the Court decided unanimously that it was competent to entertain the United States' request for an indication of provisional measures, and proceeded to indicate such measures. As already mentioned the Council met again on 31 December 1979 and adopted resolution 461 (1979). In the preamble to this second resolution the Security Council expressly took into account the Court's Order of 15 December 1979 indicating provisional measures ; and it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise.

Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute ; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter, paragraph 3 of which specifically provides that :

> "In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."

41. In the present instance the proceedings before the Court continued in accordance with the Statute and Rules of Court and, on 15 January 1980, the United States filed its Memorial. The time-limit fixed for delivery of Iran's Counter-Memorial then expired on 18 February 1980 without Iran's having filed a Counter-Memorial or having made a request for the extension of the time-limit. Consequently, on the following day the case became ready for hearing and, pursuant to Article 31 of the Rules, the views of the Applicant State were requested regarding the date for the opening of the oral proceedings. On 19 February 1980 the Court was informed by the United States Agent that, owing to the delicate stage of negotiations bearing upon the release of the hostages in the United States Embassy, he would be grateful if the Court for the time being would defer setting a date for the opening of the oral proceedings. On the very next day, 20 February, the Secretary-General announced the establishment of the above-mentioned Commission, which commenced its work in Tehran on 23 February. Asked on 27 February to clarify the position of the United States in regard to the future procedure, the Agent stated that the Commission would not address itself to the claims submitted by the United States to the Court. The United States, he said, continued to be anxious to secure an early judgment on the merits, and he suggested 17 March as a convenient date for the opening of the oral proceedings. At the same time, however, he added that consideration of the well-being of the hostages might lead the United States to suggest a later date. The Iranian Government was then asked, in a telex message of 28 February, for any views it might wish to express as to the date for the opening of the hearings, mention being made of 17 March as one possible date. No reply had been received from the Iranian Government when, on 10 March, the Commission, unable to complete its mission, decided to suspend its activities in Tehran and to return to New York.

42. On 11 March, that is immediately upon the departure of the Com-

mission from Tehran, the United States notified the Court of its readiness to proceed with the hearings, suggesting that they should begin on 17 March. A further telex was accordingly sent to the Iranian Government on 12 March informing it of the United States' request and stating that the Court would meet on 17 March to determine the subsequent procedure. The Iranian Government's reply was contained in the letter of 16 March to which the Court has already referred (paragraph 10 above). In that letter, while making no mention of the proposed oral proceedings, the Iranian Government reiterated the reasons advanced in its previous letter of 9 December 1979 for considering that the Court ought not to take cognizance of the case. The letter contained no reference to the Commission, and still less any suggestion that the continuance of the proceedings before the Court might be affected by the existence of the Commission or the mandate given to the Secretary-General by the Security Council. Having regard to the circumstances which the Court has described, it can find no trace of any understanding on the part of either the United States or Iran that the establishment of the Commission might involve a postponement of all proceedings before the Court until the conclusion of the work of the Commission and of the Security Council's consideration of the matter.

43. The Commission, as previously observed, was established to undertake a "fact-finding mission to Iran to hear Iran's grievances and to *allow* for an early solution of the *crisis* between Iran and the United States" (emphasis added). It was not set up by the Secretary-General as a tribunal empowered to decide the matters of fact or of law in dispute between Iran and the United States ; nor was its setting up accepted by them on any such basis. On the contrary, he created the Commission rather as an organ or instrument for mediation, conciliation or negotiation to provide a means of easing the situation of crisis existing between the two countries ; and this, clearly, was the basis on which Iran and the United States agreed to its being set up. The establishment of the Commission by the Secretary-General with the agreement of the two States cannot, therefore, be considered in itself as in any way incompatible with the continuance of parallel proceedings before the Court. Negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement are enumerated together in Article 33 of the Charter as means for the peaceful settlement of disputes. As was pointed out in the *Aegean Sea Continental Shelf* case, the jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement by the Court have been pursued *pari passu*. In that case, in which also the dispute had been referred to the Security Council, the Court held expressly that "the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function" (*I.C.J. Reports 1978*, p. 12, para. 29).

44. It follows that neither the mandate given by the Security Council to the Secretary-General in resolutions 457 and 461 of 1979, nor the setting up of the Commission by the Secretary-General, can be considered as

constituting any obstacle to the exercise of the Court's jurisdiction in the present case. It further follows that the Court must now proceed, in accordance with Article 53, paragraph 2, of the Statute, to determine whether it has jurisdiction to decide the present case and whether the United States' claims are well founded in fact and in law.

* * *

45. Article 53 of the Statute requires the Court, before deciding in favour of an Applicant's claim, to satisfy itself that it has jurisdiction, in accordance with Articles 36 and 37, empowering it to do so. In the present case the principal claims of the United States relate essentially to alleged violations by Iran of its obligations to the United States under the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 on Consular Relations. With regard to these claims the United States has invoked as the basis for the Court's jurisdiction Article I of the Optional Protocols concerning the Compulsory Settlement of Disputes which accompany these Conventions. The United Nations publication *Multilateral Treaties in respect of which the Secretary-General Performs Depository Functions* lists both Iran and the United States as parties to the Vienna Conventions of 1961 and 1963, as also to their accompanying Protocols concerning the Compulsory Settlement of Disputes, and in each case without any reservation to the instrument in question. The Vienna Conventions, which codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexions. Moreover, the Iranian Government has not maintained in its communications to the Court that the two Vienna Conventions and Protocols are not in force as between Iran and the United States. Accordingly, as indicated in the Court's Order of 15 December 1979, the Optional Protocols manifestly provide a possible basis for the Court's jurisdiction, with respect to the United States' claims under the Vienna Conventions of 1961 and 1963. It only remains, therefore, to consider whether the present dispute in fact falls within the scope of their provisions.

46. The terms of Article I, which are the same in the two Protocols, provide :

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

The United States' claims here in question concern alleged violations by Iran of its obligations under several articles of the Vienna Conventions of 1961 and 1963 with respect to the privileges and immunities of the per-

sonnel, the inviolability of the premises and archives, and the provision of facilities for the performance of the functions of the United States Embassy and Consulates in Iran. In so far as its claims relate to two private individuals held hostage in the Embassy, the situation of these individuals falls under the provisions of the Vienna Convention of 1961 guaranteeing the inviolability of the premises of embassies, and of Article 5 of the 1963 Convention concerning the consular functions of assisting nationals and protecting and safeguarding their interests. By their very nature all these claims concern the interpretation or application of one or other of the two Vienna Conventions.

47. The occupation of the United States Embassy by militants on 4 November 1979 and the detention of its personnel as hostages was an event of a kind to provoke an immediate protest from any government, as it did from the United States Government, which despatched a special emissary to Iran to deliver a formal protest. Although the special emissary, denied all contact with Iranian officials, never entered Iran, the Iranian Government was left in no doubt as to the reaction of the United States to the taking over of its Embassy and detention of its diplomatic and consular staff as hostages. Indeed, the Court was informed that the United States was meanwhile making its views known to the Iranian Government through its Chargé d'affaires, who has been kept since 4 November 1979 in the Iranian Foreign Ministry itself, where he happened to be with two other members of his mission during the attack on the Embassy. In any event, by a letter of 9 November 1979, the United States brought the situation in regard to its Embassy before the Security Council. The Iranian Government did not take any part in the debates on the matter in the Council, and it was still refusing to enter into any discussions on the subject when, on 29 November 1979, the United States filed the present Application submitting its claims to the Court. It is clear that on that date there existed a dispute arising out of the interpretation or application of the Vienna Conventions and thus one falling within the scope of Article I of the Protocols.

48. Articles II and III of the Protocols, it is true, provide that within a period of two months after one party has notified its opinion to the other that a dispute exists, the parties may agree either : *(a)* "to resort not to the International Court of Justice but to an arbitral tribunal", or *(b)* "to adopt a conciliation procedure before resorting to the International Court of Justice". The terms of Articles II and III however, when read in conjunction with those of Article I and with the Preamble to the Protocols, make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the

Vienna Convention in question. Articles II and III provide only that, as a substitute for recourse to the Court, the parties *may agree* upon resort either to arbitration or to conciliation. It follows, first, that Articles II and III have no application unless recourse to arbitration or conciliation has been proposed by one of the parties to the dispute and the other has expressed its readiness to consider the proposal. Secondly, it follows that only then may the provisions in those articles regarding a two months' period come into play, and function as a time-limit upon the conclusion of the agreement as to the organization of the alternative procedure.

49. In the present instance, neither of the parties to the dispute proposed recourse to either of the two alternatives, before the filing of the Application or at any time afterwards. On the contrary, the Iranian authorities refused to enter into any discussion of the matter with the United States, and this could only be understood by the United States as ruling out, *in limine*, any question of arriving at an agreement to resort to arbitration or conciliation under Article II or Article III of the Protocols, instead of recourse to the Court. Accordingly, when the United States filed its Application on 29 November 1979, it was unquestionably free to have recourse to Article I of the Protocols, and to invoke it as a basis for establishing the Court's jurisdiction with respect to its claims under the Vienna Conventions of 1961 and 1963.

* *

50. However, the United States also presents claims in respect of alleged violations by Iran of Articles II, paragraph 4, XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and Iran, which entered into force on 16 June 1957. With regard to these claims the United States has invoked paragraph 2 of Article XXI of the Treaty as the basis for the Court's jurisdiction. The claims of the United States under this Treaty overlap in considerable measure with its claims under the two Vienna Conventions and more especially the Convention of 1963. In this respect, therefore, the dispute between the United States and Iran regarding those claims is at the same time a dispute arising out of the interpretation or application of the Vienna Conventions which falls within Article I of their Protocols. It was for this reason that in its Order of 15 December 1979 indicating provisional measures the Court did not find it necessary to enter into the question whether Article XXI, paragraph 2, of the 1955 Treaty might also have provided a basis for the exercise of its jurisdiction in the present case. But taking into account that Article II, paragraph 4, of the 1955 Treaty provides that "nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party . . .", the Court considers that at the present stage of the proceedings that Treaty has importance in regard to the claims of the United States in respect of the two private individuals said to be held

hostage in Iran. Accordingly, the Court will now consider whether a basis for the exercise of its jurisdiction with respect to the alleged violations of the 1955 Treaty may be found in Article XXI, paragraph 2, of the Treaty.

51. Paragraph 2 of that Article reads :

> "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

As previously pointed out, when the United States filed its Application on 29 November 1979, its attempts to negotiate with Iran in regard to the overrunning of its Embassy and detention of its nationals as hostages had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter. In consequence, there existed at that date not only a dispute but, beyond any doubt, a "dispute . . . not satisfactorily adjusted by diplomacy" within the meaning of Article XXI, paragraph 2, of the 1955 Treaty ; and this dispute comprised, *inter alia,* the matters that are the subject of the United States' claims under that Treaty.

52. The provision made in the 1955 Treaty for disputes as to its interpretation or application to be referred to the Court is similar to the system adopted in the Optional Protocols to the Vienna Conventions which the Court has already explained. Article XXI, paragraph 2, of the Treaty establishes the jurisdiction of the Court as compulsory for such disputes, unless the parties *agree* to settlement by some other means. In the present instance, as in the case of the Optional Protocols, the immediate and total refusal of the Iranian authorities to enter into any negotiations with the United States excluded *in limine* any question of an *agreement* to have recourse to "some other pacific means" for the settlement of the dispute. Consequently, under the terms of Article XXI, paragraph 2, the United States was free on 29 November 1979 to invoke its provisions for the purpose of referring its claims against Iran under the 1955 Treaty to the Court. While that Article does not provide in express terms that either party may bring a case to the Court by unilateral application, it is evident, as the United States contended in its Memorial, that this is what the parties intended. Provisions drawn in similar terms are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court, in the absence of agreement to employ some other pacific means of settlement.

53. The point has also been raised whether, having regard to certain counter-measures taken by the United States vis-à-vis Iran, it is open to the United States to rely on the Treaty of Amity, Economic Relations, and

Consular Rights in the present proceedings. However, all the measures in question were taken by the United States after the seizure of its Embassy by an armed group and subsequent detention of its diplomatic and consular staff as hostages. They were measures taken in response to what the United States believed to be grave and manifest violations of international law by Iran, including violations of the 1955 Treaty itself. In any event, any alleged violation of the Treaty by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.

54. No suggestion has been made by Iran that the 1955 Treaty was not in force on 4 November 1979 when the United States Embassy was overrun and its nationals taken hostage, or on 29 November when the United States submitted the dispute to the Court. The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI, paragraph 2, of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Article XXI, paragraph 2, were now to be found not to be open to the parties precisely at the moment when such recourse was most needed. Furthermore, although the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran.

* *

55. The United States has further invoked Article 13 of the Convention of 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, as a basis for the exercise of the Court's jurisdiction with respect to its claims under that Convention. The Court does not, however, find it necessary in the present Judgment to enter into the question whether, in the particular circumstances of the case, Article 13 of that Convention provides a basis for the exercise of the Court's jurisdiction with respect to those claims.

* * *

56. The principal facts material for the Court's decision on the merits of the present case have been set out earlier in this Judgment. Those facts have

to be looked at by the Court from two points of view. First, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable. The events which are the subject of the United States' claims fall into two phases which it will be convenient to examine separately.

57. The first of these phases covers the armed attack on the United States Embassy by militants on 4 November 1979, the overrunning of its premises, the seizure of its inmates as hostages, the appropriation of its property and archives and the conduct of the Iranian authorities in the face of those occurrences. The attack and the subsequent overrunning, bit by bit, of the whole Embassy premises, was an operation which continued over a period of some three hours without any body of police, any military unit or any Iranian official intervening to try to stop or impede it from being carried through to its completion. The result of the attack was considerable damage to the Embassy premises and property, the forcible opening and seizure of its archives, the confiscation of the archives and other documents found in the Embassy and, most grave of all, the seizure by force of its diplomatic and consular personnel as hostages, together with two United States nationals.

58. No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognized "agents" or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf on the State, having been charged by some competent organ of the Iranian State to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the State.

59. Previously, it is true, the religious leader of the country, the Ayatollah Khomeini, had made several public declarations inveighing against the United States as responsible for all his country's problems. In so doing, it would appear, the Ayatollah Khomeini was giving utterance to the general resentment felt by supporters of the revolution at the admission of the former Shah to the United States. The information before the Court also indicates that a spokesman for the militants, in explaining their action afterwards, did expressly refer to a message issued by the Ayatollah Khomeini, on 1 November 1979. In that message the Ayatollah Khomeini had declared that it was "up to the dear pupils, students and theological students to expand with all their might their attacks against the United States and Israel, so they may force the United States to return the deposed and criminal shah, and to condemn this great plot" (that is, a plot to stir up

dissension between the main streams of Islamic thought). In the view of the Court, however, it would be going too far to interpret such general declarations of the Ayatollah Khomeini to the people or students of Iran as amounting to an authorization from the State to undertake the specific operation of invading and seizing the United States Embassy. To do so would, indeed, conflict with the assertions of the militants themselves who are reported to have claimed credit for having devised and carried out the plan to occupy the Embassy. Again, congratulations after the event, such as those reportedly telephoned to the militants by the Ayatollah Khomeini on the actual evening of the attack, and other subsequent statements of official approval, though highly significant in another context shortly to be considered, do not alter the initially independent and unofficial character of the militants' attack on the Embassy.

60. The first phase, here under examination, of the events complained of also includes the attacks on the United States Consulates at Tabriz and Shiraz. Like the attack on the Embassy, they appear to have been executed by militants not having an official character, and successful because of lack of sufficient protection.

61. The conclusion just reached by the Court, that the initiation of the attack on the United States Embassy on 4 November 1979, and of the attacks on the Consulates at Tabriz and Shiraz the following day, cannot be considered as in itself imputable to the Iranian State does not mean that Iran is, in consequence, free of any responsibility in regard to those attacks ; for its own conduct was in conflict with its international obligations. By a number of provisions of the Vienna Conventions of 1961 and 1963, Iran was placed under the most categorical obligations, as a receiving State, to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the freedom of movement of the members of their staffs.

62. Thus, after solemnly proclaiming the inviolability of the premises of a diplomatic mission, Article 22 of the 1961 Convention continues in paragraph 2 :

> *"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." (Emphasis added.)

So, too, after proclaiming that the person of a diplomatic agent shall be inviolable, and that he shall not be liable to any form of arrest or detention, Article 29 provides :

> "The receiving State shall treat him with due respect and *shall take all appropriate steps to prevent any attack on his person, freedom or dignity.*" (Emphasis added.)

The obligation of a receiving State to protect the inviolability of the

archives and documents of a diplomatic mission is laid down in Article 24, which specifically provides that they are to be "inviolable at any time and wherever they may be". Under Article 25 it is required to "accord full facilities for the performance of the functions of the mission", under Article 26 to "ensure to all members of the mission freedom of movement and travel in its territory", and under Article 27 to "permit and protect free communication on the part of the mission for all official purposes". Analogous provisions are to be found in the 1963 Convention regarding the privileges and immunities of consular missions and their staffs (Art. 31, para. 3, Arts. 40, 33, 28, 34 and 35). In the view of the Court, the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law.

63. The facts set out in paragraphs 14 to 27 above establish to the satisfaction of the Court that on 4 November 1979 the 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. They also show that on 5 November 1979 the Iranian Government similarly failed to take appropriate steps for the protection of the United States Consulates at Tabriz and Shiraz. In addition they show, in the opinion of the Court, that the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.

64. The total inaction of the Iranian authorities on that date in face of urgent and repeated requests for help contrasts very sharply with its conduct on several other occasions of a similar kind. Some eight months earlier, on 14 February 1979, the United States Embassy in Tehran had itself been subjected to the armed attack mentioned above (paragraph 14), in the course of which the attackers had taken the Ambassador and his staff prisoner. On that occasion, however, a detachment of Revolutionary Guards, sent by the Government, had arrived promptly, together with a Deputy Prime Minister, and had quickly succeeded in freeing the Ambassador and his staff and restoring the Embassy to him. On 1 March 1979, moreover, the Prime Minister of Iran had sent a letter expressing deep regret at the incident, giving an assurance that appropriate arrangements had been made to prevent any repetition of such incidents, and indicating the willingness of his Government to indemnify the United States for the damage. On 1 November 1979, only three days before the events which gave rise to the present case, the Iranian police intervened quickly and effectively to protect the United States Embassy when a large crowd of demonstrators spent several hours marching up and down outside it. Furthermore, on other occasions in November 1979 and January 1980, invasions or attempted invasions of other foreign embassies in Tehran were frustrated or speedily terminated.

65. A similar pattern of facts appears in relation to consulates. In

February 1979, at about the same time as the first attack on the United States Embassy, attacks were made by demonstrators on its Consulates in Tabriz and Shiraz ; but the Iranian authorities then took the necessary steps to clear them of the demonstrators. On the other hand, the Iranian authorities took no action to prevent the attack of 5 November 1979, or to restore the Consulates to the possession of the United States. In contrast, when on the next day militants invaded the Iraqi Consulate in Kermanshah, prompt steps were taken by the Iranian authorities to secure their withdrawal from the Consulate. Thus in this case, the Iranian authorities and police took the necessary steps to prevent and check the attempted invasion or return the premises to their rightful owners.

66. As to the actual conduct of the Iranian authorities when faced with the events of 4 November 1979, the information before the Court establishes that, despite assurances previously given by them to the United States Government and despite repeated and urgent calls for help, they took no apparent steps either to prevent the militants from invading the Embassy or to persuade or to compel them to withdraw. Furthermore, after the militants had forced an entry into the premises of the Embassy, the Iranian authorities made no effort to compel or even to persuade them to withdraw from the Embassy and to free the diplomatic and consular staff whom they had made prisoner.

67. 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, and Articles 24, 25, 26, 27 and 29 of the 1961 Vienna Convention on Diplomatic Relations, and Articles 5 and 36 of the 1963 Vienna Convention on Consular Relations. Similarly, with respect to the attacks on the Consulates at Tabriz and Shiraz, the inaction of the Iranian authorities entailed clear and serious breaches of its obligations under the provisions of several further articles of the 1963 Convention on Consular Relations. So far as concerns the two private United States nationals seized as hostages by the invading militants, that inaction entailed, albeit incidentally, a breach of its obligations under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights which, in addition to the obligations of Iran existing under general international law, requires the parties to ensure "the most constant protection and security" to each other's nationals in their respective territories.

68. The Court is therefore led inevitably to conclude, in regard to the first phase of the events which has so far been considered, that on 4 November 1979 the Iranian authorities :

*(a)* were fully aware of their obligations under the conventions in force to take appropriate steps to protect the premises of the United States Embassy and its diplomatic and consular staff from any attack and from any infringement of their inviolability, and to ensure the

security of such other persons as might be present on the said premises ;

*(b)* were fully aware, as a result of the appeals for help made by the United States Embassy, of the urgent need for action on their part ;

*(c)* had the means at their disposal to perform their obligations ;

*(d)* completely failed to comply with these obligations.

Similarly, the Court is led to conclude that the Iranian authorities were equally aware of their obligations to protect the United States Consulates at Tabriz and Shiraz, and of the need for action on their part, and similarly failed to use the means which were at their disposal to comply with their obligations.

* *

69. The second phase of the events which are the subject of the United States' claims comprises the whole series of facts which occurred following the completion of the occupation of the United States Embassy by the militants, and the seizure of the Consulates at Tabriz and Shiraz. The occupation having taken place and the diplomatic and consular personnel of the United States' mission having been taken hostage, the action required of the Iranian Government by the Vienna Conventions and by general international law was manifest. Its plain duty was at once to make every effort, and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end, to restore the Consulates at Tabriz and Shiraz to United States control, and in general to re-establish the status quo and to offer reparation for the damage.

70. No such step was, however, taken by the Iranian authorities. At a press conference on 5 November the Foreign Minister, Mr. Yazdi, conceded that "according to international regulations the Iranian Government is dutybound to safeguard the life and property of foreign nationals". But he made no mention of Iran's obligation to safeguard the inviolability of foreign embassies and diplomats ; and he ended by announcing that the action of the students "enjoys the endorsement and support of the government, because America herself is responsible for this incident". As to the Prime Minister, Mr. Bazargan, he does not appear to have made any statement on the matter before resigning his office on 5 November.

71. In any event expressions of approval of the take-over of the Embassy, and indeed also of the Consulates at Tabriz and Shiraz, by militants came immediately from numerous Iranian authorities, including religious, judicial, executive, police and broadcasting authorities. Above all, the Ayatollah Khomeini himself made crystal clear the endorsement by the State both of the take-over of the Embassy and Consulates and of the

detention of the Embassy staff as hostages. At a reception in Qom on 5 November, the Ayatollah Khomeini left his audience in no doubt as to his approval of the action of the militants in occupying the Embassy, to which he said they had resorted "because they saw that the shah was allowed in America". Saying that he had been informed that the "centre occupied by our young men . . . has been a lair of espionage and plotting", he asked how the young people could be expected "simply to remain idle and witness all these things". Furthermore he expressly stigmatized as "rotten roots" those in Iran who were "hoping we would mediate and tell the young people to leave this place". The Ayatollah's refusal to order "the young people" to put an end to their occupation of the Embassy, or the militants in Tabriz and Shiraz to evacuate the United States Consulates there, must have appeared the more significant when, on 6 November, he instructed "the young people" who had occupied the Iraqi Consulate in Kermanshah that they should leave it as soon as possible. The true significance of this was only reinforced when, next day, he expressly forbade members of the Revolutionary Council and all responsible officials to meet the special representatives sent by President Carter to try and obtain the release of the hostages and evacuation of the Embassy.

72. At any rate, thus fortified in their action, the militants at the Embassy at once went one step farther. On 6 November they proclaimed that the Embassy, which they too referred to as "the U.S. centre of plots and espionage", would remain under their occupation, and that they were watching "most closely" the members of the diplomatic staff taken hostage whom they called "U.S. mercenaries and spies".

73. The seal of official government approval was finally set on this situation by a decree issued on 17 November 1979 by the Ayatollah Khomeini. His decree began with the assertion that the American Embassy was "a centre of espionage and conspiracy" and that "those people who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respect". He went on expressly to declare that the premises of the Embassy and the hostages would remain as they were until the United States had handed over the former Shah for trial and returned his property to Iran. This statement of policy the Ayatollah qualified only to the extent of requesting the militants holding the hostages to "hand over the blacks and the women, if it is proven that they did not spy, to the Ministry of Foreign Affairs so that they may be immediately expelled from Iran". As to the rest of the hostages, he made the Iranian Government's intentions all too clear :

> "The noble Iranian nation will not give permission for the release of the rest of them. Therefore, the rest of them will be under arrest until the American Government acts according to the wish of the nation."

74. The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible. On 6 May 1980, the Minister for Foreign Affairs, Mr. Ghotbzadeh, is reported to have said in a television interview that the occupation of the United States Embassy had been "done by our nation". Moreover, in the prevailing circumstances the situation of the hostages was aggravated by the fact that their detention by the militants did not even offer the normal guarantees which might have been afforded by police and security forces subject to the discipline and the control of official superiors.

75. During the six months which have elapsed since the situation just described was created by the decree of the Ayatollah Khomeini, it has undergone no material change. The Court's Order of 15 December 1979 indicating provisional measures, which called for the immediate restoration of the Embassy to the United States and the release of the hostages, was publicly rejected by the Minister for Foreign Affairs on the following day and has been ignored by all Iranian authorities. On two occasions, namely on 23 February and on 7 April 1980, the Ayatollah Khomeini laid it down that the hostages should remain at the United States Embassy under the control of the militants until the new Iranian parliament should have assembled and taken a decision as to their fate. His adherence to that policy also made it impossible to obtain his consent to the transfer of the hostages from the control of the militants to that of the Government or of the Council of the Revolution. In any event, while highly desirable from the humanitarian and safety points of view, such a transfer would not have resulted in any material change in the legal situation, for its sponsors themselves emphasized that it must not be understood as signifying the release of the hostages.

* *

76. The Iranian authorities' decision to continue the subjection of the premises of the United States Embassy to occupation by militants and of the Embassy staff to detention as hostages, clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conven-

tions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises and staff.

77. In the first place, these facts constituted breaches additional to those already committed of paragraph 2 of Article 22 of the 1961 Vienna Convention on Diplomatic Relations which requires Iran to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of its peace or impairment of its dignity. Paragraphs 1 and 3 of that Article have also been infringed, and continue to be infringed, since they forbid agents of a receiving State to enter the premises of a mission without consent or to undertake any search, requisition, attachment or like measure on the premises. Secondly, they constitute continuing breaches of Article 29 of the same Convention which forbids any arrest or detention of a diplomatic agent and any attack on his person, freedom or dignity. Thirdly, the Iranian authorities are without doubt in continuing breach of the provisions of Articles 25, 26 and 27 of the 1961 Vienna Convention and of pertinent provisions of the 1963 Vienna Convention concerning facilities for the performance of functions, freedom of movement and communications for diplomatic and consular staff, as well as of Article 24 of the former Convention and Article 33 of the latter, which provide for the absolute inviolability of the archives and documents of diplomatic missions and consulates. This particular violation has been made manifest to the world by repeated statements by the militants occupying the Embassy, who claim to be in possession of documents from the archives, and by various government authorities, purporting to specify the contents thereof. Finally, the continued detention as hostages of the two private individuals of United States nationality entails a renewed breach of the obligations of Iran under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights.

78. Inevitably, in considering the compatibility or otherwise of the conduct of the Iranian authorities with the requirements of the Vienna Conventions, the Court has focussed its attention primarily on the occupation of the Embassy and the treatment of the United States diplomatic and consular personnel within the Embassy. It is however evident that the question of the compatibility of their conduct with the Vienna Conventions also arises in connection with the treatment of the United States Chargé d'affaires and two members of his staff in the Ministry of Foreign Affairs on 4 November 1979 and since that date. The facts of this case establish to the satisfaction of the Court that on 4 November 1979 and thereafter the Iranian authorities have withheld from the Chargé d'affaires and the two members of his staff the necessary protection and facilities to permit them to leave the Ministry in safety. Accordingly it appears to the Court that with respect to these three members of the United States' mission the Iranian authorities have committed a continuing breach of their obligations under Articles 26 and 29 of the 1961 Vienna Convention on Diplomatic Relations. It further appears to the Court that the con-

tinuation of that situation over a long period has, in the circumstances, amounted to detention in the Ministry.

79. The Court moreover cannot conclude its observations on the series of acts which it has found to be imputable to the Iranian State and to be patently inconsistent with its international obligations under the Vienna Conventions of 1961 and 1963 without mention also of another fact. This is that judicial authorities of the Islamic Republic of Iran and the Minister for Foreign Affairs have frequently voiced or associated themselves with, a threat first announced by the militants, of having some of the hostages submitted to trial before a court or some other body. These threats may at present merely be acts in contemplation. But the Court considers it necessary here and now to stress that, if the intention to submit the hostages to any form of criminal trial or investigation were to be put into effect, that would constitute a grave breach by Iran of its obligations under Article 31, paragraph 1, of the 1961 Vienna Convention. This paragraph states in the most express terms : "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State." Again, if there were an attempt to compel the hostages to bear witness, a suggestion renewed at the time of the visit to Iran of the Secretary-General's Commission, Iran would without question be violating paragraph 2 of that same Article of the 1961 Vienna Convention which provides that : "A diplomatic agent is not obliged to give evidence as a witness."

* *

80. The facts of the present case, viewed in the light of the applicable rules of law, thus speak loudly and clearly of successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963, as well as under the Treaty of 1955. 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, in often imprecise terms, the idea has been put forward that the conduct of the Iranian Government, at the time of the events of 4 November 1979 and subsequently, might be justified by the existence of special circumstances.

81. In his letters of 9 December 1979 and 16 March 1980, as previously recalled, Iran's Minister for Foreign Affairs referred to the present case as only "a marginal and secondary aspect of an overall problem". This problem, he maintained, "involves, *inter alia,* more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms". In the first of the two letters he indeed singled out amongst the "crimes" which he attributed to the United States an alleged complicity on the part of the Central Intelligence Agency in the coup d'état of 1953 and in the restoration of the Shah to the throne of Iran.

Invoking these alleged crimes of the United States, the Iranian Foreign Minister took the position that the United States' Application could not be examined by the Court divorced from its proper context, which he insisted was "the whole political dossier of the relations between Iran and the United States over the last 25 years".

82. The Court must however observe, first of all, that the matters alleged in the Iranian Foreign Minister's letters of 9 December 1979 and 16 March 1980 are of a kind which, if invoked in legal proceedings, must clearly be established to the satisfaction of the tribunal with all the requisite proof. The Court, in its Order of 15 December 1979, pointed out that if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the Application it was open to Iran to present its own case regarding those activities to the Court by way of defence to the United States' claims. The Iranian Government, however, did not appear before the Court. Moreover, even in his letter of 16 March 1980, transmitted to the Court some three months after the issue of that Order, the Iranian Foreign Minister did not furnish the Court with any further information regarding the alleged criminal activities of the United States in Iran, or explain on what legal basis he considered these allegations to constitute a relevant answer to the United States' claims. The large body of information submitted by the United States itself to the Court includes, it is true, some statements emanating from Iranian authorities or from the militants in which reference is made to alleged espionage and interference in Iran by the United States centred upon its Embassy in Tehran. These statements are, however, of the same general character as the assertions of alleged criminal activities of the United States contained in the Foreign Minister's letters, and are unsupported by evidence furnished by Iran before the Court. Hence they do not provide a basis on which the Court could form a judicial opinion on the truth or otherwise of the matters there alleged.

83. In any case, even if the alleged criminal activities of the United States in Iran could be considered as having been established, the question would remain whether they could be regarded by the Court as constituting a justification of Iran's conduct and thus a defence to the United States' claims in the present case. The Court, however, is unable to accept that they can be so regarded. This is because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions.

84. The Vienna Conventions of 1961 and 1963 contain express provisions to meet the case when members of an embassy staff, under the cover of diplomatic privileges and immunities, engage in such abuses of their functions as espionage or interference in the internal affairs of the receiving State. It is precisely with the possibility of such abuses in contemplation that Article 41, paragraph 1, of the Vienna Convention on Diplomatic

Relations, and Article 55, paragraph 1, of the Vienna Convention on Consular Relations, provide

> "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State."

Paragraph 3 of Article 41 of the 1961 Convention further states : "The premises of the mission must not be used in any manner incompatible with the functions of the missions . . . ": an analogous provision, with respect to consular premises is to be found in Article 55, paragraph 2, of the 1963 Convention.

85. Thus, it is for the very purpose of providing a remedy for such possible abuses of diplomatic functions that Article 9 of the 1961 Convention on Diplomatic Relations stipulates :

> "1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.
>
> 2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission."

The 1963 Convention contains, in Article 23, paragraphs 1 and 4, analogous provisions in respect of consular officers and consular staff. Paragraph 1 of Article 9 of the 1961 Convention, and paragraph 4 of Article 23 of the 1963 Convention, take account of the difficulty that may be experienced in practice of proving such abuses in every case or, indeed, of determining exactly when exercise of the diplomatic function, expressly recognized in Article 3 (1) *(d)* of the 1961 Convention, of "ascertaining by all lawful means conditions and developments in the receiving State" may be considered as involving such acts as "espionage" or "interference in internal affairs". The way in which Article 9, paragraph 1, takes account of any such difficulty is by providing expressly in its opening sentence that the receiving State may "at any time and without having to explain its decision" notify the sending State that any particular member of its diplomatic mission is "*persona non grata*" or "not acceptable" (and similarly Article 23, paragraph 4, of the 1963 Convention provides that "the receiving State is not obliged to give to the sending State reasons for its de-

cision"). Beyond that remedy for dealing with abuses of the diplomatic function by individual members of a mission, a receiving State has in its hands a more radical remedy if abuses of their functions by members of a mission reach serious proportions. This is the power which every receiving State has, at its own discretion, to break off diplomatic relations with a sending State and to call for the immediate closure of the offending mission.

86. The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the Convention of 1961 (cf. also Articles 26 and 27 of the Convention of 1963). Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State. Naturally, the observance of this principle does not mean – and this the Applicant Government expressly acknowledges – that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime. But such eventualities bear no relation at all to what occurred in the present case.

87. In the present case, the Iranian Government did not break off diplomatic relations with the United States ; and in response to a question put to him by a Member of the Court, the United States Agent informed the Court that at no time before the events of 4 November 1979 had the Iranian Government declared, or indicated any intention to declare, any member of the United States diplomatic or consular staff in Tehran *persona non grata.* The Iranian Government did not, therefore, employ the remedies placed at its disposal by diplomatic law specifically for dealing with activities of the kind of which it now complains. Instead, it allowed a group of militants to attack and occupy the United States Embassy by force, and to seize the diplomatic and consular staff as hostages ; instead, it has endorsed that action of those militants and has deliberately maintained their occupation of the Embassy and detention of its staff as a

means of coercing the sending State. It has, at the same time, refused altogether to discuss this situation with representatives of the United States. The Court, therefore, can only conclude that Iran did not have recourse to the normal and efficacious means at its disposal, but resorted to coercive action against the United States Embassy and its staff.

88. In an address given on 5 November 1979, the Ayatollah Khomeini traced the origin of the operation carried out by the Islamic militants on the previous day to the news of the arrival of the former Shah of Iran in the United States. That fact may no doubt have been the ultimate catalyst of the resentment felt in certain circles in Iran and among the Iranian population against the former Shah for his alleged misdeeds, and also against the United States Government which was being publicly accused of having restored him to the throne, of having supported him for many years and of planning to go on doing so. But whatever be the truth in regard to those matters, they could hardly be considered as having provided a justification for the attack on the United States Embassy and its diplomatic mission. Whatever extenuation of the responsibility to be attached to the conduct of the Iranian authorities may be found in the offence felt by them because of the admission of the Shah to the United States, that feeling of offence could not affect the imperative character of the legal obligations incumbent upon the Iranian Government which is not altered by a state of diplomatic tension between the two countries. Still less could a mere refusal or failure on the part of the United States to extradite the Shah to Iran be considered to modify the obligations of the Iranian authorities, quite apart from any legal difficulties, in internal or international law, there might be in acceding to such a request for extradition.

89. Accordingly, the Court finds that no circumstances exist in the present case which are capable of negativing the fundamentally unlawful character of the conduct pursued by the Iranian State on 4 November 1979 and thereafter. This finding does not however exclude the possibility that some of the circumstances alleged, if duly established, may later be found to have some relevance in determining the consequences of the responsibility incurred by the Iranian State with respect to that conduct, although they could not be considered to alter its unlawful character.

* * *

90. On the basis of the foregoing detailed examination of the merits of the case, the Court finds that Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, the Treaty of Amity, Economic Relations, and Consular Rights of 1955, and the applicable rules of general international law, has incurred responsibility towards the United States. As to the consequences of this finding, it clearly

entails an obligation on the part of the Iranian State to make reparation for the injury thereby caused to the United States. Since however Iran's breaches of its obligations are still continuing, the form and amount of such reparation cannot be determined at the present date.

91. At the same time the Court finds itself obliged to stress the cumulative effect of Iran's breaches of its obligations when taken together. A marked escalation of these breaches can be seen to have occurred in the transition from the failure on the part of the Iranian authorities to oppose the armed attack by the militants on 4 November 1979 and their seizure of the Embassy premises and staff, to the almost immediate endorsement by those authorities of the situation thus created, and then to their maintaining deliberately for many months the occupation of the Embassy and detention of its staff by a group of armed militants acting on behalf of the State for the purpose of forcing the United States to bow to certain demands. Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. But 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, rules the fundamental character of which the Court must here again strongly affirm. In its Order of 15 December 1979, the Court made a point of stressing that the obligations laid on States by the two Vienna Conventions are of cardinal importance for the maintenance of good relations between States in the interdependent world of today. "There is no more fundamental prerequisite for the conduct of relations between States", the Court there said, "than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose." The institution of diplomacy, the Court continued, has proved to be "an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means" (*I.C.J. Reports 1979*, p. 19).

92. It is a matter of deep regret that the situation which occasioned those observations has not been rectified since they were made. Having regard to their importance the Court considers it essential to reiterate them in the present Judgment. The frequency with which at the present time the principles of international law governing diplomatic and consular relations are set at naught by individuals or groups of individuals is already deplorable. But this case is unique and of very particular gravity because here it is not only private individuals or groups of individuals that have disregarded and set at naught the inviolability of a foreign embassy, but the government of the receiving State itself. Therefore in recalling yet again the extreme importance of the principles of law which it is called upon to apply

in the present case, the Court considers it to be its duty to draw the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.

* *

93. Before drawing the appropriate conclusions from its findings on the merits in this case, the Court considers that it cannot let pass without comment the incursion into the territory of Iran made by United States military units on 24-25 April 1980, an account of which has been given earlier in this Judgment (paragraph 32). No doubt the United States Government may have had understandable preoccupations with respect to the well-being of its nationals held hostage in its Embassy for over five months. No doubt also the United States Government may have had understandable feelings of frustration at Iran's long-continued detention of the hostages, notwithstanding two resolutions of the Security Council as well as the Court's own Order of 15 December 1979 calling expressly for their immediate release. Nevertheless, in the circumstances of the present proceedings, the Court cannot fail to express its concern in regard to the United States' incursion into Iran. When, as previously recalled, this case had become ready for hearing on 19 February 1980, the United States Agent requested the Court, owing to the delicate stage of certain negotiations, to defer setting a date for the hearings. Subsequently, on 11 March, the Agent informed the Court of the United States Government's anxiety to obtain an early judgment on the merits of the case. The hearings were accordingly held on 18, 19 and 20 March, and the Court was in course of preparing the present judgment adjudicating upon the claims of the United States against Iran when the operation of 24 April 1980 took place. The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations ; and to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries.

94. At the same time, however, the Court must point out that neither the question of the legality of the operation of 24 April 1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court. It must also point out that this question can have no bearing on the evaluation of

the conduct of the Iranian Government over six months earlier, on 4 November 1979, which is the subject-matter of the United States' Application. It follows that the findings reached by the Court in this Judgment are not affected by that operation.

* * *

95. For these reasons,

THE COURT,

1. By thirteen votes to two,

*Decides* that the Islamic Republic of Iran, by the conduct which the Court has set out in this Judgment, has violated in several respects, and is still violating, obligations owed by it to the United States of America under international conventions in force between the two countries, as well as under long-established rules of general international law ;

IN FAVOUR : *President* Sir Humphrey Waldock ; *Vice-President* Elias ; *Judges* Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST : *Judges* Morozov and Tarazi.

2. By thirteen votes to two,

*Decides* that the violations of these obligations engage the responsibility of the Islamic Republic of Iran towards the United States of America under international law ;

IN FAVOUR : *President* Sir Humphrey Waldock ; *Vice-President* Elias ; *Judges* Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST : *Judges* Morozov and Tarazi.

3. Unanimously,

*Decides* that the Government of the Islamic Republic of Iran must immediately take all steps to redress the situation resulting from the events of 4 November 1979 and what followed from these events, and to that end :

*(a)* must immediately terminate the unlawful detention of the United States Chargé d'affaires and other diplomatic and consular staff and other United States nationals now held hostage in Iran, and must immediately release each and every one and entrust them to the protecting Power (Article 45 of the 1961 Vienna Convention on Diplomatic Relations) ;

*(b)* must ensure that all the said persons have the necessary means of leaving Iranian territory, including means of transport ;

*(c)* must immediately place in the hands of the protecting Power the premises, property, archives and documents of the United States Embassy in Tehran and of its Consulates in Iran ;

4. Unanimously,

*Decides* that no member of the United States diplomatic or consular staff may be kept in Iran to be subjected to any form of judicial proceedings or to participate in them as a witness ;

5. By twelve votes to three,

*Decides* that the Government of the Islamic Republic of Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter by the events of 4 November 1979 and what followed from these events ;

IN FAVOUR : *President* Sir Humphrey Waldock ; *Vice-President* Elias ; *Judges* Forster, Gros, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST : *Judges* Lachs, Morozov and Tarazi.

6. By fourteen votes to one,

*Decides* that the form and amount of such reparation, failing agreement between the Parties, shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

IN FAVOUR : *President* Sir Humphrey Waldock ; *Vice-President* Elias ; *Judges* Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Tarazi, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST : *Judge* Morozov.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fourth day of May, one thousand nine hundred and eighty, in three copies, one of which will be placed in the archives of the Court, and the others transmitted to the Government of the United States of America and the Government of the Islamic Republic of Iran, respectively.

*(Signed)* Humphrey WALDOCK,
President.

*(Signed)* S. AQUARONE,
Registrar.

Judge LACHS appends a separate opinion to the Judgment of the Court.

Judges MOROZOV and TARAZI append dissenting opinions to the Judgment of the Court.

*(Initialled)* H.W.

*(Initialled)* S.A.

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# Annex 24

# Responsibility of States for Internationally Wrongful Acts

**2001**

Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 2001*, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

# Responsibility of States for Internationally Wrongful Acts

## PART ONE
## THE INTERNATIONALLY WRONGFUL ACT OF A STATE

### CHAPTER I
### GENERAL PRINCIPLES

#### *Article l*
#### *Responsibility of a State for its internationally wrongful acts*

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

#### *Article 2*
#### *Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(*a*) is attributable to the State under international law; and

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

#### *Article 3*
#### *Characterization of an act of a State as internationally wrongful*

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

### CHAPTER II
### ATTRIBUTION OF CONDUCT TO A STATE

#### *Article 4*
#### *Conduct of organs of a State*

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

*Article 5*
*Conduct of persons or entities exercising elements of governmental authority*

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

*Article 6*
*Conduct of organs placed at the disposal of a State by another State*

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

*Article 7*
*Excess of authority or contravention of instructions*

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

*Article 8*
*Conduct directed or controlled by a State*

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

*Article 9*
*Conduct carried out in the absence or default of the official authorities*

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

*Article 10*
*Conduct of an insurrectional or other movement*

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

*Article 11*
*Conduct acknowledged and adopted by a State as its own*

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

## CHAPTER III
## BREACH OF AN INTERNATIONAL OBLIGATION

*Article 12*
*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 is not in conformity with what is required of it by that obligation, regardless of its origin or character.

*Article 13*
*International obligation in force for a State*

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

*Article 14*
*Extension in time of the breach of an international obligation*

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

2. The breach of an international obligation by an act of a State having a continuing character extends 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 remains not in conformity with that obligation.

*Article 15*
*Breach consisting of a composite act*

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

## CHAPTER IV
## RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

*Article 16*
*Aid or assistance in the commission of an internationally wrongful act*

A State which aids or assists another State in the commission of an internationally wrongful act by the latter 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.

*Article 17*
*Direction and control exercised over the commission of an internationally wrongful act*

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act 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.

*Article 18*
*Coercion of another State*

A State which coerces another State to commit an act is internationally responsible for that act if:

(*a*) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(*b*) the coercing State does so with knowledge of the circumstances of the act.

*Article 19*
*Effect of this chapter*

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

## CHAPTER V
## CIRCUMSTANCES PRECLUDING WRONGFULNESS

*Article 20*
*Consent*

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

*Article 21*
*Self-defence*

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

*Article 22*
*Countermeasures in respect of an internationally wrongful act*

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

*Article 23*
*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, that is the occurrence of an irresistible force or of an unforeseen 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 situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the State has assumed the risk of that situation occurring.

*Article 24*
*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 has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the act in question is likely to create a comparable or greater peril.

*Article 25*
*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 the act:

(*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

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 excludes the possibility of invoking necessity; or

(*b*) the State has contributed to the situation of necessity.

*Article 26*
*Compliance with peremptory norms*

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

*Article 27*
*Consequences of invoking a circumstance precluding wrongfulness*

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) the question of compensation for any material loss caused by the act in question.

## PART TWO
## CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

### CHAPTER I
### GENERAL PRINCIPLES

#### *Article 28*
#### *Legal consequences of an internationally wrongful act*

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

#### *Article 29*
#### *Continued duty of performance*

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

#### *Article 30*
#### *Cessation and non-repetition*

The State responsible for the internationally wrongful act is under an obligation:

(*a*) to cease that act, if it is continuing;

(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

#### *Article 31*
#### *Reparation*

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

#### *Article 32*
#### *Irrelevance of internal law*

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

*Article 33*
*Scope of international obligations set out in this part*

1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

## CHAPTER II
## REPARATION FOR INJURY

*Article 34*
*Forms of reparation*

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

*Article 35*
*Restitution*

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) is not materially impossible;

(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

*Article 36*
*Compensation*

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

*Article 37*
*Satisfaction*

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

*Article 38*
*Interest*

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

*Article 39*
*Contribution to the injury*

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

## CHAPTER III
## SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

*Article 40*
*Application of this chapter*

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

*Article 41*
*Particular consequences of a serious breach of an obligation under this chapter*

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

## PART THREE
## THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

### CHAPTER I
### INVOCATION OF THE RESPONSIBILITY OF A STATE

#### *Article 42*
#### *Invocation of responsibility by an injured State*

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(*a*) that State individually; or

(*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or

(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

#### *Article 43*
#### *Notice of claim by an injured State*

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(*a*) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(*b*) what form reparation should take in accordance with the provisions of part two.

#### *Article 44*
#### *Admissibility of claims*

The responsibility of a State may not be invoked if:

(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

*Article 45*
*Loss of the right to invoke responsibility*

The responsibility of a State may not be invoked if:

(*a*) the injured State has validly waived the claim;

(*b*) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

*Article 46*
*Plurality of injured States*

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

*Article 47*
*Plurality of responsible States*

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(*a*) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(*b*) is without prejudice to any right of recourse against the other responsible States.

*Article 48*
*Invocation of responsibility by a State other than an injured State*

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(*b*) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

## CHAPTER II
## COUNTERMEASURES

### *Article 49*
### *Object and limits of countermeasures*

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

### *Article 50*
### *Obligations not affected by countermeasures*

1. Countermeasures shall not affect:

(*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(*b*) obligations for the protection of fundamental human rights;

(*c*) obligations of a humanitarian character prohibiting reprisals;

(*d*) other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(*a*) under any dispute settlement procedure applicable between it and the responsible State;

(*b*) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

*Article 51*
*Proportionality*

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

*Article 52*
*Conditions relating to resort to countermeasures*

1. Before taking countermeasures, an injured State shall:

(*a*) call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;

(*b*) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (*b*), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(*a*) the internationally wrongful act has ceased; and

(*b*) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

*Article 53*
*Termination of countermeasures*

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.

*Article 54*
*Measures taken by States other than an injured State*

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

## PART FOUR
## GENERAL PROVISIONS

### *Article 55*
### Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

### *Article 56*
### *Questions of State responsibility not regulated by these articles*

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

### *Article 57*
### *Responsibility of an international organization*

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

### *Article 58*
### *Individual responsibility*

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

### *Article 59*
### *Charter of the United Nations*

These articles are without prejudice to the Charter of the United Nations.

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# Annex 25

# Climate change litigation

Sandrine Maljean-Dubois

# Climate Change Litigation

**Sandrine Maljean-Dubois**

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## A. Introduction

**1** The damage caused by climate change is extensive and varied. It occurs on different timescales, with impacts ranging from extreme weather events such as intense rainfall, storms, hurricanes, etc to phenomena that appear slowly over time such as the rise of sea level, ocean acidification, ice mass loss, coastal erosion, loss of biodiversity, or declining soil productivity (Huggel and others, 2015, 453). Different spatial scales also come into play: mostly local, sometimes national (such as the rise of sea level wiping out a small insular State), potentially global (such as the impact of climate change on biodiversity, or in a larger sense climate change as a planetary boundary). Lastly, climate change harms not only the environment itself but also persons and property. These changes are already felt everywhere around the globe. Impacts are growing in frequency and severity. There is a risk that they will significantly worsen in the future depending on our greenhouse gas emission ('GHG') trajectories. The Intergovernmental Panel on Climate Change ('IPCC') has contributed here to raising an international consensus based on solid foundations (Climate Change 2014 Synthesis Report, Summary for Policymakers ['IPCC 2014 Report'], 2).

**2** The human origin of climate change is no longer in question. According to the IPCC:

> Anthropogenic greenhouse gas emissions have increased since the pre-industrial era, driven largely by economic and population growth, and are now higher than ever. … Their effects … are *extremely likely* to have been the dominant cause of the observed warming since the mid-20th century (IPCC 2014 Report, 4) (emphasis in original).

Yet, while scientists consider that climate change is causing and will continue to cause more frequent and more intense extreme events, human causation with respect to specific events is impossible to establish or isolate. The causal link is perhaps easier to establish with regard to slow phenomena but it remains difficult nonetheless to separate the climate change factor caused by man, from other factors (solar or volcanic activity for instance) or to quantify the part of a particular country or group of countries. But science is advancing. Thus, for the first time, scientists have determined with certainty the link between human-caused climate change and extreme weather events. They have established that some extreme events that occurred in 2016 simply could not have happened due to natural climate variability alone (Explaining Extreme Events from a Climate Perspective, 2017, 1).

**3** Climate change has been rightly viewed as a 'super-wicked problem' from a policy and legal point of view (Lazarus, 2009, 1153). First, GHGs that contribute to global warming and, beyond that, to climate change, originate from a very large number of sources. A wide variety of actors are involved in climate change, from States themselves, to small and large businesses, farmers, and individuals who consume goods, heat their homes, or drive a car, etc. Furthermore, the emission of GHGs is not forbidden in and of itself; at best it is simply regulated. It is the cumulative effect of these emissions in space and in time that is problematic. Besides, the diffusion of GHGs in the atmosphere is so fast—a matter of days for CO2—that the effects of emissions are not related to the location of their source. The increase in GHG in a particular country or region of the world is thus likely to have consequences in very distant areas of the globe. At the same time, while Northern countries are taking on the historical responsibility for the current climate change, Southern countries are the ones who are paying and who will continue to pay the highest price. Indeed, climate change will impact all parts of the world unevenly and the most vulnerable populations will be most affected. Complex issues of international justice arise. It is not an

ordinary transboundary matter of ‘good neighbourly relationships’ but a global issue in its very essence, calling for extensive international cooperation.

**4** States have designed a specific international regime starting with the United Nations Framework Convention on Climate Change (‘UNFCCC’ or ‘Convention’) (1992), complemented by the Kyoto Protocol (1997) and the Paris Agreement (2015). These three treaties have been ratified by a large number of countries (as of 5 February 2018, the UNFCCC included 197 Parties, the Kyoto Protocol 192, and the Paris Agreement 173). States have been slow to implement this legal regime which is not sufficiently ambitious. It was not able to prevent the temperature rise that can already be felt and which, as previously mentioned, is likely to worsen in the future (The Emissions Gap Report 2017: A UN Environment Synthesis Report, 2017, xiv).

**5** With the growing impacts of climate change rise the contemporary challenges of compensation for damages. Questions of responsibility and liability are arising and will continue to arise with increasing urgency, including between States. This is evidenced by the recent → *International Court of Justice (ICJ)* judgment which, even if the Paris Agreement is not mentioned, upholds Costa Rica’s claims regarding the role of trees in gas regulation and air quality services before valuating it (*Certain Activities Carried Out by Nicaragua in the Border Area, Costa Rica v Nicaragua*, 2018, para 86 [‘*Certain Activities Carried Out by Nicaragua*’]). In this context, it is paramount to clarify the responsibility of States in these matters and, therewith, the risks to which States are exposed. But States’ responsibility is not the only one that can be invoked. Those businesses that feature among the largest emitters and the banks and investment funds that finance them are also exposed to liability claims. Indeed, the past several years have seen an explosion of litigation over actions or inaction related to climate change mitigation and adaptation efforts, before subnational, national, and supranational courts and committees, pushing for more ambitious regulations, opposing regulatory steps or new plans and proposed developments, or even requesting compensation measures. Hence, according to the Sabin Center database, as of March 2017, climate change cases had been filed in 24 countries, with 654 cases filed in the United States and over 230 cases filed in all other countries combined. With limited exceptions, governments are almost always the defendants in these cases (The Status of Climate Change Litigation – A Global Review, 2017, 10). These cases are as many as they are varied:

- as to the claimants: States (vulnerable low-emitting States like small island nations, or virtuous States against less virtuous ones, etc), NGOs, businesses, individuals;
- as to the defendants: States, businesses, banks, investment funds, even NGOs;
- as to the object of the claim: lack of sufficient measures to fight climate change or to adapt to climate change, lack of sufficient funding to support Southern States, impacts of geo-engineering measures designed to fight climate change, or the challenge of large infrastructure projects (new coal-fired power stations, new airports, etc);
- as to the forum: national or international courts;
- as to the means of dispute resolution: it can be contentious or non-contentious.

Climate litigation can pursue an objective of compensation—triggered *ex post* in relation to the damage—but more often than not it primarily aims to play a preventive role (*ex ante*), trying to push for concrete action, to press legislators and policymakers to be more ambitious in their approaches to climate change and fill the gaps left by legislative and regulatory inaction (The Status of Climate Change Litigation – A Global Review, 4). Another

specific feature is that these highly publicized and globalized litigation cases are part of communication and awareness strategies. Then the outcome of the dispute, often a negative one, matters less than the orchestration of the communication campaign.

**6** This contribution will endeavour to address climate litigation in all its forms. It will focus on international courts, tribunals, and adjudicative means of dispute resolution, including non-contentious and non-binding forms of adjudication, but also on domestic courts to the extent that international law is invoked and concerned. We will discuss how, at the international level, States have sought to avoid litigation by refusing to consider the issue of climate change in terms of their responsibility (see sec B below). Even though international law is rather ill-equipped to handle interstate disputes, this type of litigation could nonetheless be brought before an international jurisdiction (see sec C below). Because of the many hurdles thereto, our reflection cannot be limited to interstate litigation in its traditional form. Beyond that, climate issues can give rise to transnational litigation (see sec D below). Last but not least, the increasing number of climate disputes at the national level is in fact related to international law. National courts are required to lay down or apply rules of obvious international relevance (see sec E below).

## B. State Attempts at Avoiding Interstate Litigation

**7** When breaching its international obligations, a State must respond to the grievances of the subject to whom it caused prejudice when violating the latter's rights. As the Permanent Court of International Justice stated in 1928, 'it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form' (*Factory at Chorzów, Germany v Poland*, 1928, 29). This obligation is even a very extensive one; it 'must, "as far as possible" wipe out all the consequences of the illegal act' (*Gabčíkovo-Nagymaros Project, Hungary v Slovakia,* 1997, para 150; quoting *Factory at Chorzów, Germany v Poland, 1928,* 47; see also → *Gabčíkovo-Nagymaros Case (Hungary/Slovakia)*).

**8** Nevertheless, in matters relating to the environment, States have long shown a certain defiance towards international jurisdiction mechanisms. Already in 1972, principle 22 of the Stockholm Declaration of the United Nations Conference on the Human Environment invited States to 'cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction'. Principle 13 of the 1992 Rio Declaration on Environment and Development also encourages this cooperation (see → *Stockholm Declaration (1972) and Rio Declaration (1992)*). Yet the subject is still characterized today by its poor conventional content. Case law has made little contribution to the development of a liability regime as almost all interstate disputes have been settled through the negotiation of compensation agreements, agreed to without any reference to international litigation rules (Boisson de Chazournes, 1995, 48), when they were not shifted towards international private law (Nollkaemper, 2006, 186). Several conventions are thus designed to facilitate the resolution of this type of disputes and to respond to the common challenge of loss and damage from environmental pollution. They establish legal regimes of private liability and compensation, 'channelling' the liability of operators by providing for the creation of compensation funds, by developing systems of strict liability, by assigning jurisdiction, or by ensuring the enforcement of rulings. However, this transfer of liability did not take place in all sectors; this only applies to certain activities, such as the transport of dangerous goods.

**9** The creation of a similar international regime with regard to damage caused by climate change would have constituted a welcome solution, given that private economic actors are largely responsible for damages suffered. But it was never seriously contemplated and only ever proposed by legal scholars (for instance Cullet, 2007, 99).

**10** States have also failed to reach an agreement on a specific legal framework regarding their own responsibility. More than that, they have carefully avoided doing so when establishing the UNFCCC and later on the Kyoto Protocol and Paris Agreement. The UNFCCC recognizes that 'the largest share of historical and current emissions of greenhouse gases has originated in developed countries' and that developed countries must 'take the lead in combating climate change and the adverse effects thereof', but it does not establish whether the special obligations of developed countries stem from their historical responsibility or simply from their greater capacities or their generosity. Admittedly, the principle of shared but different responsibilities and of respective capacities plays a key role in the international climate regime, and is referred to many times in these treaties. Nevertheless, whether this responsibility is causal or moral is not specified (Mayer, 2014, 8).

**11** States have opted instead for the implementation of → *climate change compliance procedures*. The climate change compliance procedure for the Paris Agreement is currently being negotiated, but the Paris Agreement provides that this mechanism will be 'expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive' (Art 15 (2) Paris Agreement), thus clearly non-contentious. The mechanism put in place pursuant to the Kyoto Protocol is more ambiguous from this point of view. One of the most elaborate non-compliance mechanisms of international environmental law, it includes two branches, one of which (the enforcement branch) could almost be seen as jurisdictional. It can be called upon to settle actual legal disputes (Maljean-Dubois, 2007, 193). The system provides for specific sanctions for the failure to meet certain obligations, among them specific reduction targets; however, the mechanism does not deal with the legal consequences of climate change damages (Voigt, 2008, 1). The application of penalties is not intended as compensation for any injury caused by the non-compliance, as would be the case in a State responsibility setting. Instead, the non-compliance mechanism stipulates that the consequences applied by the enforcement branch 'shall be aimed at the restoration of compliance to ensure environmental integrity, and shall provide for an incentive to comply' (Peel, 2016, 1009). We know that such mechanisms, because they are better suited for environmental matters, tend to marginalize traditional dispute resolution mechanisms, although they do not exclude them at least in theory (Koskenniemi, 1993, 123).

**12** The creation of the 'Warsaw international mechanism for loss and damage associated with climate change impacts' follows the same trend. In response to the old and pressing demands of Southern countries, the Conference of the Parties ('COP') 19, in 2013, in Warsaw, finally put in place this mechanism, which was inserted in the Paris Agreement (Art 8 Paris Agreement). Far from meeting the demands of developing countries, it is not a compensation mechanism for climate damage that involves the recognition of a form of international liability. The decision 1/CP.21 that accompanies and adopts the Paris Agreement is very clear on this point as it expressly specifies that 'Article 8 of the Agreement does not involve or provide a basis for any liability or compensation'. It is in fact, once again, a mechanism set up to avoid States' international liability that could nevertheless lead to the prevention, possibly even the compensation, of climate damage, not

by virtue of a recognition of an international liability but for reasons of solidarity in the context of a cooperation policy (Doelle, 2016, 622).

**13** These are only attempts at marginalizing States' responsibility, but its invocation remains possible. Within the Kyoto Protocol, it is clear that 'the procedures and mechanisms relating to compliance shall operate without prejudice to' the dispute settlement clause (Art 14 UNFCCC; Decision 27/CMP.1 Procedures and mechanisms relating to compliance under the Kyoto Protocol, 2005, 92). Moreover, some States—among small Pacific islands, such as Fiji—have made declarations specifying that their ratification 'shall, in no way, constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the [UNFCCC] can be interpreted as derogating from the principles of general international law' (Fiji Declaration upon ratification of the United Nations Framework Convention on Climate Change, 1993). Kiribati, Nauru, Papua New Guinea, and Tuvalu have made similar declarations. Under the Kyoto Protocol, the Cook Islands, Kiribati, Nauru, and Niue have done the same. Even more such declarations have been made pursuant to the Paris Agreement (Marshall Islands, Micronesia, Nauru, Niue, Philippines, Solomon Islands, Tuvalu, and Vanuatu). The wording differs slightly sometimes. In that respect, the Cook Islands' declaration is more specific, stating that '[t]he Government of the Cook Islands declares its understanding that acceptance of the Paris Agreement and its application shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change and that no provision in the Paris Agreement can be interpreted as derogating from principles of general international law or any claims or rights concerning compensation due to the impacts of climate change' (Cook Islands Declaration upon ratification of the Paris Agreement, 2016). These declarations 'demonstrated their belief that the worst greenhouse gas emitters can still be held legally responsible for their actions' (Koivurova, 2007, 267). Indeed, even though (or because) there are no → *lex specialis* secondary rules, nothing in the climate regime can be read as excluding the applicability of general international law with regard to damage caused by climate change (Voigt, 2008, 10). On the contrary, Parties' awareness is reflected in the Preamble of the UNFCCC, which recalls that States 'have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction' (UNFCCC, Preamble para 8). Given the enormous scale of the impacts foreseen from GHG pollution, the particular vulnerability of many developing countries to these impacts, and advances in attribution science, the likelihood of legal action against major-emitting countries can only increase (Verheyen and Roderick, 2008, 37).

## C. Is Inter-State Climate Litigation Conceivable?

**14** International law is often viewed as unable to provide an adequate response to these issues. According to Voigt, for instance, 'international law is ill-equipped when confronted with a complex situation, such as compensation for climate change damages. Vague primary rules, multiplicity of actors, different types of damages and non-linear causation all pose significant challenges to the traditional law on State responsibility' (Voigt, 2008, 2). Some small island States entertained the idea of interstate proceedings but were dissuaded on the grounds that this could have disrupted international negotiations on climate, which were already quite tense. For instance, Tuvalu, a small island State in the South Pacific whose land will be inundated within the next 50 years, announced in 2002 that it would take Australia to the ICJ (Koivurova, 2007, 267). Many contemplated litigation based on the insufficient outcome of the Copenhagen COP in 2009. In 2011, Palau, another small island developing State, initiated a campaign for the United Nations General Assembly to request an advisory opinion from the ICJ, but had to back out after the launch of the Durban negotiations and *a fortiori* when the United States threatened to interrupt the provision of

development aid (Beck and Burleson, 2014, 17). A sort of wait-and-see attitude then imbued the preparation and launch of the Paris Agreement, (almost) everyone now deeming the content of the Agreement to be insufficient but in any event both fragile and better than nothing.

**15** It is true that climate change constitutes a challenge when considering the principles and conditions surrounding States' international responsibility, whether one is looking at wrongful conduct, its consequences, or even at the enforcement of responsibility. The following discussion applies to States but also, for the most part, to any subject of international law (such as an international organization financing a project generating large GHG emissions).

## 1. Wrongful Act: A Violation of International Law Attributable to a State

### *(a) An Internationally Wrongful Act*

**16** The 1996 proposals of the International Law Commission ('ILC') 1996 proposals for making States strictly liable for significant transboundary harm proved to be too progressive and have been abandoned (see also Title and texts of the preamble and the draft principles on the allocation of loss arising out of hazardous activities adopted by the Drafting Committee on second reading, 2006, 1). Hence, the international liability of a State may only be incurred on the basis of an internationally wrongful act. It is a well-established principle that 'every internationally wrongful act of a State entails the international liability of that State' (Draft Articles on Responsibility of States for Internationally Wrongful Acts ['2001 ILC Draft Articles'], 2001, 2). Thus, the responsibility of the State results from the violation of international law, regardless of its consequences. It can be a breach of conventional or customary international law that may be committed through an act or omission. Indeed, the remarkable development of States' primary obligations is related to both the multiplication and increasing precision of conventional obligations, but also to the strengthening of a foundation made of customary rules. In both respects, the densification of State obligations mechanically increases the potential for litigation. Consequently, the breached primary obligation can be found within the specific climate change legal regime but also in other special regimes and general international law.

**17** Treaty law is the main source of obligations in international environmental law, containing more specific obligations than customary law. Depending on the States involved in an international litigation on climate change, the UNFCCC, the Kyoto Protocol, and the Paris Agreement are directly relevant. Whether the UNFCCC imposes legally enforceable obligations is disputed in the literature. The predominant view appears to be that as a framework convention it does not stipulate enforceable primary legal norms of international law, but provides a general framework whose rules lack specificity and are subject to the treaty's compliance procedures only (Schwarte and Byrne, 2010, 1). Regarding the reduction of GHG emissions, the most specific provision, Article 4 (2) UNFCCC, provides that Parties 'shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases'. Although vague, this provision 'stipulate[s] a commitment' and 'arguably could be the basis of a liability claim' (Faure and Nollkaemper, 2007, 123; Voigt, 2008, 6). Similarly, one could also think of Article 4 (4) UNFCCC which established a 'commitment' to 'assist the developing country parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects', or even of Article 5 UNFCCC (technology transfer). For its part, the Kyoto Protocol set out more specific and quantified obligations, in particular with regard to the reduction of GHG emissions. Because they are specific, these obligations could be a basis for litigation. Lastly, the Paris Agreement sets out a general objective that is more detailed than the one found in the

UNFCCC and in the light of which it must be interpreted: '[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels' (Art 2.1 (a) Paris Agreement). The obligations laid down in this agreement are essentially procedural. Regarding mitigation, the obligation is not really substantial as 'each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions' (Art 4 (2) Paris Agreement). But the Party contribution shall 'reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances' (Art 4 (3) Paris Agreement). This implies 'a due diligence standard which requires governments to act in proportion to the risk at stake' (Voigt, 2016, 158).

**18** Other conventions could also be relevant, such as the United Nations Convention on the Law of the Sea ('UNCLOS') and others treaties combating pollution of the marine environment, the Montreal Protocol on substances that deplete the ozone layer, or treaties seeking to reduce long-range transboundary air pollution. One could also think of the Convention on Biological Diversity, the UNESCO World Heritage Convention, or even human rights treaties. Very limited case law exists in this regard. For instance, an application has been made by environmental organizations and private citizens to include several sites on the List of World Heritage in Danger, on the basis of Article 11 (4) World Heritage Convention, because climate change threatens the future of these sites, including the Himalayan mountain range (Thorson, 2009, 255). Several petitions were also made to the World Heritage Committee raising the prospect of GHG emissions causing damage, through climate change, to World Heritage sites such as the Great Barrier Reef in Australia (Peel, 2016, 1009).

**19** Without getting into too much detail, climate treaties and other conventions provide a fragile basis to support a finding of State liability given that the obligations are vague, attenuated, sometimes conditional, and often indirect. That is why it is interesting to also examine the possibility of invoking, in and of itself or in addition to the violation of a conventional obligation, customary obligations. From this point of view, the obligation not to harm the environment in other States or the environment in areas beyond national jurisdictions (the so called 'no-harm rule') provides an interesting lead. It is an old rule that recent case law has clarified while highlighting potential implications. Thus, it is not an obligation not to cause damage, but a positive obligation, a duty of due diligence. States must act with due diligence in order to ensure to the highest possible extent that dangerous activities which are being carried out on their territory or within their jurisdiction do not cause harmful consequences. This obligation is extremely wide. It is an obligation of 'means' and not of results: 'an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result' (*Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area,* 2011, 39 ['*Responsibilities and Obligations*']). It is very strict: 'it is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators' (*Pulp Mills on the River Uruguay, Argentina v Uruguay,* 2010, para 197; see also → *Pulp Mills on the River Uruguay (Argentina v Uruguay)*). The → *International Tribunal for the Law of the Sea (ITLOS)* Chamber has even considered that the 'precautionary approach is also an integral part of the general obligation of due diligence' (*Responsibilities and Obligations,* para 131). Moreover, the general duty of due diligence includes a number of procedural obligations (information, notification, cooperation, impact assessment, and continuous monitoring) that could also be relied upon successfully in the context of litigation regarding large infrastructure projects (the construction of a pipeline), industrial projects

(construction, on a large scale, of coal-fired power plants) that emit a lot of GHG, or on the contrary geo-engineering projects designed to mitigate climate change.

**20** This broad interpretation of due diligence, the customary nature of which is established, has significant consequences for States. Due to its ‘umbrella’ character, due diligence could make up for the potential shortcomings of treaties. Beyond its preventive role, it paves the way for increasing litigation based on an increasing knowledge of the thresholds not to be crossed in order to ‘prevent dangerous anthropogenic interference with the climate system’. It is all the more interesting in a matter like climate change that this direct obligation of the State has an indirect impact on private stakeholders within the State’s territory or jurisdiction, who are responsible for a very large part of GHG emissions. Due diligence is also seen as an attractive basis for State responsibility claims for climate change damage as it is binding on all States, including major emitters who lack specific emissions reduction obligations under the Kyoto Protocol or Paris Agreement (Peel, 2016, 1009). It is in any case an interesting basis that could be relied upon in addition to conventional ones. Indeed, the customary obligation of due diligence complements conventional obligations, keeping in mind that to this day the commitments to reduce emissions pursuant to conventions are inadequate and insufficient to ‘prevent dangerous anthropogenic interference with the climate system’. A State may comply with its conventional commitments while failing to comply with its customary obligations. As for conventional obligations, they must be interpreted in the light of the customary obligation, which can result in broader obligations. In practice, conventional and customary due diligence obligations mutually feed and shed light on each other. The recent award on the South China Sea perfectly reflects the catalysis, possibly even the symbiosis, that can take place between these different kinds of obligations (*The South China Sea Arbitration, The Republic of Philippines v The People's Republic of China*, 2016, paras 941–48). Thus, despite being vague, the customary basis can remain relevant, including in the case of a dispute between two States that are Parties to the Paris Agreement.

**21** It is now established that state of necessity is one of the circumstances that can preclude a finding of wrongfulness. Could a State invoke necessity to be exonerated from its obligations to prevent and limit climate change, and more generally of all its obligations on this matter? Economic necessity in particular could be argued, given the States’ development imperatives. The International Center for Settlement of Investment Disputes (‘ICSID’) arbitral tribunals have accepted that a catastrophic economic situation threatening the living conditions of a population could justify a state of necessity (*Metalpar SA and Buen Aire SA v Argentine Republic*, 2008, para 208). On the other hand, the ICJ has accepted the possibility of an ecological state of necessity (*Gabčikovo-Nagymaros Project*, para 51). Yet, even though it is easy to compare emissions per capita, which can differ significantly from one State to the next, to this day there is no consensus as to what would constitute necessary emissions—required for subsistence—and what would be deemed superfluous emissions. Thus, this route seems rather complicated, except perhaps in the most extreme case of the lowest or largest emitters. Perhaps the actual carbon footprint of a State should be taken into account, excluding emissions related to exports. This seems all the more difficult given that necessity is construed in a restrictive manner to avoid any abuse. Besides, necessity can justify the violation of international law only to the extent that it ‘does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole’ (Art 25 (1) 2001 ILC Draft Articles). This is another hurdle that subjects of international law must overcome to be able to rely on necessity to escape liability.

**22** Considerations as to whether the responsible States had the opportunity to take preventive action, the foreseeability of harm, and the proportionality of the measures chosen to reduce the harm, will also be relevant to the determination of the standard of care the State has to follow (Peel, 2016, 1009). Moreover, this standard of care is not set in stone. It evolves over time alongside scientific and technological knowledge and in space, depending on the different capacities of States, which themselves also evolve over time. As years go by, States' obligations become increasingly onerous, lightening in equal measure the burden of proof. Foreseeability of harm continuously improves, thanks in particular to the work of the IPCC, some of it at least being co-decided with representatives of States. Proportionality also evolves with scientific knowledge. It requires an assessment of the balance between the defendant's and the claimant's interests. Yet the risk involved for some States, in particular small island States, is so great, including substantial or even total loss of territory, that only significant reduction measures of GHGs could be considered proportionate (Voigt, 2008, 13). Further to the Stern Review in 2006, a significant number of economic papers have established that the costs of inaction would ultimately become far greater than the costs of action (Stern, 2006, ii).

### *(b) Attributing Harm to a State*

**23** For a State to be found liable, a causal link must be established between the harm done and the violation of international law. In theory, a State is only responsible for the actions of public authorities and of its own entities, not for those of private individuals—who are responsible for the most part of GHG emissions—except indirectly if it does not comply with its due diligence obligations in this respect. Thus, in principle, a State cannot be held responsible on the basis that its GHG emissions have caused harm, but because it has failed to take necessary and adequate measures in order to regulate emitting activities carried out within its territory or jurisdiction. From this point of view, a State is accountable for activities on its territory and under its effective control. In other situations, the lack of action by public authorities has been condemned (*Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v Rwanda,* 2005, para 180; → *Armed Activities on the Territory of the Congo Cases*), as well as normative initiatives by legislators that contradicted a conventional covenant (*Metalclad Corporation v The United Mexican States*, 2000, paras 109–11). As found by the seabed disputes chamber of the ITLOS, 'it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law' (*Responsibilities and Obligations*, para 112). Similarly, an international organization could be held liable both for the initiatives of its normative bodies and for the actions of its services (Art 4 Draft Articles on the Responsibility of International Organizations ['2011 ILC Draft Articles'], 2011).

**24** As mentioned above (see para 2), the human origin of climate change is no longer in question. It has been established by IPCC reports. Nevertheless, the climate system is complex and not linear. Even though there are clear estimates of different countries' relative contributions to the absolute tons of GHGs emitted globally, at least since the 1990s, sources of emissions are varied, vague, and untraceable. Thus, while the overall causation leaves no doubt, the same cannot be said of specific causation.

**25** With regard to due diligence obligations, however, the burden of proof is less challenging. Indeed, it will be easier to show that a State has failed to take all the measures it should have taken. Proof must be provided not as to the existence of a risk but as to the lack of implementation by the State of legislation and regulation that would have enabled such State to be made aware of such risk, to assess its probability and gravity, and to take measures in order to avoid its occurrence. Proof of such failure is not particularly difficult to establish (Kerbrat and Maljean-Dubois, 2014, 929). Indeed, as due diligence obligations

are obligations of conduct, it is not necessary to prove that the environment was substantially harmed (except at a later stage when determining the right method of compensation) but simply that the State has failed to meet its obligations of conduct by not having taken all the measures that should have been taken.

**26** Climate change constitutes a challenge for international law, but the latter has shown on many occasions its ability to adapt. A number of leads would be worth looking into, even though the standard of proof that would be accepted by an international jurisdiction remains unclear. As a matter of fact, each GHG emission increases the risk of specific harm by adding, in cumulative terms, to the GHG already present in the atmosphere. Thus, one could suggest that causation could be established on the sole basis of contribution to the problem of climate change by a specific actor. The issue of how much damage might have been caused by this contribution is irrelevant in this respect, although it will play a role at the stage of apportioning costs (Voigt, 2008, 16). It must be pointed out that the fact that the injury was at least partially caused by the polluting activity of the Trail Smelter in Canada appeared to be sufficient (Voigt, 2008, 15; *Trail Smelter Case*, 1938, 1941; → *Trail Smelter Arbitration*). Or that, in another case, a proximate cause was found, largely based on empirical interpretation (*Preliminary Decision No 7*, 2007, para 13). In spite of the developments of scientific knowledge, it is still relevant to consider whether the precautionary principle could not lighten the standard of proof (Faure and Nollkaemper, 2007, 1588). Indeed, we may not be in a context of uncertainty as to the overall causation any more, but the determination of specific causation does remain subject to uncertainty.

## 2. Consequences of the Internationally Wrongful Act

**27** Under international law, as in any other legal system, a legal rule can be divided into a main or primary obligation, the obligation to comply, and an ancillary or secondary obligation, which is to correct the consequences of non-compliance. Even though any internationally wrongful act by a subject of international law gives rise to liability, if no direct harm was done the responsibility will remain theoretical and will not result in actual consequences; unless a State engages the responsibility of another State for an indirect harm, but this time exercising the diplomatic protection in respect of its nationals. That said, harm is construed in a wide sense here as it is now established that ‘injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State’ (Art 31 (2) 2011 ILC Draft Articles).

**28** Only affected subjects will be entitled to seek the liability of the author of the wrongful act, and the concept of injured State has long been construed in a strict manner. The existence of a real and actual dispute is a condition to litigation. The ICJ uses a narrow definition of the term ‘dispute’, thus restricting the borders of litigation and scope of action (*Mavrommatis Palestine Concessions*, 1924, 11; → *Mavrommatis Concessions Cases*). Eliminating ‘virtual’ or ‘abstract’ disputes, it considers that there is a dispute, in the judicial sense, when a State has a claim that is legally opposed to a claim from another State. In order for a dispute to exist, the two sides must hold clearly opposite views as to the performance or non-performance of certain international obligations. Moreover, a dispute exists when the evidence demonstrates that the respondent was aware, or could not have been unaware, that its views were positively opposed by the applicant (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament, Marshall Islands v India,* 2016, paras 33–40). The issue is thus not only about opposed legal views. Indeed ‘it must be shown that the claim of one party is positively opposed by the other’ (*South West Africa*, *Ethiopia v South Africa, Liberia v South Africa*, 1962, para 328; see also → *South West Africa/Namibia (Advisory Opinions and Judgments)*). In the → *Northern Cameroons Case*, the ICJ declared that ‘it would still be impossible for the Court to render a judgment capable of effective application’ since it was neither asked

to ‘address the alleged injustice’, nor to ‘award any reparation’. It thus reaffirmed that its function is indeed to guarantee the rule of law but ‘in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties’ and that the decision ‘must have some practical consequences in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations’ (*Northern Cameroons, Cameroon v United Kingdom*, 1963, para 15).

**29** Thus, in general, international law does not recognize *actio popularis* (→ *Obligations erga omnes*; → *Community Interest*; → *Barcelona Traction Case*), that is to say the possibility for any State to help establishing the responsibility of another State that breached international law. In 1966, the Court stated that ‘although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present’ (*South West Africa, Ethiopia v South Africa, Liberia v South Africa*, 1966, para 47; see also the dissenting opinion of Judge Jessup, 387–88). This principle does suffer one exception: *erga omnes* obligations, since they create *omnium* rights. The Court has already referred to this notion explicitly and repeatedly, for instance concerning the Convention on genocide (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Serbia and Montenegro*, 1996, para 31; see also → *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro)*). The principle inherent to this concept is that all States have a legal interest to act when such an obligation is breached (*Barcelona Traction Light and Power Company Ltd*, *Belgium v Spain*, 1970, para 32; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, paras 87–88; → *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)*). The idea here is not to invoke a subjective right any more, but rather an objective interest for the respect of legality. This leads directly to an *actio popularis*, even a limited one. Most obligations that are contained in environmental treaties seem to fit into the category of ‘interdependent’ obligations, according to which it is sufficient, in order to establish an interest to act, to be a Party to the treaty whenever it is impossible to single out third persons or Parties as creditors of the obligation (Santulli, 2015, 240). The 2001 ILC Draft Articles allow for the possibility that any State other than an injured State may invoke the responsibility of another State if ‘a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or b) the obligation breached is owed to the international community as a whole’ (Art 48 2001 ILC Draft Articles). It follows from commentaries issued by the ILC that paragraph (a) concerns mainly obligations related to the protection of the environment (2001 ILC Draft Articles, 126, para 7). And yet, the ITLOS Chamber used this provision of the ILC project to consider that ‘each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to the preservation of the environment of the high seas and in the Area’ (*Responsibilities and Obligations*, para 180). We may observe here an important clarification that could facilitate the invocation of the responsibility of a State or of a group of States for climate damages.

**30** The first consequence when a State is found liable is that the internationally wrongful act must end if it is still ongoing. But the responsible State—or organization—is also ‘under an obligation to make full reparation for the injury caused by the internationally wrongful act’ (Art 31 2001 ILC Draft Articles). This reparation ‘takes the form of restitution, compensation and satisfaction, either singly or in combination’ (Art 34 2001 ILC Draft Articles). The ICJ has confirmed that compensation may be an appropriate form of reparation, particularly in those cases where restitution is materially impossible or unduly burdensome (*Pulp Mills on the River Uruguay, Argentina v Uruguay*, 2010, para 273). However, it recalled recently, in the → *Ahmadou Sadio Diallo Case (Republic of Guinea v*

*Democratic Republic of the Congo)*, that, in order to award compensation, the Court has to determine 'whether there is a sufficiently direct and certain causal nexus between the wrongful act … and the injury suffered by the Applicant' (*Ahmadou Sadio Diallo, Republic of Guinea* v *Democratic Republic of the Congo,* 2012, para 14; quoted in *Certain Activities Carried Out by Nicaragua*, para 32). Except by interpreting causation in a very loose way or by applying probabilistic theories, it will be difficult in the current state of scientific knowledge to establish a 'direct and certain causal nexus' between a climate damage and the emissions of a particular State or group of States. Thus, it will be difficult to obtain the *restitutio in integrum* or even a financial compensation for the material prejudice, even without taking into account that it might in fact be physically impossible to restore the situation *ex ante*. In the meantime, it is worth noting that the ICJ has no difficulty with the compensation of environmental damage. Even if it has not previously 'adjudicated a claim for compensation for environmental damage', it recently considered that 'it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage' (*Certain activities carried out by Nicaragua*, para 41). Moreover, the ICJ recalls that 'the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage' and that '[i]n such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate' (*Certain activities carried out by Nicaragua*, para 35; quoting *Trail Smelter Case*).

**31** Let us imagine a Pacific State, A, seeking the liability of an industrialized State, B, for the damage incurred on its territory (eg sea level rise and ultimately disappearance, extreme climate events, etc) on the basis of State B's failure to comply with its due diligence obligations. By bringing a claim based on due diligence, State A avoids the delicate issues surrounding the attribution to State B of the conduct of private individuals and companies that have emitted the most part of the GHGs causing climate change. Furthermore, State A no longer has to prove the responsibility of State B in the changes State A is suffering from. It must simply establish that State B did not set sufficient emissions reduction targets. Thanks, in particular, to the work of the IPCC, it will be quite easy to establish that State B has failed to act with the required due diligence. Material compensation of the harm caused will be more delicate as the question will arise as to whether, and to what extent, the harm can be attributed to State B. As it happens, it is impossible to trace the gas emitted within State B's territory or jurisdiction and to ascertain its share of responsibility for the harm done to State A (except for relying on presumptions made from emission data). Even though the delicate issues surrounding compensation are thus not all resolved, an international court could easily find that State B breached its due diligence obligation. State A would most likely not see it as an adequate response but it could have an impact on State B's conduct, as well as, down the line, the conduct of other large emitters. In that case, responsibility is not about compensation for a material prejudice but about restoring legality and preventing further harm. An international court could also request the parties to find a solution to their dispute through negotiation in good faith and cooperation. This would be consistent with international case law (for instance, *Pulp Mills on the River Uruguay, Argentina v Uruguay*, 2010, para 81 et seq) and the work of the ILC on the protection of the atmosphere (Voigt, 2016, 163).

**32** If it is established that the violation constitutes ‘a serious breach by a State of an obligation arising under a peremptory norm of general international law’, the draft project of the ILC provides for specific consequences in addition to those existing under common law. On the one hand, ‘States shall cooperate to bring to an end through lawful means any serious breach’ of this kind. On the other hand, ‘[n]o State shall recognize as lawful a situation created by’ such ‘a serious breach’ ‘nor render aid or assistance in maintaining that situation’ (Art 41 2001 ILC Draft Articles).

**33** The liability of a State is not limited by the fact that one or several other States are responsible for the same internationally wrongful act (Art 47 2001 ILC Draft Articles). Each State can therefore be held separately and individually liable; however, the extent of a State’s contribution to the damage will be taken into account at the compensation stage. The Commentary to Article 47 makes it clear that each responsible State is liable only for the harm it individually causes. Thus, ‘in the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought’ (Art 39 2001 ILC Draft Articles). This issue is particularly relevant with respect to climate change, but even beyond that, with respect to a significant number of cross-border pollution cases. International law will have to provide some answers. A few principles could be relied upon, such as the principle of common but differentiated responsibilities and respective capabilities, but they are far from offering ‘turnkey’ solutions. There are only a few, incomplete scientific studies that could be relied upon by a court (for instance Summary Report of the ad hoc group for the modelling and assessment of contributions to climate change, 2007, 1).

**34** Given that it is the cumulative effect of GHG emissions by several—all—States that is causing harm, the question arises as to whether States that are contributing (independently) to an internationally wrongful act can be held jointly and severally liable. The effect would be that the victim could choose to sue any of the injurers falling within the joint and several liability regime and claim full compensation from any of them. The injurer who would have to fully compensate the victim could then in turn claim from the other wrongdoers the amount which they contributed to the loss (Faure and Nollkaemper, 2007, 165). This principle can be found in most legal systems but its existence in international law is far from established.

## 3. Enforcing State Responsibility

**35** Even when a State can convincingly show that one or more other States are responsible for the violation of a primary international legal obligation that forms part of their mutual relationship, there are limited judicial avenues through which redress can be sought (Schwarte and Byrne, 2010, 15). Even if a basis for litigation can be found in substantive law, it will generally be difficult, in certain cases impossible, to find procedural means to bring a successful claim. The injured State will face the hurdle of the principle of consent to international jurisdiction. In the event of a dispute, it will thus be difficult to find a forum with jurisdiction, unless the respondent State accepts such jurisdiction once the dispute has come to light; an unlikely scenario.

**36** The settlement of disputes clause in Article 14 UNFCCC provides a theoretical basis for a liability claim. Article 14 (1) provides that the Parties ‘shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice’. If this fails, Article 14 (2) includes an optional jurisdictional settlement clause: Parties may make a prior declaration (when ratifying or at any time thereafter) that they recognize submission of the dispute to the ICJ or to arbitration (in accordance with procedures that were supposed to be adopted by the COP but were not). In the event that neither the ICJ nor an arbitral tribunal

may be seized, Article 14 (5)–(7) provides for conciliation. This clause applies *mutatis mutandis* to the Kyoto Protocol (see Art 19) and to the Paris Agreement (see Art 24).

**37** These provisions are not suited for the resolution of disputes arising out of the interpretation or application of multilateral conventions adopted for the defence of a 'collective interest' (Art 48 2001 ILC Draft Articles). Indeed, in fear of a boomerang effect, States are reluctant to rely on them for the 'sole' defence of a collective interest. While for years these clauses were never relied on and could be viewed as having been included only as a matter of form, they recently provided a basis for several arbitration rulings: for instance, between the Netherlands and France (*The Audit of Accounts between the Netherlands and France*, 2004). However, in these cases, contrary to what is provided in Article 14 UNFCCC, the constitution of an arbitration tribunal could be requested unilaterally; the agreement of the parties to the dispute was not required.

**38** Reliance on these provisions to challenge a violation of the Convention is possible in theory. This is all the more true that the concepts of 'dispute between any two or more Parties concerning the interpretation or application of the Convention' or of injured State, which define their scope of application, should, in this case, be construed in a rather large sense. The core of the climate regime, featuring obligations and means to reduce emissions, most likely falls into the category of *erga omnes partes* obligations—obligations that apply to all Parties to the treaty, be it the Convention, the Kyoto Protocol, or the Paris Agreement. For this type of obligations, a 'universalisation of liability relationships' could and should be recognized (Sicilianos, 2003, 169).

**39** Yet, in practice, the UNFCCC dispute settlement clause cannot be invoked. The fact is that it was not met with great success: out of the 197 Parties to the Convention, the Netherlands is the only country that recognized the jurisdiction of the ICJ and the possibility of arbitration proceedings, while the Solomon Islands and Tuvalu have accepted compulsory arbitration according to Article 14 (2) UNFCCC. Given the requirement for reciprocity, the clause could therefore be relied upon only between the Netherlands and Tuvalu and the Solomon Islands, or between Tuvalu and the Solomon Islands. Of course, States can always submit their dispute to such jurisdiction after its occurrence, but this scenario is, once again, very unlikely.

**40** Nevertheless, litigation could arise in other fora with compulsory jurisdiction such as the Dispute Settlement Body of the WTO ('DSB') (→ *International trade disputes)*, for disputes related to the application of the UNFCCC, of the Kyoto Protocol, or of the Paris Agreement. This possibility was brought up several times in connection with the challenge of proposals for carbon tax border adjustments; however, the outcome of these disputes is uncertain. The DSB can only intervene insofar as the dispute involves two or more Members of the WTO and has a trade-related dimension: the special group potentially put in place would naturally rule 'in the light of the relevant provisions' of WTO law (Art 7 Understanding on the Rules and Procedures Governing the Settlement of Disputes, Annex 2 to Agreement Establishing the World Trade Organization). This could be the case even in disputes involving a WTO Member that is not a Party to the climate treaties. This is in fact the scenario that would involve the most severe conflicts. However, even if all States involved in a dispute were Members of the WTO as well as of the Kyoto Protocol or Paris Agreement, panels do not have the power to articulate these two legal spaces. It is true that the WTO Appellate Body has clearly stated, in its very first ruling, that the General Agreement on Tariffs and Trade 1994 is not to be read 'in clinical isolation from public international law' (*United States – Standards for Reformulated and Conventional Gasoline*, 1996, para 16). However, the → *Biotech Case* showed later that an environmental convention—in this instance, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity ('Cartagena Protocol')—could not be seen as being part of the law

applicable for the purposes of resolving a dispute within the WTO. According to the opinion adopted by the panel, which to this day has not been overturned given the absence of any appeal, for it to be the case, all Members of the WTO would have to be Parties to the Convention on Biological Diversity. Applied to climate change, this 'case law' prevents reliance on climate-related conventional law to interpret the WTO law, at least on the basis of Article 31 (3) (c) Vienna Convention on the Law of Treaties ('Vienna Convention'), given that the United States or Canada are WTO Members but not Parties to the Cartagena Protocol, or that a dozen of States are WTO Members and not Parties to the Paris Agreement, among them Russia or Turkey (*European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Panel Report, 2006, paras 7.73 et seq; *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, Appellate Body Report, 2011, paras 844–45; for an (unsuccessful) utilization of the UNFCC, see *India – Certain Measures Relating to Solar Cells and Solar Modules*, Appellate Body Report, 2016, paras 7.285–7.301).

**41** Other conventional mechanisms could come into play, such as the ones provided in the UNCLOS (Part XV), the United Nations Fish Stocks Agreement (Part VIII), the Montreal Protocol on substances that deplete the ozone layer (see in particular Art 14 with Art 11 Vienna Convention), or the Convention on Biological Diversity (Art 27), other supervisory bodies of international treaties, conciliation procedures, advisory opinions of the ICJ, or even the ITLOS, which has proven to be more progressive. While the relevance of a request for an advisory opinion from the Court could have been called into question during the negotiations that lead to the adoption of the Paris Agreement in 2015, the situation is now different. Advisory opinions are not binding, but they do provide an authoritative statement on questions of international law. As States' national contributions are significantly insufficient to reach the objectives of the Paris Agreement, it could be the right time for the Court to clarify the rights and obligations of States on the matter, including, most importantly, on the basis of customary law (Koran and Garcia, 2012, 35).

## D. Transnational Climate Litigation

**42** Climate litigation can also be transnational, involving claims by private persons or subnational actors against States, or even private persons against multinational companies. Climate damage can also give rise to complaints before bodies protecting human rights by 'ricochet' by relying on the right to life, right to health, or right to respect for the home. This is evidenced by the Inuit's 2005 petition to the Inter-American Commission on Human Rights claiming that US climate change policy violated the human rights of its US and Canadian citizens by failing to adopt adequate GHG controls. The US was still the largest cumulative emitter of GHG emissions at that time. The petition was dismissed but it did succeed in drawing public attention to the severe effects of global warming on the Inuit, and instigating further discussion about the human rights implications of climate change (The Status of Climate Change Litigation – A Global Review, 31). One should also mention the ruling of the Federal Court of Nigeria considering that Shell's flaring of methane from its gas production activities on the Niger Delta violated human rights to a clean and healthy environment protected under the Nigerian constitution and the African Charter on Human and Peoples' Rights (*Gbemre v Shell Petroleum Development Company Nigeria Limited and Others*, 2005; The Status of Climate Change Litigation – A Global Review, 31). Indeed, with climate damages increasing, it would seem appropriate to explore the role of human rights bodies (Wewerinke-Singh, 2017, 22).

**43** Transnational disputes may in particular occur in the context of → *international investment arbitration*, with claims relating to environmental measures adopted by governments (Fuentes Torrijo, 2016, 309). The trend towards investment in renewable and low carbon energy industries has also given rise to a growing number of arbitrations at the → *Permanent Court of Arbitration (PCA)* under the Energy Charter Treaty, NAFTA, and bilateral investment treaties ('BITs'; → *Investments, Bilateral Treaties*) relating to solar, wind and hydropower investment (Miles, 2017, 26). This is also the case under the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States. For example, a Swedish investor, the owner of a coal-fired power plant near Hamburg, has initiated arbitration against Germany before an ICSID tribunal, claiming that additional environmental restrictions to reduce the plant pollution in the Elbe River were imposed after the provisional approval of the project in 2007 and that they constitute a violation of its right to a fair and equitable treatment (*Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*, 2009). There is also a growing number of investment arbitrations relating this time to the enactment of legislative measures reducing or withdrawing economic support mechanisms previously introduced in support of renewable sources of energy (Dias Simões, 2017, 174).

**44** Lastly, a claim before the accountability mechanisms of the international financial institutions could also be contemplated, be it the World Bank inspection panel or the International Finance Corporations' Compliance Advisor and Ombudsman. They provide potentially useful opportunities to raise climate-related concerns regarding projects financed by the World Bank or other international financial institutions (Gleason and Hunter, 2009, 311).

## E. International Law and Domestic Climate Change Litigation

**45** Admittedly, international courts 'have themselves become new social actors, ones that contribute to evolutions in the state of human consciousness and actions' (Sands, 2016, 889). Yet international courts do not appear to have sufficient political legitimacy to set precedents with potentially tremendous consequences on the world's order and to persuade States to implement the courts' decisions (Mayer, 2014, 19). In these circumstances, control at the national level is to play a crucial role. The development of national climate litigation is not a new phenomenon, but it is now 'booming', initiated by a wide variety of claimants, from farmers to a group of grandmothers, cities, a law student, or groups of children. Opposite them are States, and large emitters such as the fossil fuel industry, or those financing them. In these cases, climate defenders' requests are rarely granted, but that is almost secondary. What matters equally, if not more, is the successful mediatization at the global level of these cases that are real communication stunts. Furthermore, national litigation does have a link with international law. Such litigation is increasing because of the slow implementation of an ambitious international climate regime, claimants seeking to make up for the gaps and shortcomings thereof (Peel and Osofsky, 2015, 338).

**46** Yet, national climate disputes also benefit from international negotiations and State commitments, and even from the recent clarifications regarding the customary 'no harm' rule. Claimants rely on factual data gathered pursuant thereto (eg a stocktake of GHG emissions prepared since the 1990s pursuant to the UNFCCC, elements presented in reports prepared by States), on scientific arguments (the legitimacy and authority of IPCC reports in particular are widely recognized), and on legal arguments (eg the objective of limited global warming set out in the Paris Agreement, or national contributions as unilateral declarations capable of creating legal obligations). They can also rely, in a less direct way, on a law that implements a State's international commitments. Here, the Paris Agreement provides more of a breeding ground conducive to national litigation, rather than legal arguments as such. While the Paris Agreement does not assign each country a carbon

budget, it does offer a basis for deducing a budget from national commitments. It also makes clear that policies leading to net increases in emissions are disfavoured (The Status of Climate Change Litigation – A Global Review, 17). The Dutch *Urgenda* case has contributed to creating a powerful incentive for national climate trials: the Court found that the Dutch government had a duty to take more ambitious mitigation measures, by virtue of national law, European law, and international law (the 'no harm' rule for instance, or the sustainability principle embodied in the UNFCCC) (*Urgenda Foundation v The State of the Netherlands*, 2015). In the New Zealand case of *Thomson v The Minister for Climate Change Issues*, 2017 ('*Thomson*'), while denying the claimant's plea, the High Court of New Zealand recognized that the national emissions targets should be reviewed with regard to IPCC reports (*Thomson,* para 178) after stating that 'the IPCC reports provide a factual basis on which decisions can be made' (*Thomson,* para 133). The court reviewed national policy and in particular the national contribution of New Zealand to the Paris Agreement, in the light of the requirements, minimal in substance, laid down by the Agreement. The court concluded that 'neither the Convention nor the Paris Agreement stipulate any specific criteria or process for how a country is to set its [intended nationally determined contribution] and [nationally determined contribution], nor how it is to assess the costs of the measures it intends to take' (*Thomson*, para 139). Thus the claimant did not succeed in establishing the unlawful nature of the national contribution (*Thomson*). The Swiss grandmothers case, *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council*, still pending, relates to the adequacy of the Swiss government's climate change mitigation targets and implementation measures. The claimants have underlined the objectives laid down by the Paris Agreement, and argued that Switzerland was not creating the conditions to meet these objectives. Other cases are leading claimants to assert that their respective governments' legal commitments to climate change mitigation are consistent with and articulated through ratification of the Paris Agreement (one dealing with the expansion of Vienna's airport in Austria, another one with licenses for deep-sea oil and gas extraction in the Barents Sea in Norway, a last one in Sweden with the sale of coal mines and coal-fired power plants in Germany by a State-owned energy company; The Status of Climate Change Litigation – A Global Review, 219). Now that the control mechanism of the climate regime is going to be less strict than it used to be, there is a growing need for a 'handover' between the international and the national level. It has been shown that these two control mechanisms fit into a sort of 'circular continuum'. They mutually support and feed each other. Yet they are not interdependent and have very different characteristics that plead in favour of a combination rather than a substitution (Tabau, 2017, 220).

**47** Climate change litigation 'provides a valuable complement to treaty, legislative, and executive action because it fosters needed interaction across levels of government' (Osofsky, 2009, 377). If States do not raise the level of ambition of their national contributions to the Paris Agreement, if they do not honour their financial and technology transfer commitments, climate litigation cases and adjudicative approaches could skyrocket in the years to come, not only at the national but also at the international level.

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# Annex 26

United Nations

Framework Convention on Climate Change

FCCC/PA/CMA/2018/3/Add.2

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**Conference of the Parties serving as the meeting of the Parties to the Paris Agreement**

# Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on the third part of its first session, held in Katowice from 2 to 15 December 2018

## Addendum

## Part two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement

Contents

## Decisions adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement



GE.19-03302(E)

*1903302*

# Decision 13/CMA.1

# Matters relating to the Adaptation Fund

*The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*,

1. *Decides* that the Adaptation Fund shall serve the Paris Agreement under the guidance of, and be accountable to, the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement with respect to all matters relating to the Paris Agreement, effective 1 January 2019, subject to the decision on this matter made by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol;

2. *Recommends* that the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol decide that the Adaptation Fund will continue to be financed by the activities under Articles 6, 12 and 17 of the Kyoto Protocol;

3. *Also recommends* to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol that the Adaptation Fund shall exclusively serve the Paris Agreement once the share of proceeds under Article 6, paragraph 4, of the Paris Agreement becomes available;

4. *Invites* the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to ensure that developing country Parties and developed country Parties that are Parties to the Paris Agreement are eligible for membership on the Adaptation Fund Board;

5. *Decides* that, when the Adaptation Fund serves the Paris Agreement, it shall be financed from the share of proceeds from the mechanism established by Article 6, paragraph 4, of the Paris Agreement and from a variety of voluntary public and private sources;

6. *Invites* the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to request the Adaptation Fund Board to consider the rules of procedure of the Board, the arrangements of the Adaptation Fund with respect to the Paris Agreement and the implications of the Adaptation Fund receiving the share of proceeds from activities under Articles 6, 12 and 17 of the Kyoto Protocol when the Adaptation Fund serves the Paris Agreement, with a view to forwarding recommendations to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement for consideration at its second session (December 2019).

*26th plenary meeting*
*15 December 2018*

# Decision 14/CMA.1

## Setting a new collective quantified goal on finance in accordance with decision 1/CP.21, paragraph 53

*The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*,

*Recalling* decision 1/CP.21, paragraph 53,

1. *Decides* to initiate at its third session (November 2020), in accordance with Article 9, paragraph 3, of the Paris Agreement, deliberations on setting a new collective quantified goal from a floor of USD 100 billion per year in the context of meaningful mitigation actions and transparency of implementation and taking into account the needs and priorities of developing countries;

2. *Agrees* to consider, in its deliberations referred to in paragraph 1 above, the aim to strengthen the global response to the threat of climate change in the context of sustainable development and efforts to eradicate poverty, including by making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

*26th plenary meeting*
*15 December 2018*

# Decision 15/CMA.1

# Technology framework under Article 10, paragraph 4, of the Paris Agreement

*The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*,

*Recalling* Article 10, paragraph 1, of the Paris Agreement, regarding the long-term vision for technology development and transfer,

*Also recalling* Article 10, paragraphs 3 and 4, of the Paris Agreement,

*Further recalling* decision 1/CP.21, paragraphs 67 and 68,

*Recognizing* the need to ensure that the operationalization of the technology framework undertaken by the Technology Mechanism to support the achievement of the Paris Agreement is consistent with the long-term vision for technology development and transfer and Article 2 of the Paris Agreement,

*Noting with appreciation* the work undertaken by the Subsidiary Body for Scientific and Technological Advice in elaborating the technology framework in accordance with decision 1/CP.21, paragraph 67,

1. *Adopts* the technology framework under Article 10, paragraph 4, of the Paris Agreement as elaborated in the annex;

2. *Decides* that the Technology Executive Committee and the Climate Technology Centre and Network, consistently with their respective functions, mandates and modalities of work, shall implement the technology framework in close collaboration under the guidance of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement;

3. *Requests* the Technology Executive Committee and the Climate Technology Centre and Network:

(a) To incorporate the guidance contained in the technology framework into their respective workplans and programmes of work, which should also include methods for the monitoring and evaluation of their activities;

(b) To include information in their joint annual report for 2019 on how they incorporated the guidance contained in the technology framework into their respective workplans and programmes of work as referred to in paragraph 3(a) above;

4. *Takes note* of the recommendation of the Technology Executive Committee and the Climate Technology Centre and Network to prepare and submit their joint annual report to both the Conference of the Parties and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement;[1]

5. *Requests* the Technology Executive Committee and the Climate Technology Centre and Network to report on the progress of their work and challenges and lessons learned in implementing the technology framework in their joint annual reports;

6. *Reiterates* the importance of the support, including financial support, that shall be provided to developing country Parties for strengthening cooperative action on technology development and transfer at different stages of the technology cycle, and *agrees* that the technology framework can facilitate the strengthening of such support;

7. *Decides* that the outcome of and/or recommendations resulting from the periodic assessment referred to in decision 1/CP.21, paragraph 69, shall be considered when updating the technology framework;

8. *Requests* the secretariat to facilitate the implementation of the technology framework;

[1] FCCC/SB/2017/3, paragraph 43.

9. *Also requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.

# Annex

## Technology framework under Article 10, paragraph 4, of the Paris Agreement

## I. Purpose

1. The purpose of the technology framework under the Paris Agreement is to provide overarching guidance to the work of the Technology Mechanism in promoting and facilitating enhanced action on technology development and transfer in order to support the implementation of the Paris Agreement in pursuit of the long-term vision referred to in its Article 10, paragraph 1. The long-term vision for technology development and transfer shared by Parties relates to the importance of fully realizing technology development and transfer in order to improve resilience to climate change and reduce greenhouse gas emissions.

2. The technology framework can play a strategic role in improving the effectiveness and efficiency of the work of the Technology Mechanism, which consists of the Technology Executive Committee (TEC) and the Climate Technology Centre and Network (CTCN), by addressing the transformational changes envisioned in the Paris Agreement and the long-term vision for technology development and transfer.

## II. Principles

3. The principles of the technology framework, which are coherence, inclusiveness, results-oriented approach, transformational approach and transparency, should guide the Technology Mechanism in implementing the Paris Agreement, as follows:

(a) Align with the long-term vision for technology development and transfer and other provisions of the Paris Agreement, national plans and strategies under the Convention and actions undertaken by relevant institutions in the international climate regime and beyond;

(b) Be designed and implemented in a manner that facilitates the active participation of all relevant stakeholders and takes into account sustainable development, gender, the special circumstances of the least developed countries and small island developing States, and the enhancement of indigenous capacities and endogenous technologies;

(c) Be results-oriented in terms of output, outcome and impact;

(d) Address the transformational changes envisioned in the Paris Agreement;

(e) Be designed and implemented in a manner that enhances the transparency of the results, costs and process, such as through planning, resource management and reporting on activities and support.

## III. Key themes

4. The following key themes for the technology framework represent focused areas of action to be undertaken under the framework:

(a) Innovation;

(b) Implementation;

(c) Enabling environment and capacity-building;

(d) Collaboration and stakeholder engagement;

(e) Support.

## A. Innovation

5. As stipulated in Article 10, paragraph 5, of the Paris Agreement, accelerating, encouraging and enabling innovation is critical for an effective, long-term global response to climate change and promoting economic growth and sustainable development. To achieve the purpose and goals of the Paris Agreement, there is a pressing need to accelerate and strengthen technological innovation so that it can deliver environmentally and socially sound, cost-effective and better-performing climate technologies on a larger and more widespread scale.

6. Actions and activities under this key theme should therefore accelerate and scale up innovation at different stages of the technology cycle, addressing both adaptation and mitigation in a balanced manner to help countries to build resilience and reduce their emissions, and be undertaken in a manner that enhances the effective participation of developing country Parties, fosters sustainable development and ensures gender responsiveness.

7. Fostering innovation could be done through new collaborative approaches to climate technology research, development and demonstration (RD&D); the creation and promotion of relevant enabling policy to incentivize and nurture a supportive environment for innovation; and the active engagement of the private sector and closer collaboration between the public and private sector.

8. Actions and activities in this area of work include:

(a) Supporting countries in incentivizing innovation by improving the policy environments, strategies, legal and regulatory frameworks, and institutional arrangements for establishing and/or strengthening their national systems of innovation;

(b) Providing information and facilitating the sharing of information on international technology RD&D partnerships and initiatives, good practices and lessons learned from countries' climate technology RD&D policies and activities;

(c) Promoting the development, deployment and dissemination of existing innovative technologies and accelerating the scale-up and diffusion of emerging climate technologies;

(d) Supporting countries in developing long-term technological transition pathways towards the widespread uptake of climate technologies in the context of climate resilience and low greenhouse gas emission development;

(e) Promoting collaboration with international technology RD&D partnerships and initiatives to stimulate climate technology RD&D;

(f) Supporting countries in initiating joint climate technology RD&D activities;

(g) Identifying ways to increase the effective participation of developing country Parties in collaborative approaches to RD&D;

(h) Promoting the engagement of the private sector in the development of new and innovative climate technologies, including through:

(i) Raising awareness of future market opportunities in climate technology innovation;

(ii) Identifying ways to incentivize their participation;

(i) Promoting partnerships between the public and private sector in the development and transfer of climate technologies.

## B. Implementation

9. The Paris Agreement highlights the importance of technology for the implementation of mitigation and adaptation actions under the Agreement. The Technology Mechanism should facilitate and promote enhanced action on technology to help countries to achieve the

purpose and goals of the Paris Agreement, while at the same time recognizing the importance of rapidly accelerating the transformational changes towards climate resilience and low greenhouse gas emission development.

10. Actions and activities under this key theme should therefore facilitate the implementation of collaborative technology development and transfer, build on the past and ongoing work of the Technology Mechanism and take into account the role of North–South, South–South, triangular and regional collaboration in facilitating implementation.

11. Actions and activities under this key theme should also facilitate the implementation of mitigation and adaptation action identified using planning tools and processes such as nationally determined contributions, long-term low greenhouse gas emission development strategies, technology needs assessments (TNAs), national adaptation plans, technology road maps and other relevant policies, and facilitate overcoming challenges by implementing such action, as appropriate.

12. Actions and activities in this area of work include:

(a) Facilitating the undertaking and updating of TNAs, as well as enhancing the implementation of their results, particularly technology action plans and project ideas, and capacity-building related to TNAs;

(b) Promoting the link or alignment of TNAs with nationally determined contributions and national adaptation plans in order to increase coherence between the implementation of those national plans with national strategies to achieve climate-resilient and low-emission development;

(c) Reviewing the TNA guidelines and updating them as necessary with a view to TNAs leading to plans and implementation that are aligned with the transformational changes envisioned in the Paris Agreement;

(d) Identifying and developing recommendations on approaches, tools and means, as appropriate, for the assessment of the technologies that are ready to transfer;

(e) Identifying and developing recommendations for the enhancement of enabling environments for and the addressing of barriers to the development and transfer of socially and environmentally sound technologies.

## C. Enabling environment and capacity-building

13. In the context of technology development and transfer, countries may face various challenges. Creating and enhancing enabling environments for the development and transfer of socially and environmentally sound technologies should consider the challenges faced by countries, and the different needs of the countries in overcoming such challenges.

14. Capacity-building for technology development and transfer is a cross-cutting and comprehensive issue. Although initiatives and activities on capacity-building for technology development and transfer are already being undertaken, further measures in this area are needed to develop, strengthen and enhance countries' capabilities to take effective climate action in the context of the Paris Agreement.

15. Actions and activities under this key theme should therefore foster the creation and enhancement of an enabling environment, including policy and regulatory environments for technology development and transfer, and strengthen the capacity of countries to effectively address various challenges.

16. Actions and activities in this area of work include:

(a) Enhancing public awareness on climate technology development and transfer;

(b) Facilitating countries in enhancing an investment-friendly environment, including national strategies and action plans, a policy environment, legal and regulatory frameworks and other institutional arrangements;

(c) Facilitating countries in enhancing an enabling environment to promote endogenous and gender-responsive technologies for mitigation and adaptation actions;

(d) Assisting countries in developing and implementing policies for enabling environments to incentivize the private and public sector to fully realize the development and transfer of climate technologies;

(e) Assisting governments in playing a key role in fostering private sector involvement by designing and implementing policies, regulations and standards that create enabling environments and favourable market conditions for climate technologies;

(f) Facilitating information-sharing and networking among relevant organizations and institutions to create synergies and to enable the exchange among relevant players of best practices, experience and knowledge on technology development and transfer;

(g) Formulating and analysing information on capacity-building activities at different stages of the technology cycle;

(h) Catalysing the development and enhancement of endogenous capacities for climate-related technologies and harnessing indigenous knowledge;

(i) Enhancing collaboration with existing capacity-building organizations and institutions, including those under the Convention, to create synergies in a manner that enhances efficiency and avoids duplication of work;

(j) Enhancing the capacity of national designated entities (NDEs) of all Parties, especially those in developing countries, to fulfil their roles;

(k) Enhancing the capacities of Parties to plan, monitor and achieve technological transformation in accordance with the purpose and goals of the Paris Agreement.

## D. Collaboration and stakeholder engagement

17. Collaboration with and engagement of stakeholders will enhance interaction between those involved in the development and transfer of climate technology and help to share knowledge and mobilize support. In this context, stakeholders will provide important input to the work of the Technology Mechanism.

18. Therefore, the Technology Mechanism shall work in an open and inclusive, including gender-responsive, manner whereby stakeholders are invited to participate and actively engage. Collaboration with and engagement of stakeholders should take place at different stages of the technology cycle.

19. Enhanced engagement of stakeholders at the local, regional, national and global level will be beneficial for the Technology Mechanism. Further, activities for cooperation on technology development and transfer across relevant organizations, institutions and initiatives should be harmonized and synergized to avoid duplication and ensure consistency and coherence.

20. Actions and activities in this area of work include:

(a) Enhancing engagement and collaboration with relevant stakeholders, including local communities and authorities, national planners, the private sector and civil society organizations, in the planning and implementation of Technology Mechanism activities;

(b) Enhancing engagement and collaboration with the private sector, on a voluntary basis, to leverage expertise, experience and knowledge regarding effective enabling environments that support the implementation of the Paris Agreement;

(c) Enhancing engagement between NDEs and relevant stakeholders, including by providing guidance and information;

(d) Enhancing collaboration and synergy with relevant international organizations, institutions and initiatives, including academia and the scientific community, to leverage their specific expertise, experience, knowledge and information, particularly on new and innovative technologies.

## E. Support

21. Article 10, paragraph 6, of the Paris Agreement states that support, including financial support, shall be provided to developing country Parties for the implementation of that Article, including for strengthening cooperative action on technology development and transfer at different stages of the technology cycle, with a view to achieving a balance between support for mitigation and adaptation.

22. The understanding of support under this key theme is broader than just financial support, as it may include all aspects of support for the implementation of Article 10 of the Paris Agreement. The support should be provided for all key themes of the technology framework, taking into account the gender perspective and endogenous and indigenous aspects.

23. The provision and mobilization of various types of support coming from a wide variety of sources are crucial to implementing Article 10 of the Paris Agreement and can enhance cooperative action on technology development and transfer.

24. Monitoring and evaluation of the Technology Mechanism can enhance the effectiveness of the support provided.

25. Actions and activities in this area of work include:

(a) Enhancing the collaboration of the Technology Mechanism with the Financial Mechanism for enhanced support for technology development and transfer;

(b) Identifying and promoting innovative finance and investment at different stages of the technology cycle;

(c) Providing enhanced technical support to developing country Parties, in a country-driven manner, and facilitating their access to financing for innovation, including for RD&D, enabling environments and capacity-building, developing and implementing the results of TNAs, and engagement and collaboration with stakeholders, including organizational and institutional support;

(d) Enhancing the mobilization of various types of support, including pro bono and in-kind support, from various sources for the implementation of actions and activities under each key theme of the technology framework;

(e) Developing and/or enhancing a system for monitoring and tracking of actions and activities undertaken, and support received, by the Technology Mechanism to implement the technology framework, with a view to such information maybe also contributing to the enhanced transparency framework referred to in Article 13 and the global stocktake referred to in Article 14 of the Paris Agreement.

*26th plenary meeting*
*15 December 2018*

# Decision 16/CMA.1

## Scope of and modalities for the periodic assessment referred to in paragraph 69 of decision 1/CP.21

*The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*,

*Recalling* decision 1/CP.21, in particular paragraph 69, and decision 1/CP.23,

1. *Adopts* the scope of and modalities for the periodic assessment of the effectiveness and adequacy of the support provided to the Technology Mechanism in supporting the implementation of the Paris Agreement on matters relating to technology development and transfer, in accordance with decision 1/CP.21, as contained in the annex;

2. *Decides* that the periodic assessment referred to in paragraph 1 above should be undertaken in a transparent, inclusive and participatory manner;

3. *Also decides* to initiate the first periodic assessment referred to in paragraph 1 above at its fourth session (November 2021) in accordance with the scope and modalities as contained in the annex, or as these may be subsequently amended, with a view to completing the first periodic assessment at its fifth session (November 2022);

4. *Further decides* that the outcomes of the periodic assessment referred to in paragraph 1 above should serve as an input to the global stocktake referred to in Article 14 of the Paris Agreement;

5. *Decides* that the outcome of the periodic assessment should guide improved effectiveness and enhanced support to the Technology Mechanism in supporting the implementation of the Paris Agreement;

6. *Requests* the Subsidiary Body for Implementation to initiate, at its fifty-first session (December 2019), consideration of the alignment between processes pertaining to the review of the Climate Technology Centre and Network[1] and the periodic assessment referred to in paragraph 1 above with a view to recommending a draft decision for consideration and adoption by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its third session (November 2020);

7. *Also requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.

[1] In accordance with decisions 2/CP.17, 14/CP.18 and 12/CP.24.

# Annex

## Scope of and modalities for the periodic assessment referred to in paragraph 69 of decision 1/CP.21

## I. Scope

1. The mandate is to undertake a periodic assessment of the effectiveness and adequacy of the support provided to the Technology Mechanism in supporting the implementation of the Paris Agreement on matters relating to technology development and transfer (hereinafter referred to as the periodic assessment).[1] The scope has two elements:[2]

(a) The effectiveness of the Technology Mechanism in supporting the implementation of the Paris Agreement on matters relating to technology development and transfer;

(b) The adequacy of support provided to the Technology Mechanism in supporting the implementation of the Paris Agreement on matters relating to technology development and transfer.

### A. Effectiveness of the Technology Mechanism

2. On the effectiveness of the Technology Mechanism in supporting the implementation of the Paris Agreement, as guided by the technology framework,[3] the scope may include the assessment of the impact, outputs and outcomes of the Technology Mechanism, in particular, how it has:

(a) Facilitated the transformational changes envisioned in the Paris Agreement;

(b) Contributed to the achievement of the long-term vision referred to in Article 10, paragraph 1, of the Paris Agreement;

(c) Contributed to strengthening cooperative action on technology development and transfer;

(d) Enhanced the implementation of the technology elements of nationally determined contributions and technology needs assessments;

(e) Resulted in quantitative impacts through technical assistance, including potential emission reductions, the number of technology solutions delivered, and investments leveraged;

(f) Undertaken its work in a cost-effective and efficient manner;

(g) Achieved success in terms of how the bodies of the Technology Mechanism have implemented their workplans;

(h) Overcome challenges;

(i) Identified opportunities for improvement;

(j) Collaborated with other stakeholders in supporting the implementation of the Paris Agreement on matters relating to technology development and transfer;

(k) Responded to the overarching guidance provided by the technology framework referred to in Article 10 of the Paris Agreement, including aligning its work with the themes of the technology framework;

[1] Decision 1/CP.21, paragraph 69.
[2] See document FCCC/SBI/2016/8, paragraph 94.
[3] Decision 15/CMA.1.

(l) Responded to existing mandates under the Paris Agreement and to guidance from Parties.

3. To undertake the assessment of effectiveness referred to in paragraph 2 above, the work of the Technology Mechanism in supporting the implementation of the Paris Agreement on matters relating to cooperative action on technology development and transfer to be assessed may include:

(a) The work of the Technology Executive Committee (TEC) in supporting the implementation of the Paris Agreement on matters relating to technology development and transfer;

(b) The work of the Climate Technology Centre and Network (CTCN) in supporting the implementation of the Paris Agreement on matters relating to technology development and transfer, including in relation to:

(i) The implementation of its three core services: responding to requests from developing countries; fostering collaboration and sharing of information; and strengthening networks, partnerships and capacity-building;

(ii) Its institutional arrangements;

(c) The collaboration between the TEC and the CTCN, and the linkages between these bodies and institutional arrangements under the Paris Agreement;

(d) The work on technology needs assessments and the implementation of technology action plans to support the implementation of the Paris Agreement on matters relating to technology development and transfer.

## B. Adequacy of the support provided to the Technology Mechanism

4. On the adequacy of the support provided to the Technology Mechanism[4] in supporting the implementation of the Paris Agreement on matters relating to technology development and transfer, the scope may include, but is not limited to, the assessment of:

(a) The recipients of the support provided:

(i) The TEC;

(ii) The CTCN, including the national designated entities;

(b) The sources of support provided;

(c) The types of support provided;

(d) How the support provided was used, taking into account actions at the different stages of the technology cycle:

(i) Mitigation actions;

(ii) Adaptation actions;

(iii) Cross-cutting actions;

(e) The level of support provided and whether it has changed over time;

(f) The extent to which the support has met the budgets and plans of the Technology Mechanism.

# II. Modalities

5. The scope and modalities for the periodic assessment of the effectiveness and adequacy of the support provided to the Technology Mechanism should follow international

[4] In line with decision 2/CP.17, paragraphs 139–141.

best practices for conducting assessments. These best practices include the following five evaluation criteria categories: relevance, effectiveness, efficiency, impact and sustainability.

6. The periodic assessment is undertaken by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA). The CMA:

(a) Initiates the periodic assessment in accordance with paragraph 10 below;

(b) Provides guidance to the secretariat and requests it to prepare interim and final reports on the periodic assessment;

(c) Finalizes the periodic assessment, with possible outputs in accordance with paragraph 11 below.

7. The Subsidiary Body for Implementation (SBI) supports the CMA by:

(a) Considering the interim report and providing guidance to the secretariat for preparing the final report. The SBI does this in its first sessional period in the year after that in which the CMA initiated the assessment;

(b) Preparing draft recommendations for consideration and adoption by the CMA, as appropriate, based on a consideration of the final report.

8. The periodic assessment is both qualitative and quantitative:

(a) Qualitative elements may include reviewing existing reports and gathering information from stakeholders;

(b) Quantitative elements may include collecting data and undertaking statistical analysis.

9. The sources of information for the periodic assessment include, but are not limited to:

(a) The technology framework;

(b) The joint annual reports of the TEC and the CTCN to the CMA;

(c) Other UNFCCC reporting documents and processes relevant to the implementation of the Paris Agreement on matters relating to technology development and transfer;

(d) Information provided by relevant stakeholders;

(e) Documents and outcomes resulting from the independent reviews of the CTCN;

(f) Where relevant, reports of the Intergovernmental Panel on Climate Change.

10. The periodic assessment:

(a) Is undertaken every five years;

(b) Takes one year or less to complete.

11. The outputs of the periodic assessment include, as appropriate:

(a) A report to the CMA through the SBI;

(b) Recommendations of the CMA on updating the technology framework.

*26th plenary meeting*
*15 December 2018*

# Decision 17/CMA.1

## Ways of enhancing the implementation of education, training, public awareness, public participation and public access to information so as to enhance actions under the Paris Agreement

*The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*,

*Recalling* Article 12 of the Paris Agreement, which provides that Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information,

*Reaffirming* the importance of all elements of Article 6 of the Convention and of Article 12 of the Paris Agreement for the implementation of the ultimate objective of the Convention and the Paris Agreement, respectively,

*Recognizing* the key role that Action for Climate Empowerment can play at all stages and levels of the implementation of the Paris Agreement,

*Recalling* decision 15/CP.18, which established the Doha work programme on Article 6 of the Convention and defined key areas of work and activities for the implementation of Article 6 of the Convention,

*Also recalling* decision 17/CP.22, in which it was decided that efforts related to the implementation of Article 6 of the Convention shall be referred to as Action for Climate Empowerment,

*Recognizing* that Action for Climate Empowerment plays a key role in promoting changes in lifestyles, attitudes and behaviours needed to foster low-emission, climate-resilient and sustainable development,

*Reaffirming* the key role that a broad range of stakeholders, inter alia national governments, regions as applicable, cities, education and cultural institutions, museums, the private sector, intergovernmental organizations, non-governmental organizations, international organizations, decision makers, scientists, the media, teachers, youth, women and indigenous peoples, play in ensuring Action for Climate Empowerment,

*Acknowledging* the importance of linkages between activities taken to support Article 6 of the Convention, Article 12 of the Paris Agreement and the Sustainable Development Goals,

1. *Decides* that efforts related to the implementation of Article 12 of the Paris Agreement will also be referred to as Action for Climate Empowerment;

2. *Invites* the Conference of the Parties, when reviewing the Doha work programme on Article 6 of the Convention in accordance with decision 15/CP.18, to also include efforts related to the implementation of Article 12 of the Paris Agreement;

3. *Decides* that the focal points nominated under Article 6 of the Convention will also serve as focal points under Article 12 of the Paris Agreement and will be referred to as Action for Climate Empowerment focal points in the context of the Paris Agreement as well;

4. *Encourages* Parties that have not already designated an Action for Climate Empowerment focal point to do so and to provide the necessary institutional support for the focal point's activities, as appropriate;

5. *Also encourages* Parties to continue to promote the systematic integration of gender-sensitive and participatory education, training, public awareness, public participation, public access to information, and regional and international cooperation into all mitigation and adaptation activities implemented under the Convention, as well as under the Paris Agreement, as appropriate, including into the processes of designing and implementing their nationally determined contributions, national adaptation plans, long-term low greenhouse gas emission development strategies and climate policies;

6. *Invites* Parties to develop and implement national strategies on Action for Climate Empowerment in relation to Article 12 of the Paris Agreement taking into account their national circumstances;

7. *Also invites* Parties and non-Party stakeholders to consider relevant activities that enhance Action for Climate Empowerment, as referred to in the reports on the Action for Climate Empowerment workshop[1] held at the first part of the forty-eighth session of the Subsidiary Body for Implementation and the Action for Climate Empowerment youth forum,[2] when developing and implementing Action for Climate Empowerment, taking into consideration national circumstances;

8. *Encourages* Parties to include, as appropriate, information on how education, training, public awareness, public participation, public access to information, and regional and international cooperation are considered in the preparation and implementation of the actions under the Paris Agreement;

9. *Considers* that Parties and stakeholders may, as appropriate, take into account actions to enhance climate change education, training, public awareness, public participation, public access to information, and regional and international cooperation in the context of Article 14 of the Paris Agreement;

10. *Encourages* Parties to foster public participation and collaborate with, inter alia, regional as applicable and local authorities, the scientific community, universities, the private sector, civil society organizations and youth to scale up the implementation of Action for Climate Empowerment;

11. *Invites* Parties, multilateral and bilateral institutions, private sector and other potential sources to support activities related to the implementation of Article 12 of the Paris Agreement;

12. *Requests* the secretariat:

(a) To continue organizing, in collaboration with Parties and international organizations, training, workshops, webinars and other activities to exchange good practices and to build and strengthen existing skills and the capacity of the Action for Climate Empowerment national focal points and stakeholders;

(b) To organize the 7th Dialogue on Action for Climate Empowerment in 2019 to advance the discussions on the final review of the Doha work programme and ways of enhancing the implementation of education, training, public awareness, public participation, public access to information, and international and regional cooperation so as to also enhance actions under Article 12 of the Paris Agreement;

(c) To continue organizing awareness-raising campaigns and training activities to empower children and youth to support and lead climate action;

(d) To continue collaborating with Parties, non-Party stakeholders and regional and international organizations with a view to catalysing the implementation of Article 12 of the Paris Agreement;

[1] See https://unfccc.int/sites/default/files/resource/Action%20for%20Climate%20Empowerment%20Workshop%20outcomes.pdf.

[2] See https://unfccc.int/sites/default/files/resource/180505_Outcomes%20AYF%20-%20Final.pdf.

13. *Takes note* of the estimated budgetary implications of the activities to be undertaken by the secretariat referred to in paragraph 12 above;

14. *Requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.

*26th plenary meeting*
*15 December 2018*

# Decision 18/CMA.1

## Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement

*The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*,

*Recalling* the Paris Agreement, adopted under the Convention, in particular Article 2, paragraph 2, and Article 13, including paragraphs 1, 14 and 15,

*Also recalling* decision 1/CP.21,

*Recognizing* that the Capacity-building Initiative for Transparency, established pursuant to decision 1/CP.21, paragraph 84, will continue to support developing country Parties, upon request, to build their institutional and technical capacity, both pre- and post-2020,

*Also recognizing* that flexibility for those developing country Parties that need it in the light of their capacities is reflected in the modalities, procedures and guidelines for the transparency of action and support,

1. *Adopts*, pursuant to Article 13, paragraph 13, of the Paris Agreement, the modalities, procedures and guidelines for the transparency framework for action and support (hereinafter referred to as the modalities, procedures and guidelines) contained in the annex;

2. *Requests* the Subsidiary Body for Scientific and Technological Advice to undertake the first review and update, as appropriate, of the modalities, procedures and guidelines no later than 2028 on the basis of experience in reporting, technical expert review and facilitative, multilateral consideration of progress, and *decides* that subsequent reviews and updates will be undertaken as and when the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement determines them to be appropriate;

3. *Decides* that Parties shall submit their first biennial transparency report and national inventory report, if submitted as a stand-alone report, in accordance with the modalities, procedures and guidelines, at the latest by 31 December 2024;

4. *Also decides* that the least developed country Parties and small island developing States may submit the information referred to in Article 13, paragraphs 7, 8, 9 and 10, of the Paris Agreement at their discretion;

5. *Invites* Parties and, as appropriate, intergovernmental organizations to nominate technical experts with the relevant qualifications to the UNFCCC roster of experts as referred to in chapter VII.I of the annex;

6. *Requests* the secretariat, in addition to the actions specified in the modalities, procedures and guidelines, to:

(a) Produce synthesis reports on Parties' biennial transparency reports and national inventory reports;

(b) Produce an annual report on the technical expert review;

(c) Publish Parties' biennial transparency reports and national inventory reports, if submitted as a stand-alone report, the technical expert review reports, and the records of Parties' facilitative, multilateral consideration of progress on the UNFCCC website;

7. *Recalls* that, in accordance with Article 13, paragraphs 14 and 15, of the Paris Agreement, support shall be provided to developing country Parties for the implementation of Article 13 and for the building of transparency-related capacity of developing country Parties on a continuous basis;

8. *Urges* and *requests* the Global Environment Facility, as an operating entity of the Financial Mechanism, throughout its replenishment cycles, to support developing country Parties in preparing their first and subsequent biennial transparency reports;

9. *Encourages* the Global Environment Facility to consider options for improving the efficiency of the process for providing support for reporting under Article 13 of the Paris Agreement, in particular for addressing the challenges in the application process, including by potentially providing an avenue for Parties to apply for funding for more than one report through the same application in each replenishment period;

10. *Urges* the Global Environment Facility and its implementing and executing agencies and *encourages* the Global Environment Facility Council to consider options for improving the efficiency of the process for providing support for reporting under Article 13 of the Paris Agreement, including through better streamlining of the processes related to applications, implementation plans and signing of grant agreements;

11. *Requests* the Global Environment Facility to continue to support the operation of the Capacity-building Initiative for Transparency as a priority reporting-related need;

12. *Also requests* the Subsidiary Body for Scientific and Technological Advice to develop, pursuant to the modalities, procedures and guidelines, for consideration and adoption by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its third session (November 2020):

(a) Common reporting tables for the electronic reporting of the information referred to in chapter II, and common tabular formats for the electronic reporting of the information referred to in chapters III, V and VI, of the annex, taking into account the existing common tabular formats and common reporting formats;

(b) Outlines of the biennial transparency report, national inventory document and technical expert review report, pursuant to the modalities, procedures and guidelines contained in the annex;

(c) A training programme for technical experts participating in the technical expert review;

13. *Invites* Parties to submit their views on the work referred to in paragraph 12 above via the submission portal[1] by 31 March 2019;

14. *Notes* decision 1/CP.24, paragraphs 45 and 46, in which the Conference of the Parties decided that the technical annex referred to in decision 14/CP.19, paragraph 7, containing modalities for measuring, reporting and verifying the activities referred to in decision 1/CP.16, paragraph 70, shall be submitted as an annex to the biennial transparency report to be submitted by Parties under Article 13 of the Paris Agreement, and that the technical analysis referred to in decision 14/CP.19, paragraph 11, shall be carried out concurrently with the technical expert review under Article 13 of the Paris Agreement;

15. *Decides* that, subject to the extension of its term by the Conference of the Parties, as referred to in decision 11/CP.24, paragraph 1, the Consultative Group of Experts referred to therein shall also serve the Paris Agreement, starting from 1 January 2019, to support the implementation of the enhanced transparency framework under Article 13 of the Paris Agreement by, inter alia:

(a) Facilitating the provision of technical advice and support to developing country Parties, as applicable, including for the preparation and submission of their biennial transparency reports and facilitating improved reporting over time;

(b) Providing technical advice to the secretariat on the implementation of the training of the technical expert review teams referred to in paragraph 12(c) above;

16. *Requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.

[1] https://unfccc.int/submissions_and_statements.

# Annex

## Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement

# I. Introduction

## A. Purpose

1. In accordance with Article 13, paragraph 5, of the Paris Agreement, the purpose of the framework for transparency of action is to provide a clear understanding of climate change action in the light of the objective of the Convention as set out in its Article 2, including clarity and tracking of progress towards achieving Parties' individual nationally determined contributions (NDCs) under Article 4, and Parties' adaptation actions under Article 7, including good practices, priorities, needs and gaps, to inform the global stocktake under Article 14.

2. In accordance with Article 13, paragraph 6, of the Paris Agreement, the purpose of the framework for transparency of support is to provide clarity on support provided and received by relevant individual Parties in the context of climate change actions under Articles 4, 7, 9, 10 and 11, and, to the extent possible, to provide a full overview of aggregate financial support provided, to inform the global stocktake under Article 14.

## B. Guiding principles

3. The guiding principles of these modalities, procedures and guidelines (MPGs) are:

(a) Building on and enhancing the transparency arrangements under the Convention, recognizing the special circumstances of the least developed countries (LDCs) and small island developing States (SIDS), and implementing the transparency framework in a facilitative, non-intrusive, non-punitive manner, respecting national sovereignty and avoiding placing undue burden on Parties;

(b) The importance of facilitating improved reporting and transparency over time;

(c) Providing flexibility to those developing country Parties that need it in the light of their capacities;

(d) Promoting transparency, accuracy, completeness, consistency and comparability;

(e) Avoiding duplication of work and undue burden on Parties and the secretariat;

(f) Ensuring that Parties maintain at least the frequency and quality of reporting in accordance with their respective obligations under the Convention;

(g) Ensuring that double counting is avoided;

(h) Ensuring environmental integrity.

## C. Flexibility to those developing country Parties that need it in the light of their capacities

4. In accordance with Article 13, paragraph 2, of the Paris Agreement, the enhanced transparency framework shall provide flexibility in the implementation of the provisions of Article 13 to those developing country Parties that need it in the light of their capacities, and these MPGs shall reflect such flexibility.

5. These MPGs specify the flexibility that is available to those developing country Parties that need it in the light of their capacities pursuant to Article 13, paragraph 2, reflecting flexibility, including in the scope, frequency and level of detail of reporting, and in the scope of the review, as referred to decision 1/CP.21, paragraph 89.

6. The application of a flexibility provided for in the provisions of these MPGs for those developing country Parties that need it in the light of their capacities is to be self-determined. The developing country Party shall clearly indicate the provision to which flexibility is applied, concisely clarify capacity constraints, noting that some constraints may be relevant to several provisions, and provide self-determined estimated time frames for improvements in relation to those capacity constraints. When a developing country Party applies flexibility provided for in these MPGs, the technical expert review teams shall not review the Party's determination to apply such flexibility or whether the Party possesses the capacity to implement that specific provision without flexibility.

## D. Facilitating improved reporting and transparency over time

7. To facilitate continuous improvement, each Party should, to the extent possible, identify, regularly update and include as part of its biennial transparency report information on areas of improvement in relation to its reporting pursuant to chapters II, III, IV, V and VI of these MPGs, including, as applicable:

(a) Areas of improvement identified by the Party and the technical expert review team in relation to the Party's implementation of Article 13 of the Paris Agreement;

(b) How the Party is addressing or intends to address areas of improvement as referred to in paragraph 7(a) above, as appropriate;

(c) Those developing country Parties that need flexibility in the light of their capacities are encouraged to highlight the areas of improvement that are related to the flexibility provisions used;

(d) Identification of reporting-related capacity-building support needs, including those referred to in paragraph 6 above, and any progress made, including those previously identified as part of the technical expert review referred to in chapter VII below.

8. Parties' domestic plans and priorities with regard to improved reporting reported pursuant to paragraph 7 above are not subject to technical expert review, but the information may inform discussions on areas of improvement and identification of capacity-building needs between the technical expert review team and the Party concerned.

9. In accordance with Article 13, paragraphs 14 and 15, of the Paris Agreement, support shall be provided to developing country Parties for the implementation of Article 13 of the Paris Agreement and for the building of transparency-related capacity of developing country Parties on a continuous basis.

## E. Reporting format

10. In the biennial transparency report:

(a) Each Party shall provide a national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases (GHGs), in accordance with the MPGs contained in chapter II below;

(b) Each Party shall provide the information necessary to track progress in implementing and achieving its NDC under Article 4 of the Paris Agreement, in accordance with the MPGs contained in chapter III below;

(c) Each Party should provide information on climate change impacts and adaptation under Article 7 of the Paris Agreement, in accordance with the MPGs contained in chapter IV below;

(d) Developed country Parties shall provide information pursuant to Article 13, paragraph 9, in accordance with the MPGs contained in chapter V below. Other Parties that provide support should provide such information and, in doing so, are encouraged to use the MPGs contained in chapter V below;

(e) Developing country Parties should provide information on financial, technology transfer and capacity-building support needed and received under Articles 9, 10 and 11 of the Paris Agreement, in accordance with the MPGs contained in chapter VI below.

11. The LDCs and SIDS may submit the information referred to in paragraph 10 above at their discretion.

12. Notwithstanding paragraph 10 above, the national inventory report referred to in paragraph 10 above may be submitted as a stand-alone report or as a component of a biennial transparency report.

13. If a Party submits an adaptation communication as a component of or in conjunction with a biennial transparency report, it should clearly identify which part of the report is the adaptation communication.

14. When reporting information related to climate change impacts and adaptation under Article 7 of the Paris Agreement as referred to in paragraph 10(c) above, a Party may cross-reference previously reported information and focus its reporting on updates to previously reported information.

15. Each Party shall transmit its biennial transparency report, and national inventory report if submitted as a stand-alone report, via an online portal maintained by the secretariat. The secretariat shall post the reports on the UNFCCC website.

16. Each Party shall submit the reports referred to in paragraphs 10 and 12 above in one of the official languages of the United Nations.

# II. National inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases

## A. Definitions

17. The definitions of the GHG inventory principles used shall be as provided in the Intergovernmental Panel on Climate Change (IPCC) *2006 IPCC Guidelines for National Greenhouse Gas Inventories* (hereinafter referred to as the 2006 IPCC Guidelines), volume 1, chapter 1, section 1.4.

## B. National circumstances and institutional arrangements

18. Each Party should implement and maintain national inventory arrangements, including institutional, legal and procedural arrangements for the continued estimation, compilation and timely reporting of national inventory reports in accordance with these MPGs. National inventory arrangements can vary by Party depending on their national circumstances and preferences, and change over time.

19. Each Party shall report on the following functions related to inventory planning, preparation and management:

(a) Its national entity or national focal point with overall responsibility for the national inventory;

(b) Its inventory preparation process, including division of specific responsibilities of institutions participating in the inventory preparation to ensure that sufficient activity data collection, choice and development of methods, emission factors and other parameters are in accordance with the IPCC guidelines referred to in paragraph 20 below and these MPGs;

(c) Its archiving of all information for the reported time series, including all disaggregated emission factors and activity data, all documentation about generating and aggregating data, including quality assurance/quality control (QA/QC), review results and planned inventory improvements;

(d) Its processes for the official consideration and approval of the inventory.

## C. Methods

### 1. Methodologies, parameters and data

20. Each Party shall use the 2006 IPCC Guidelines, and shall use any subsequent version or refinement of the IPCC guidelines agreed upon by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA). Each Party is encouraged to use the *2013 Supplement to the 2006 IPCC Guidelines for National Greenhouse Gas Inventories: Wetlands*.

21. Each Party shall use methods from the IPCC guidelines referred to in paragraph 20 above. Each Party should make every effort to use a recommended method (tier level) for key categories in accordance with those IPCC guidelines.

22. Each Party may use nationally appropriate methodologies if they better reflect its national circumstances and are consistent with the IPCC guidelines referred to in paragraph 20 above. In these cases, each Party shall transparently explain national methods, data and/or parameters selected.

23. A Party may be unable to adopt a higher tier method for a particular key category owing to lack of resources. In such cases, the Party may use a tier 1 approach, and shall clearly document why the methodological choice was not in line with the corresponding decision tree of the IPCC guidelines referred to in paragraph 20 above. The Party should prioritize for future improvement any key categories for which the good practice method elaborated in the IPCC guidelines referred to in paragraph 20 above cannot be used.

24. Each Party is encouraged to use country-specific and regional emission factors and activity data, where available, or to propose plans to develop them, in accordance with the good practice elaborated in the IPCC guidelines referred to in paragraph 20 above.

### 2. Key category analysis

25. Each Party shall identify key categories for the starting year and the latest reporting year referred to in chapter II.E.3 below, including and excluding land use, land-use change and forestry (LULUCF) categories, using approach 1, for both level and trend assessment, by implementing a key category analysis consistent with the IPCC guidelines referred to in paragraph 20 above; those developing country Parties that need flexibility in the light of their capacities with respect to this provision have the flexibility to instead identify key categories using a threshold no lower than 85 per cent in place of the 95 per cent threshold defined in the IPCC guidelines referred to in paragraph 20 above, allowing a focus on improving fewer categories and prioritizing resources.

### 3. Time-series consistency and recalculations

26. To ensure time-series consistency, each Party should use the same methods and a consistent approach to underlying activity data and emission factors for each reported year.

27. Each Party should use surrogate data, extrapolation, interpolation and other methods consistent with splicing techniques contained in the IPCC guidelines referred to in paragraph 20 above to estimate missing emission values resulting from lack of activity data, emission factors or other parameters in order to ensure a consistent time series.

28. Each Party shall perform recalculations in accordance with the IPCC guidelines referred to in paragraph 20 above, ensuring that changes in emission trends are not introduced as a result of changes in methods or assumptions across the time series.

### 4. Uncertainty assessment

29. Each Party shall quantitatively estimate and qualitatively discuss the uncertainty of the emission and removal estimates for all source and sink categories, including inventory totals, for at least the starting year and the latest reporting year of the inventory time series referred to in paragraphs 57 and 58 below. Each Party shall also estimate the trend uncertainty of emission and removal estimates for all source and sink categories, including totals, between the starting year and the latest reporting year of the inventory time series referred to in paragraphs 57 and 58 below, using at least approach 1, as provided in the IPCC guidelines referred to in paragraph 20 above; those developing country Parties that need flexibility in the light of their capacities with respect to this provision have the flexibility to instead provide, at a minimum, a qualitative discussion of uncertainty for key categories, using the IPCC guidelines referred to in paragraph 20 above, where quantitative input data are unavailable to quantitatively estimate uncertainties, and are encouraged to provide a quantitative estimate of uncertainty for all source and sink categories of the GHG inventory.

### 5. Assessment of completeness

30. Each Party should indicate the sources and sinks (categories, pools and gases) that are not considered in the national inventory report but for which estimation methods are included in the IPCC guidelines referred to in paragraph 20 above and explain the reasons for such exclusion.

31. Each Party shall use notation keys where numerical data are not available when completing common reporting tables, indicating the reasons why emissions from sources and removals by sinks and associated data for specific sectors, categories and subcategories or gases are not reported. These notation keys include:

(a) "NO" (not occurring) for categories or processes, including recovery, under a particular source or sink category that do not occur within a Party;

(b) "NE" (not estimated) for activity data and/or emissions by sources and removals by sinks of GHGs that have not been estimated but for which a corresponding activity may occur within a Party;

(c) "NA" (not applicable) for activities under a given source/sink category that do occur within the Party but do not result in emissions or removals of a specific gas;

(d) "IE" (included elsewhere) for emissions by sources and removals by sinks of GHGs estimated but included elsewhere in the inventory instead of under the expected source/sink category;

(e) "C" (confidential) for emissions by sources and removals by sinks of GHGs where the reporting would involve the disclosure of confidential information.

32. Each Party may use the notation key "NE" (not estimated) when the estimates would be insignificant in terms of level according to the following considerations: emissions from a category should only be considered insignificant if the likely level of emissions is below 0.05 per cent of the national total GHG emissions, excluding LULUCF, or 500 kilotonnes of carbon dioxide equivalent (kt $CO_2$ eq), whichever is lower. The total national aggregate of estimated emissions for all gases from categories considered insignificant shall remain below 0.1 per cent of the national total GHG emissions, excluding LULUCF. Parties should use approximated activity data and default IPCC emission factors to derive a likely level of emissions for the respective category. Those developing country Parties that need flexibility in the light of their capacities with respect to this provision have the flexibility to instead consider emissions insignificant if the likely level of emissions is below 0.1 per cent of the national total GHG emissions, excluding LULUCF, or 1,000 kt $CO_2$ eq, whichever is lower. The total national aggregate of estimated emissions for all gases from categories considered insignificant, in this case, shall remain below 0.2 per cent of the national total GHG emissions, excluding LULUCF.

33. Once emissions or removals have been estimated for a category and if they continue to occur, each Party shall report them in subsequent submissions.

### 6. Quality assurance/quality control

34. Each Party shall elaborate an inventory QA/QC plan in accordance with the IPCC guidelines referred to in paragraph 20 above, including information on the inventory agency responsible for implementing QA/QC; those developing country Parties that need flexibility in the light of their capacities with respect to this provision are instead encouraged to elaborate an inventory QA/QC plan in accordance with the IPCC guidelines referred to in paragraph 20 above, including information on the inventory agency responsible for implementing QA/QC.

35. Each Party shall implement and provide information on general inventory QC procedures in accordance with its QA/QC plan and the IPCC guidelines referred to in paragraph 20 above; those developing country Parties that need flexibility in the light of their capacities with respect to this provision are instead encouraged to implement and provide information on general inventory QC procedures in accordance with its QA/QC plan and the IPCC guidelines referred to in paragraph 20 above. In addition, Parties should apply category-specific QC procedures in accordance with the IPCC guidelines referred to in paragraph 20 above for key categories and for those individual categories in which significant methodological changes and/or data revisions have occurred. In addition, Parties should implement QA procedures by conducting a basic expert peer review of their inventories in accordance with the IPCC guidelines referred to in paragraph 20 above.

36. Each Party should compare the national estimates of $CO_2$ emissions from fuel combustion with those obtained using the reference approach, as contained in the IPCC guidelines referred to in paragraph 20 above, and report the results of this comparison in its national inventory report.

## D. Metrics

37. Each Party shall use the 100-year time-horizon global warming potential (GWP) values from the IPCC Fifth Assessment Report, or 100-year time-horizon GWP values from a subsequent IPCC assessment report as agreed upon by the CMA, to report aggregate emissions and removals of GHGs, expressed in $CO_2$ eq. Each Party may in addition also use other metrics (e.g. global temperature potential) to report supplemental information on aggregate emissions and removals of GHGs, expressed in $CO_2$ eq. In such cases, the Party shall provide in the national inventory document information on the values of the metrics used and the IPCC assessment report they were sourced from.

## E. Reporting guidance

38. Pursuant to Article 13, paragraph 7(a), of the Paris Agreement, each Party shall provide a national inventory report of anthropogenic emissions by sources and removals by sinks of GHGs. The national inventory report consists of a national inventory document and the common reporting tables. Each Party shall report the information referred to in paragraphs 39–46 below, recognizing the associated flexibilities provided for those developing country Parties that need them in the light of their capacities.

### 1. Information on methods and cross-cutting elements

39. Each Party shall report methods used, including the rationale for the choice of methods, in accordance with good practice elaborated in the IPCC guidelines referred to paragraph 20 above, and the descriptions, assumptions, references and sources of information used for the emission factors and activity data used to compile the GHG inventory.

40. Each Party shall provide information on the category and gas, and the methodologies, emission factors and activity data used at the most disaggregated level, to the extent possible, according to the IPCC guidelines referred to in paragraph 20 above, including related data references for reported emission and removal estimates for any country-specific category and gas that is not included in the IPCC guidelines referred to in paragraph 20 above.

41. Each Party shall describe the key categories, including information on the approach used for their identification, and information on the level of disaggregation used, in accordance with paragraph 25 above.

42. Each Party shall report the individual and cumulative percentage contributions from key categories, for both level and trend, consistent with the IPCC guidelines referred to in paragraph 20 above and the provisions referred to in paragraph 25 above.

43. Each Party shall report recalculations for the starting year referred to in paragraphs 57 and 58 below and all subsequent years of the inventory time series, together with explanatory information and justifications for recalculations with an indication of relevant changes and their impact on the emission trends, in accordance with paragraphs 26–28 above.

44. Each Party shall report the results of the uncertainty analysis as well as methods used, underlying assumptions, as applicable, and trends, at least for the starting year and the latest reporting year of the inventory time series referred to in paragraphs 57 and 58 below, in accordance with paragraph 29 above.

45. Each Party shall report information on the reasons for lack of completeness, including information on any methodological or data gaps, in accordance with paragraphs 30–33 above.

46. Each Party shall report the QA/QC plan and information on QA/QC procedures already implemented or to be implemented in the future, in accordance with paragraphs 34−36 above.

### 2. Sectors and gases

47. Each Party shall report estimates of emissions and removals for all categories, gases and carbon pools considered in the GHG inventory throughout the reported period on a gas-by-gas basis in units of mass at the most disaggregated level, in accordance with the IPCC guidelines referred to in paragraph 20 above, using the common reporting tables, including a descriptive summary and figures underlying emission trends, with emissions by sources listed separately from removals by sinks, except in cases where it may be technically impossible to separate information on emissions and removals in the LULUCF sector, and noting that a minimum level of aggregation is needed to protect confidential business and military information.

48. Each Party shall report seven gases ($CO_2$, methane ($CH_4$), nitrous oxide ($N_2O$), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulfur hexafluoride ($SF_6$) and nitrogen trifluoride ($NF_3$)); those developing country Parties that need flexibility in the light of their capacities with respect to this provision have the flexibility to instead report at least three gases ($CO_2$, $CH_4$ and $N_2O$) as well as any of the additional four gases (HFCs, PFCs, $SF_6$ and $NF_3$) that are included in the Party's NDC under Article 4 of the Paris Agreement, are covered by an activity under Article 6 of the Paris Agreement, or have been previously reported.

49. Each Party reporting HFCs, PFCs, $SF_6$ and $NF_3$ shall report actual emissions of the gases, providing disaggregated data by chemical (e.g. HFC-134a) and category in units of mass and in $CO_2$ eq.

50. Each Party shall report the following sectors: energy, industrial processes and product use, agriculture, LULUCF and waste, according to the IPCC guidelines referred to in paragraph 20 above.

51. Each Party should provide information on the following precursor gases: carbon monoxide (CO), nitrogen oxides and non-methane volatile organic compounds (NMVOCs), as well as sulfur oxides.

52. Each Party may report indirect $CO_2$ from the atmospheric oxidation of $CH_4$, CO and NMVOCs. For Parties that decide to report indirect $CO_2$, the national totals shall be presented with and without indirect $CO_2$. Each Party should report indirect $N_2O$ emissions from sources other than those in the agriculture and LULUCF sectors as a memo item. Those estimates of indirect $N_2O$ shall not be included in national totals. Parties may provide information on other substances that have an impact on climate.

53. Each Party should report international aviation and marine bunker fuel emissions as two separate entries and should not include such emissions in national totals but report them distinctly, if disaggregated data are available, making every effort to both apply and report according to the method contained in the IPCC guidelines referred to in paragraph 20 above for separating domestic and international emissions.

54. Each Party should clearly indicate how feedstocks and non-energy use of fuels have been accounted for in the inventory, under the energy or industrial processes sector, in accordance with the IPCC guidelines referred to in paragraph 20 above.

55. In the case of a Party addressing the emissions and subsequent removals from natural disturbances on managed lands in its national GHG inventory, that Party shall report information on the approach taken, and how it is consistent with IPCC guidance, as appropriate, and shall indicate if the estimates are indicated in national totals.

56. In the case of a Party using an approach to reporting emissions and removals from harvested wood products in accordance with IPCC guidance other than the production approach, that Party shall also provide supplementary information on emissions and removals from harvested wood products estimated using the production approach.

#### 3. Time series

57. Each Party shall report a consistent annual time series starting from 1990; those developing country Parties that need flexibility in the light of their capacities with respect to this provision have the flexibility to instead report data covering, at a minimum, the reference year/period for its NDC under Article 4 of the Paris Agreement and, in addition, a consistent annual time series from at least 2020 onwards.

58. For each Party, the latest reporting year shall be no more than two years prior to the submission of its national inventory report; those developing country Parties that need flexibility in the light of their capacities with respect to this provision have the flexibility to instead have their latest reporting year as three years prior to the submission of their national inventory report.

# III. Information necessary to track progress made in implementing and achieving nationally determined contributions under Article 4 of the Paris Agreement

## A. National circumstances and institutional arrangements

59. Each Party shall describe its national circumstances relevant to progress made in implementing and achieving its NDC under Article 4 of the Paris Agreement, including:

(a) Government structure;

(b) Population profile;

(c) Geographical profile;

(d) Economic profile;

(e) Climate profile;

(f) Sector details.

60. Each Party shall provide information on how its national circumstances affect GHG emissions and removals over time.

61. Each Party shall provide information on the institutional arrangements in place to track progress made in implementing and achieving its NDC under Article 4, including those used for tracking internationally transferred mitigation outcomes, if applicable, along with any changes in institutional arrangements since its most recent biennial transparency report.

62. Each Party shall provide information on legal, institutional, administrative and procedural arrangements for domestic implementation, monitoring, reporting, archiving of information and stakeholder engagement related to the implementation and achievement of its NDC under Article 4.

63. In reporting the information referred to in paragraphs 59–62 above, a Party may reference previously reported information.

## B. Description of a Party's nationally determined contribution under Article 4 of the Paris Agreement, including updates

64. Each Party shall provide a description of its NDC under Article 4, against which progress will be tracked. The information provided shall include the following, as applicable, including any updates to information previously provided:

(a) Target(s) and description, including target type(s) (e.g. economy-wide absolute emission reduction, emission intensity reduction, emission reduction below a projected baseline, mitigation co-benefits of adaptation actions or economic diversification plans, policies and measures, and other);

(b) Target year(s) or period(s), and whether they are single-year or multi-year target(s);

(c) Reference point(s), level(s), baseline(s), base year(s) or starting point(s), and their respective value(s);

(d) Time frame(s) and/or periods for implementation;

(e) Scope and coverage, including, as relevant, sectors, categories, activities, sources and sinks, pools and gases;

(f) Intention to use cooperative approaches that involve the use of internationally transferred mitigation outcomes under Article 6 towards NDCs under Article 4 of the Paris Agreement;

(g) Any updates or clarifications of previously reported information (e.g. recalculation of previously reported inventory data, or greater detail on methodologies or use of cooperative approaches).

## C. Information necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4 of the Paris Agreement

65. Each Party shall identify the indicator(s) that it has selected to track progress towards the implementation and achievement of its NDC under Article 4. Indicators shall be relevant to a Party's NDC under Article 4, and may be either qualitative or quantitative.

66. These indicators could include, as appropriate, for example: net GHG emissions and removals, percentage reduction of GHG intensity, relevant qualitative indicators for a specific policy or measure, mitigation co-benefits of adaptation actions and/or economic diversification plans or other (e.g. hectares of reforestation, percentage of renewable energy use or production, carbon neutrality, share of non-fossil fuel in primary energy consumption and non-GHG related indicators).

67. Each Party shall provide the information for each selected indicator for the reference point(s), level(s), baseline(s), base year(s) or starting point(s), and shall update the information in accordance with any recalculation of the GHG inventory, as appropriate.

68. Each Party shall provide the most recent information for each selected indicator identified in paragraph 65 above for each reporting year during the implementation period of its NDC under Article 4.

69. Each Party shall compare the most recent information for each selected indicator with the information provided pursuant to paragraph 67 above to track progress made in implementing its NDC under Article 4.

70. For the first biennial transparency report that contains information on the end year or end of the period of its NDC under Article 4, each Party shall provide an assessment of whether it has achieved the target(s) for its NDC under Article 4 based on the relevant information described in paragraphs 59–69 above and paragraph 78 below, as applicable, and the most recent information for each selected indicator relevant to tracking progress towards the implementation and achievement of its NDC under Article 4.

71. For the first NDC under Article 4, each Party shall clearly indicate and report its accounting approach, including how it is consistent with Article 4, paragraphs 13 and 14, of the Paris Agreement. Each Party may choose to provide information on accounting of its first NDC consistent with decision 4/CMA.1.

72. For the second and subsequent NDC under Article 4, each Party shall provide information referred to in chapter III.B and C above consistent with decision 4/CMA.1. Each Party shall clearly indicate how its reporting is consistent with decision 4/CMA.1.

73. Each Party shall provide any definitions needed to understand its NDC under Article 4, including those related to each indicator identified in paragraph 65 above, those related to any sectors or categories defined differently than in the national inventory report, or the mitigation co-benefits of adaptation actions and/or economic diversification plans.

74. Each Party shall provide a description of each methodology and/or accounting approach used, as applicable for:

(a) Target(s), as described in paragraph 64 above;

(b) The construction of baselines, as described in paragraph 64 above, to the extent possible;

(c) Each indicator identified in paragraph 65 above.

75. The information referred to in paragraph 74 above shall include, as applicable and available to the Party's NDC under Article 4:

(a) Key parameters, assumptions, definitions, data sources and models used;

(b) IPCC guidelines used;

(c) Metrics used;

(d) Where applicable to its NDC, any sector-, category- or activity-specific assumptions, methodologies and approaches consistent with IPCC guidance, taking into account any relevant decision under the Convention, including as applicable:

(i) The approach used to address emissions and subsequent removals from natural disturbances on managed lands;

(ii) The approach used to account for emissions and removals from harvested wood products;

(iii) The approach used to address the effects of age-class structure in forests;

(e) Methodologies used to estimate mitigation co-benefits of adaptation actions and/or economic diversification plans;

(f) Methodologies associated with any cooperative approaches that involve the use of internationally transferred mitigation outcomes towards its NDC under Article 4, consistent with CMA guidance on cooperative approaches under Article 6;

(g) Methodologies used to track progress arising from the implementation of policies and measures;

(h) Any other methodologies related to its NDC under Article 4;

(i) Any conditions and assumptions relevant to the achievement of its NDC under Article 4.

76. Each Party shall also:

(a) Describe, for each indicator identified in paragraph 65 above, how it is related to its NDC under Article 4;

(b) Explain how the methodology in each reporting year is consistent with the methodology or methodologies used when communicating the NDC;

(c) Explain methodological inconsistencies with its most recent national inventory report, if applicable;

(d) Describe how double counting of net GHG emission reductions has been avoided, including in accordance with guidance developed in relation to Article 6, if relevant.

77. Each Party shall provide the information referred to in paragraphs 65–76 above in a structured summary to track progress made in implementing and achieving its NDC under Article 4, including:

(a) For each selected indicator:

(i) Information for the reference point(s), level(s), baseline(s), base year(s), or starting point(s) referred to in paragraph 67 above;

(ii) Information for previous reporting years during the implementation period of its NDC under Article 4, identified in paragraph 68 above, as applicable;

(iii) The most recent information identified in paragraph 68 above;

(b) Where applicable, information on GHG emissions and removals consistent with the coverage of its NDC under Article 4;

(c) Contribution from the LULUCF sector for each year of the target period or target year, if not included in the inventory time series of total net GHG emissions and removals, as applicable;

(d) Each Party that participates in cooperative approaches that involve the use of internationally transferred mitigation outcomes towards an NDC under Article 4, or authorizes the use of mitigation outcomes for international mitigation purposes other than achievement of its NDC, shall also provide the following information in the structured summary consistently with relevant decisions adopted by the CMA on Article 6:

(i) The annual level of anthropogenic emissions by sources and removals by sinks covered by the NDC on an annual basis reported biennially;

(ii) An emissions balance reflecting the level of anthropogenic emissions by sources and removals by sinks covered by its NDC adjusted on the basis of corresponding adjustments undertaken by effecting an addition for internationally transferred mitigation outcomes first-transferred/transferred and a subtraction for internationally transferred mitigation outcomes used/acquired, consistent with decisions adopted by the CMA on Article 6;

(iii) Any other information consistent with decisions adopted by the CMA on reporting under Article 6;

(iv) Information on how each cooperative approach promotes sustainable development; and ensures environmental integrity and transparency, including in governance; and applies robust accounting to ensure inter alia the avoidance of double counting, consistent with decisions adopted by the CMA on Article 6.

78. Each Party with an NDC under Article 4 that consists of adaptation actions and/or economic diversification plans resulting in mitigation co-benefits consistent with Article 4, paragraph 7, of the Paris Agreement shall provide the information necessary to track progress on the implementation and achievement of the domestic policies and measures implemented to address the social and economic consequences of response measures, including:

(a) Sectors and activities associated with the response measures;

(b) Social and economic consequences of the response measures;

(c) Challenges in and barriers to addressing the consequences;

(d) Actions to address the consequences.

79. Each Party shall report the information referred to in paragraphs 65–78 above in a narrative and common tabular format, as applicable. Such common tabular formats should accommodate all types of NDC under Article 4, as appropriate.

## D. Mitigation policies and measures, actions and plans, including those with mitigation co-benefits resulting from adaptation actions and economic diversification plans, related to implementing and achieving a nationally determined contribution under Article 4 of the Paris Agreement

80. Each Party shall provide information on actions, policies and measures that support the implementation and achievement of its NDC under Article 4 of the Paris Agreement, focusing on those that have the most significant impact on GHG emissions or removals and those impacting key categories in the national GHG inventory. This information shall be presented in narrative and tabular format.

81. To the extent possible, Parties shall organize the reporting of actions by sector (energy, transport, industrial processes and product use, agriculture, LULUCF, waste management and other).

82. Each Party shall provide the following information on its actions, policies and measures, to the extent possible, in a tabular format:

(a) Name;

(b) Description;

(c) Objectives;

(d) Type of instrument (regulatory, economic instrument or other);

(e) Status (planned, adopted or implemented);

(f) Sector(s) affected (energy, transport, industrial processes and product use, agriculture, LULUCF, waste management or other);

(g) Gases affected;

(h) Start year of implementation;

(i) Implementing entity or entities.

83. Each Party may also provide the following information for each action, policy and measure reported:

(a) Costs;

(b) Non-GHG mitigation benefits;

(c) How the mitigation actions as identified in paragraph 80 above interact with each other, as appropriate.

84. For each Party with an NDC under Article 4 of the Paris Agreement that consists of mitigation co-benefits resulting from Parties' adaptation actions and/or economic diversification plans consistent with Article 4, paragraph 7, information to be reported under paragraphs 80, 82 and 83 above includes relevant information on policies and measures contributing to mitigation co-benefits resulting from adaptation actions or economic diversification plans.

85. Each Party shall provide, to the extent possible, estimates of expected and achieved GHG emission reductions for its actions, policies and measures in the tabular format referred to in paragraph 82 above; those developing country Parties that need flexibility in the light

of their capacities with respect to this provision are instead encouraged to report this information.

86. Each Party shall describe the methodologies and assumptions used to estimate the GHG emission reductions or removals due to each action, policy and measure, to the extent available. This information may be presented in an annex to its biennial transparency report.

87. Each Party should identify those actions, policies and measures that are no longer in place compared with the most recent biennial transparency report, and explain why they are no longer in place.

88. Each Party should identify its actions, policies and measures that influence GHG emissions from international transport.

89. Each Party should, to the extent possible, provide information about how its actions, policies and measures are modifying longer-term trends in GHG emissions and removals.

90. Each Party is encouraged to provide detailed information, to the extent possible, on the assessment of economic and social impacts of response measures.

## E. Summary of greenhouse gas emissions and removals

91. Each Party that submits a stand-alone national inventory report shall provide a summary of its GHG emissions and removals. This information shall be provided for those reporting years corresponding to the Party's most recent national inventory report, in a tabular format.

## F. Projections of greenhouse gas emissions and removals, as applicable

92. Each Party shall report projections pursuant to paragraphs 93–101 below; those developing country Parties that need flexibility in the light of their capacities are instead encouraged to report these projections.

93. Projections are indicative of the impact of mitigation policies and measures on future trends in GHG emissions and removals, and shall not be used to assess progress towards the implementation and achievement of a Party's NDC under Article 4 of the Paris Agreement unless the Party has identified a reported projection as its baseline as identified in chapter III.B above.

94. Each Party that reports pursuant to paragraph 92 above shall report a 'with measures' projection of all GHG emissions and removals and may report a 'with additional measures' projection and a 'without measures' projection.[1]

95. Projections shall begin from the most recent year in the Party's national inventory report and extend at least 15 years beyond the next year ending in zero or five; those developing country Parties that need flexibility in the light of their capacities with respect to this provision have the flexibility to instead extend their projections at least to the end point of their NDC under Article 4 of the Paris Agreement.

96. Each Party should provide information in describing the methodology used to develop the projections. This information should include:

(a) Models and/or approaches used and key underlying assumptions and parameters used for projections (e.g. gross domestic product growth rate/level, population growth rate/level);

[1] A 'with measures' scenario encompasses currently implemented and adopted policies and measures. If provided, a 'with additional measures' scenario encompasses implemented, adopted and planned policies and measures. If provided, a 'without measures' projection excludes all policies and measures implemented, adopted and planned after the year chosen as the starting points for the projection.

(b) Changes in the methodology since the Party's most recent biennial transparency report;

(c) Assumptions on policies and measures included in the 'with measures' projections and 'with additional measures' projections, if included;

(d) Sensitivity analysis for any of the projections, together with a brief explanation of the methodologies and parameters used.

97. Each Party shall also provide projections of key indicators to determine progress towards its NDC under Article 4 of the Paris Agreement.

98. Each Party shall include projections on a sectoral basis and by gas, as well as for the national total, using a common metric consistent with that in its national inventory report.

99. Projections shall be presented relative to actual inventory data for the preceding years.

100. Emission projections shall be provided with and without LULUCF.

101. Projections shall be presented in graphical and tabular formats.

102. Those developing country Parties that need flexibility in the light of their capacities with respect to paragraphs 93–101 above can instead report using a less detailed methodology or coverage.

### G. Other information

103. Each Party may provide any other information relevant to tracking progress made in implementing and achieving its NDC under Article 4 of the Paris Agreement.

## IV. Information related to climate change impacts and adaptation under Article 7 of the Paris Agreement

104. Each Party should provide information related to climate change impacts and adaptation under Article 7 of the Paris Agreement, as appropriate. Providing such information is not mandatory.

105. The information referred to below could facilitate, inter alia, recognition of the adaptation efforts of developing country Parties.

### A. National circumstances, institutional arrangements and legal frameworks

106. Each Party should provide the following information, as appropriate:

(a) National circumstances relevant to its adaptation actions, including biogeophysical characteristics, demographics, economy, infrastructure and information on adaptive capacity;

(b) Institutional arrangements and governance, including for assessing impacts, addressing climate change at the sectoral level, decision-making, planning, coordination, addressing cross-cutting issues, adjusting priorities and activities, consultation, participation, implementation, data governance, monitoring and evaluation, and reporting;

(c) Legal and policy frameworks and regulations.

### B. Impacts, risks and vulnerabilities, as appropriate

107. Each Party should provide the following information, as appropriate:

(a) Current and projected climate trends and hazards;

(b) Observed and potential impacts of climate change, including sectoral, economic, social and/or environmental vulnerabilities;

(c) Approaches, methodologies and tools, and associated uncertainties and challenges, in relation to paragraph 107(a) and (b) above.

## C. Adaptation priorities and barriers

108. Each Party should provide the following information, as appropriate:

(a) Domestic priorities and progress towards those priorities;

(b) Adaptation challenges and gaps, and barriers to adaptation.

## D. Adaptation strategies, policies, plans, goals and actions to integrate adaptation into national policies and strategies

109. Each Party should provide the following information, as appropriate:

(a) Implementation of adaptation actions in accordance with the global goal on adaptation as set out in Article 7, paragraph 1, of the Paris Agreement;

(b) Adaptation goals, actions, objectives, undertakings, efforts, plans (e.g. national adaptation plans and subnational plans), strategies, policies, priorities (e.g. priority sectors, priority regions or integrated plans for coastal management, water and agriculture), programmes and efforts to build resilience;

(c) How best available science, gender perspectives and indigenous, traditional and local knowledge are integrated into adaptation;

(d) Development priorities related to climate change adaptation and impacts;

(e) Any adaptation actions and/or economic diversification plans leading to mitigation co-benefits;

(f) Efforts to integrate climate change into development efforts, plans, policies and programming, including related capacity-building activities;

(g) Nature-based solutions to climate change adaptation;

(h) Stakeholder involvement, including subnational, community-level and private sector plans, priorities, actions and programmes.

## E. Progress on implementation of adaptation

110. Each Party should provide the following information, as appropriate, on progress on:

(a) Implementation of the actions identified in chapter IV.D above;

(b) Steps taken to formulate, implement, publish and update national and regional programmes, strategies and measures, policy frameworks (e.g. national adaptation plans) and other relevant information;

(c) Implementation of adaptation actions identified in current and past adaptation communications, including efforts towards meeting adaptation needs, as appropriate;

(d) Implementation of adaptation actions identified in the adaptation component of NDCs, as applicable;

(e) Coordination activities and changes in regulations, policies and planning.

111. Developing country Parties may also include information on, as appropriate, implementation of supported adaptation actions, and the effectiveness of already implemented adaptation measures.

## F. Monitoring and evaluation of adaptation actions and processes

112. In order to enhance their adaptation actions and to facilitate reporting, as appropriate, each Party should report on the establishment or use of domestic systems to monitor and evaluate the implementation of adaptation actions. Parties should report on approaches and systems for monitoring and evaluation, including those in place or under development.

113. Each Party should provide the following information, as appropriate, related to monitoring and evaluation:

(a) Achievements, impacts, resilience, review, effectiveness and results;

(b) Approaches and systems used, and their outputs;

(c) Assessment of and indicators for:

(i) How adaptation increased resilience and reduced impacts;

(ii) When adaptation is not sufficient to avert impacts;

(iii) How effective implemented adaptation measures are;

(d) Implementation, in particular on:

(i) Transparency of planning and implementation;

(ii) How support programmes meet specific vulnerabilities and adaptation needs;

(iii) How adaptation actions influence other development goals;

(iv) Good practices, experience and lessons learned from policy and regulatory changes, actions and coordination mechanisms.

114. Each Party should provide information related to the effectiveness and sustainability of adaptation actions, as appropriate, including on:

(a) Ownership, stakeholder engagement, alignment of adaptation actions with national and subnational policies, and replicability;

(b) The results of adaptation actions and the sustainability of those results.

## G. Information related to averting, minimizing and addressing loss and damage associated with climate change impacts

115. Each interested Party may provide, as appropriate, information related to enhancing understanding, action and support, on a cooperative and facilitative basis, to avert, minimize and address loss and damage associated with climate change impacts, taking into account projected changes in climate-related risks, vulnerabilities, adaptive capacities and exposure, including, as appropriate, on:

(a) Observed and potential climate change impacts, including those related to extreme weather events and slow onset events, drawing upon the best available science;

(b) Activities related to averting, minimizing and addressing loss and damage associated with the adverse effects of climate change;

(c) Institutional arrangements to facilitate the implementation of the activities referred to in paragraph 115(b) above.

## H. Cooperation, good practices, experience and lessons learned

116. Each Party should provide the following information, as appropriate, related to cooperation, good practices, experience and lessons learned:

(a) Efforts to share information, good practices, experience and lessons learned, including as they relate to:

(i) Science, planning and policies relevant to adaptation;

(ii) Policy innovation and pilot and demonstration projects;

(iii) Integration of adaptation actions into planning at different levels;

(iv) Cooperation to share information and to strengthen science, institutions and adaptation;

(v) Area, scale and types of cooperation and good practices;

(vi) Improving durability and effectiveness of adaptation actions;

(vii) Helping developing countries to identify effective adaptation practices, needs, priorities, and challenges and gaps in a way that is consistent with encouraging good practices;

(b) Strengthening scientific research and knowledge related to:

(i) Climate, including research and systematic observation and early warning systems, to inform climate services and decision-making;

(ii) Vulnerability and adaptation;

(iii) Monitoring and evaluation.

### I. Any other information related to climate change impacts and adaptation under Article 7 of the Paris Agreement

117. Each Party may provide, as appropriate, any other information related to climate change impacts and adaptation under Article 7.

## V. Information on financial, technology development and transfer and capacity-building support provided and mobilized under Articles 9–11 of the Paris Agreement

118. Developed country Parties shall provide information pursuant to Article 13, paragraph 9, of the Paris Agreement in accordance with the MPGs contained in this chapter. Other Parties that provide support should provide such information and, in doing so, are encouraged to use the MPGs contained in this chapter.

### A. National circumstances and institutional arrangements

119. Information on national circumstances and institutional arrangements relevant to reporting on the provision and mobilization of support, including:

(a) Description of the systems and processes used to identify, track and report on support provided and mobilized through public interventions;

(b) Description of challenges and limitations;

(c) Information on experience and good practices in relation to public policy and regulatory frameworks to incentivize further private climate financing and investment;

(d) Efforts taken to enhance comparability and accuracy of information reported on financial support provided and mobilized through public interventions, such as through use of international standards or harmonization with other countries, institutions and international systems.

120. Information, if available, on national circumstances and institutional arrangements for the provision of technology development and transfer and capacity-building support.

## B. Underlying assumptions, definitions and methodologies

121. In order to enhance the transparency of reporting, a description of the underlying assumptions, methodologies and definitions, as applicable, used to identify and/or report, including:

(a) The chosen reporting year (calendar year, fiscal year);

(b) The conversion between domestic currency and United States dollars;

(c) The status (committed, disbursed);

(d) The channel (bilateral, regional, multi-bilateral, multilateral);

(e) The funding source (official development assistance (ODA), other official flows (OOF), other);

(f) The financial instrument (e.g. grant, concessional loan, non-concessional loan, equity, guarantee, insurance, other (specify));

(g) Information on instruments and funding sources reported, including how a Party has determined finance to be concessional and/or ODA, including by using information such as grant equivalency, institution and/or instrument-based approaches;

(h) The type of support (e.g. adaptation, mitigation, cross-cutting);

(i) The sector;

(j) The subsector;

(k) Whether it supported capacity-building and/or technology development and transfer objectives;

(l) The support as being climate-specific;

(m) Information on the efforts taken to avoid double counting, including on:

(i) How double counting among multiple Parties involved in the provision of support was avoided;

(ii) How double counting among multiple Parties involved in the mobilization of private finance through public interventions was avoided, including the methodologies and assumptions used to attribute the mobilized resources through public interventions reported to the Party that reports them, if possible relative to the type of instrument used for the mobilization;

(iii) How double counting was avoided between the resources reported as provided or mobilized, and the resources used under Article 6 of the Paris Agreement by the acquiring Party for use towards the achievement of its NDC;

(iv) How support is attributed between multiple recipient countries, in cases where a project involves multiple recipient countries and where this information is reported on a country-by-country basis;

(n) The definition of public and private finance, in particular where entities or funds are mixed;

(o) How private finance was assessed as mobilized through public interventions, including by:

(i) Identifying a clear causal link between a public intervention and mobilized private finance, where the activity would not have moved forward, or moved forward at scale, in the absence of the Party's intervention;

(ii) Providing information on the point of measurement (e.g. point of commitment, point of disbursement) of the private finance mobilized as a result of the public intervention, to the extent possible in relation to the type of instrument or mechanism used for the mobilization;

(iii) Providing information on the boundaries used to identify finance as mobilized by public intervention;

(p) How it seeks to ensure that support provided and mobilized through public interventions effectively addresses the needs and priorities of developing country Parties for the implementation of the Paris Agreement, as identified in country-driven strategies and instruments, such as biennial transparency reports, NDCs and national adaptation plans;

(q) How it seeks to ensure that support provided and mobilized through public interventions is in line with the long-term goals of the Paris Agreement;

(r) An indication of what new and additional financial resources have been provided, and how it has been determined that such resources are new and additional;

(s) How the information provided reflects a progression from previous levels in the provision and mobilization of finance under the Paris Agreement;

(t) Information on reporting on multilateral finance, including:

(i) Whether the multilateral finance reported is based on the Party's inflow contribution to a multilateral institution and/or on the Party's share in the outflow of the multilateral institution;

(ii) Whether and how multilateral finance has been reported as climate-specific and how the climate-specific share was calculated, including by, for example, using existing international standards;

(iii) Whether multilateral finance has been reported as core/general, with the understanding that the actual climate finance amount it would transfer into depends on the programming choices of the multilateral institutions;

(iv) Whether and how multilateral finance has been attributed to the reporting Party.

122. A description of the underlying assumptions, definitions and methodologies used to provide information on technology development and transfer and capacity-building support.

## C. Information on financial support provided and mobilized under Article 9 of the Paris Agreement

### 1. Bilateral, regional and other channels

123. Relevant information, in a tabular format, for the previous two reporting years without overlapping with the previous reporting periods, on bilateral and regional financial support provided, specifying:

(a) Year (calendar year, fiscal year);

(b) Amount (in United States dollars and domestic currency) (the face value and, on a voluntary basis, the grant-equivalent value);

(c) Recipient, including, to the extent possible, information on the recipient region or country and the title of the project, programme, activity or other (specify);

(d) Status (disbursed, committed);

(e) Channel (bilateral, regional, multi-bilateral, other (specify));

(f) Funding source (ODA, OOF, other (specify));

(g) Financial instrument (e.g. grant, concessional loan, non-concessional loan, equity, guarantee, insurance, other (specify));

(h) The type of support (e.g. adaptation, mitigation or cross-cutting);

(i) Sector (e.g. energy, transport, industry, agriculture, forestry, water and sanitation, cross-cutting, other (specify));

(j) Subsector, as available;

(k) Additional information, as available (such as project/programme details, implementing agency and, to the extent possible, link to relevant project/programme documentation);

(l) Whether it contributes to capacity-building and/or technology development and transfer objectives, as available.

### 2. Multilateral channels

124. Relevant information, in a tabular format, for the previous two reporting years without overlapping with the previous reporting periods, on financial support provided through multilateral channels, specifying:

(a) Year (calendar year, fiscal year);

(b) Institution (e.g. multilateral fund, the operating entities of the Financial Mechanism, entities of the Technology Mechanism, multilateral financial institution, international organization, other (specify));

(c) Amount (in United States dollars and domestic currency) (the face value and, on a voluntary basis, the grant-equivalent value);

(d) Core-general or climate-specific, as applicable;

(e) Inflows and/or outflows, as applicable;

(f) Recipient (e.g. country, region, global, project, programme, activity, other (specify)), as applicable, as available;

(g) Status (disbursed, committed);

(h) Channel (multilateral, multi-bilateral);

(i) Funding source (ODA, OOF, other (specify));

(j) Financial instrument (e.g. grant, concessional loan, non-concessional loan, equity, guarantee, insurance, other (specify));

(k) The type of support (e.g. adaptation, mitigation or cross-cutting), as available;

(l) Sector (e.g. energy, transport, industry, agriculture, forestry, water and sanitation, cross-cutting, other (specify)), as available;

(m) Subsector, as available;

(n) Whether it contributes to capacity-building and/or technology development and transfer objectives, as applicable, as available.

### 3. Information on finance mobilized through public interventions

125. Relevant information, in textual and/or tabular format, for the previous two reporting years without overlapping with the previous reporting periods, on financial support mobilized through public interventions through bilateral, regional and multilateral channels, including the operating entities of the Financial Mechanism and entities of the Technology Mechanism, as applicable and to the extent possible:

(a) Year (calendar year, fiscal year);

(b) Amount (in United States dollars and domestic currency) (the face value and, on a voluntary basis, the grant-equivalent value, if applicable);

(c) Amount of resources used to mobilize the support (in United States dollars and domestic currency);

(d) Type of public intervention used (e.g. grant, concessional loan, non-concessional loan, equity, guarantee, insurance, policy intervention, capacity-building, technology development and transfer, technical assistance);

(e) Recipient (country, region, global, project, programme, activity, other (specify));

(f) Channel (bilateral, regional, multilateral);

(g) The type of support (e.g. adaptation, mitigation or cross-cutting);

(h) Sector (e.g. energy, transport, industry, agriculture, forestry, water and sanitation, cross-cutting, other (specify));

(i) Subsector;

(j) Additional information.

## D. Information on support for technology development and transfer provided under Article 10 of the Paris Agreement

126. Information, in textual format, on support for technology development and transfer provided under Article 10 of the Paris Agreement, including, to the extent possible, qualitative and/or quantitative information on:

(a) Strategies employed to support technology development and transfer, including case studies;

(b) Support provided at different stages of the technology cycle;

(c) Support for the development and enhancement of endogenous capacities and technologies of developing country Parties;

(d) Efforts to encourage private sector activities related to technology development and transfer and how such efforts support developing country Parties;

(e) Efforts to accelerate, encourage and enable innovation, including research, development and deployment efforts, and collaborative approaches to research and development;

(f) Knowledge generated.

127. Quantitative and/or qualitative information in a common tabular format on measures or activities related to support for technology development and transfer implemented or planned since their previous report, including, to the extent possible and as relevant:

(a) Title;

(b) Recipient entity;

(c) Description and objectives;

(d) Type of support (mitigation, adaptation or cross-cutting);

(e) Sector;

(f) Type of technology;

(g) Status of measure or activity;

(h) Whether the activity was undertaken by the public and/or private sector.

## E. Information on capacity-building support provided under Article 11 of the Paris Agreement

128. Information, in textual format, on capacity-building support provided under Article 11 of the Paris Agreement, including, to the extent possible, qualitative and/or quantitative information on:

(a) Strategies employed to provide capacity-building support, including case studies;

(b) How capacity-building support that was provided responds to the existing and emerging capacity-building needs, priorities and gaps identified by developing country Parties in the areas of mitigation, adaptation, and technology development and transfer;

(c) Policies that promote capacity-building support;

(d) Involvement of stakeholders;

(e) How support for capacity-building actions in developing country Parties that was provided promotes the sharing of lessons learned and best practices.

129. Quantitative and/or qualitative information in a common tabular format on measures or activities related to capacity-building support implemented or planned since their previous report, including, to the extent possible and as relevant:

(a) Title;

(b) Recipient entity;

(c) Description and objectives;

(d) Type of support (mitigation, adaptation or cross-cutting);

(e) Status of measure or activity.

# VI. Information on financial, technology development and transfer and capacity-building support needed and received under Articles 9–11 of the Paris Agreement

## A. National circumstances, institutional arrangements and country-driven strategies

130. Developing country Parties should provide information on national circumstances and institutional arrangements relevant to reporting on support needed and received, including:

(a) A description of the systems and processes used to identify, track and report support needed and received, including a description of the challenges and limitations;

(b) Information on country priorities and strategies and on any aspects of the Party's NDC under Article 4 of the Paris Agreement that need support.

## B. Underlying assumptions, definitions and methodologies

131. In reporting information on support needed and received, developing country Parties should describe the underlying assumptions, definitions and methodologies used to provide information on support needed and received, including, as applicable, those used to:

(a) Convert domestic currency into United States dollars;

(b) Estimate the amount of support needed;

(c) Determine the reporting year or time frame;

(d) Identify support as coming from specific sources;

(e) Determine support as committed, received or needed;

(f) Identify and report the status of the supported activity (planned, ongoing or completed);

(g) Identify and report the channel (bilateral, regional or multilateral);

(h) Identify and report the type of support (mitigation, adaptation or cross-cutting);

(i) Identify and report the financial instrument (grant, concessional loan, non-concessional loan, equity, guarantee or other);

(j) Identify and report sectors and subsectors;

(k) Report on the use, impact and estimated results of the support needed and received;

(l) Identify and report support as contributing to technology development and transfer and capacity-building;

(m) Avoid double counting in reporting information on support needed and received for the implementation of Article 13 of the Paris Agreement and transparency-related activities, including for transparency-related capacity-building, when reporting such information separately from other information on support needed and received.

## C. Information on financial support needed by developing country Parties under Article 9 of the Paris Agreement

132. Developing country Parties should provide information on financial support needed under Article 9 of the Paris Agreement in textual format, including, to the extent possible and as available and as applicable:

(a) Sectors for which the Party wishes to attract international finance, including existing barriers to attracting international finance;

(b) Description of how the support will contribute to its NDC and to the long-term goals of the Paris Agreement.

133. Developing country Parties should provide, in a common tabular format, information on financial support needed, including the following, to the extent possible, and as available and as applicable:

(a) Title (of activity, programme or project);

(b) Programme/project description;

(c) Estimated amount (in domestic currency and in United States dollars);

(d) Expected time frame;

(e) Expected financial instrument (grant, concessional loan, non-concessional loan, equity, guarantee or other);

(f) Type of support (mitigation, adaptation or cross-cutting);

(g) Sector and subsector;

(h) Whether the activity will contribute to technology development and transfer and/or capacity-building, if relevant;

(i) Whether the activity is anchored in a national strategy and/or an NDC;

(j) Expected use, impact and estimated results.

## D. Information on financial support received by developing country Parties under Article 9 of the Paris Agreement

134. Developing country Parties should provide, in a common tabular format, information on financial support received, including, to the extent possible, and as available and as applicable:

(a) Title (of activity, programme or project);

(b) Programme/project description;

(c) Channel;

(d) Recipient entity;

(e) Implementing entity;

(f) Amount received (in domestic currency and in United States dollars);

(g) Time frame;

(h) Financial instrument (grant, concessional loan, non-concessional loan, equity, guarantee or other);

(i) Status (committed or received);

(j) Sector and subsector;

(k) Type of support (mitigation, adaptation or cross-cutting);

(l) Whether the activity has contributed to technology development and transfer and/or capacity-building;

(m) Status of activity (planned, ongoing or completed);

(n) Use, impact and estimated results.

## E. Information on technology development and transfer support needed by developing country Parties under Article 10 of the Paris Agreement

135. Developing country Parties should provide, in textual format, information on technology development and transfer support needed under Article 10 of the Paris Agreement, including on, to the extent possible, and as available and as applicable:

(a) Plans, needs and priorities related to technology development and transfer, including those identified in technology needs assessments, where applicable;

(b) Technology development and transfer related needs for the enhancement of endogenous capacities and technologies.

136. Developing country Parties should provide, in a common tabular format, information on technology development and transfer support needed, including, to the extent possible and as available and as applicable:

(a) Title (of activity, programme or project);

(b) Programme/project description;

(c) Type of support (mitigation, adaptation or cross-cutting);

(d) Type of technology;

(e) Expected time frame;

(f) Sector;

(g) Expected use, impact and estimated results.

## F. Information on technology development and transfer support received by developing country Parties under Article 10 of the Paris Agreement

137. Developing country Parties should provide, in textual format, information on technology development and transfer support received under Article 10 of the Paris Agreement, including on, to the extent possible, and as available and as applicable:

(a) Case studies, including key success and failure stories;

(b) How the support contributes to technology development and transfer, endogenous capacities and know-how;

(c) The stage of the technology cycle supported, including research and development, demonstration, deployment, diffusion and transfer of technology.

138. Developing country Parties should provide, in a common tabular format, information on technology development and transfer support received, including on, to the extent possible, and as available and as applicable:

(a) Title (of activity, programme or project);

(b) Programme/project description;

(c) Type of technology;

(d) Time frame;

(e) Recipient entity;

(f) Implementing entity;

(g) Type of support (mitigation, adaptation or cross-cutting);

(h) Sector;

(i) Status of activity (planned, ongoing or completed);

(j) Use, impact and estimated results.

## G. Information on capacity-building support needed by developing country Parties under Article 11 of the Paris Agreement

139. Developing country Parties should provide, in textual format, information on capacity-building support needed under Article 11 of the Paris Agreement, including on, to the extent possible and as available and as applicable:

(a) The approach a Party seeks to take to enhance capacity-building support;

(b) Country-specific capacity-building needs, constraints and gaps in communicating those needs, and an explanation of how the capacity-building support needed would improve the provision of such information;

(c) Processes for enhancing public awareness, public participation and access to information in relation to capacity-building.

140. Developing country Parties should provide, in a common tabular format, information on capacity-building support needed, including the following, to the extent possible, and as available and as applicable:

(a) Title (of activity, programme or project);

(b) Programme/project description;

(c) Expected time frame;

(d) Type of support (mitigation, adaptation or cross-cutting);

(e) Expected use, impact and estimated results.

## H. Information on capacity-building support received by developing country Parties under Article 11 of the Paris Agreement

141. Developing country Parties should provide, in textual format, information on capacity-building support received under Article 11 of the Paris Agreement, including on, to the extent possible, and as available and as applicable:

(a) Case studies, including key success and failure stories;

(b) How support received has enhanced a Party's capacity;

(c) Capacity-building support received at the national and, where appropriate, subregional and regional level, including priorities, participation and the involvement of stakeholders.

142. Developing country Parties should provide, in a common tabular format, information on capacity-building support received, including the following, to the extent possible and as available and as applicable:

(a) Title (of activity, programme or project);

(b) Programme/project description;

(c) Implementing entity;

(d) Recipient entity;

(e) Type of support (mitigation, adaptation or cross-cutting);

(f) Time frame;

(g) Status of activity (planned, ongoing or completed);

(h) Use, impact and estimated results.

### I. Information on support needed and received by developing country Parties for the implementation of Article 13 of the Paris Agreement and transparency-related activities, including for transparency-related capacity-building

143. Developing country Parties should provide information on support needed and received for implementing Article 13 of the Paris Agreement and transparency-related activities, including on, to the extent possible:

(a) Support needed and received for preparing reports pursuant to Article 13;

(b) Support needed and received for addressing the areas for improvement identified by the technical expert review teams.

144. Developing country Parties should provide, in a common tabular format, summary information on support needed and received for implementing Article 13 and transparency-related activities, including for transparency-related capacity-building, including, to the extent possible and as applicable:

(a) Title (of activity, programme or project);

(b) Objectives and description;

(c) Recipient entity;

(d) Channel;

(e) Amount (in domestic currency and in United States dollars);

(f) Time frame;

(g) Status of activity (planned, ongoing or completed);

(h) Use, impact and estimated results.

145. In reporting information on support needed and received for the implementation of Article 13 of the Paris Agreement and transparency-related activities, including for transparency-related capacity-building, developing country Parties should ensure the avoidance of double counting in reporting this information separately from other information on financial, technology development and capacity-building support that is needed or received.

## VII. Technical expert review

### A. Scope

146. A technical expert review consists of:

(a) A review of the consistency of the information submitted by the Party under Article 13, paragraphs 7 and 9, of the Paris Agreement with these MPGs, taking into account the flexibility accorded to the Party under Article 13, paragraph 2, of the Paris Agreement;

(b) Consideration of the Party's implementation and achievement of its NDC under Article 4 of the Paris Agreement;

(c) Consideration of the Party's support provided, as relevant;

(d) Identification of areas of improvement for the Party related to implementation of Article 13 of the Paris Agreement;

(e) For those developing country Parties that need it in the light of their capacities, assistance in identifying capacity-building needs.

147. The technical expert review shall pay particular attention to the respective national capabilities and circumstances of developing country Parties.

148. In accordance with Article 13, paragraph 3, of the Paris Agreement, the technical expert review will be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and will avoid placing undue burden on Parties.

149. Technical expert review teams shall not:

(a) Make political judgments;

(b) Review the adequacy or appropriateness of a Party's NDC under Article 4 of the Paris Agreement, of its associated description pursuant to chapter III.B above, or of the indicators identified in chapter III.C above;

(c) Review the adequacy of a Party's domestic actions;

(d) Review the adequacy of a Party's support provided;

(e) For those developing country Parties that need flexibility in the light of their capacities, review the Party's determination to apply flexibility that has been provided for in these MPGs, including the self-determined estimated time frames referred to in paragraph 6 above, or whether a developing country Party possesses the capacity to implement that specific provision without flexibility.

## B. Information to be reviewed

150. Information submitted under Article 13, paragraphs 7 and 9, of the Paris Agreement shall undergo a technical expert review consistent with the MPGs contained in this chapter. This includes:

(a) A national inventory report of anthropogenic emissions by sources and removals by sinks of GHGs, as referred to in paragraph 10(a) above, submitted by each Party;

(b) Information necessary to track progress made in implementing and achieving its NDC under Article 4, as referred to in paragraph 10(b) above, submitted by each Party;

(c) Information on financial, technology development and transfer and capacity-building support provided to developing country Parties under Articles 9, 10 and 11 of the Paris Agreement referred to in paragraph 10(d) above. Information submitted by other Parties that provide support, as referred to in Article 9, paragraph 2, of the Paris Agreement, may undergo a technical expert review of this reported information at the Party's discretion.

## C. Technical expert review format

### 1. Definitions

151. A technical expert review may be conducted as a centralized review, in-country review, desk review or simplified review.

152. A centralized review is when the members of a technical expert review team conduct the review from a single, centralized location. During a centralized review, a single technical expert review team could review several Parties.

153. An in-country review is when the members of a technical expert review team conduct the review in the country of the Party undergoing a technical expert review. In-country visits will be scheduled, be planned and take place with the consent of, and in close coordination with, the Party subject to review.

154. A desk review is when the members of a technical expert review team conduct the review remotely from their respective countries.

155. A simplified review of a Party's national inventory report involves the secretariat undertaking an initial assessment of completeness and consistency with the MPGs, consistent with the initial assessment procedures.[2] A review of the findings of this initial assessment will form part of the consequent technical expert review of the Party's national inventory report.

### 2. Applicability

156. A Party's biennial transparency report that is not subject to an in-country or simplified review shall undergo a centralized or desk review.

157. The LDCs and SIDS may choose to participate in the same centralized review as a group. During a centralized group review, a single expert review team will review several biennial transparency reports from the LDCs and SIDS.

158. A Party shall undergo an in-country review for:

(a) The first biennial transparency report;

(b) At least two biennial transparency reports in a 10-year period, of which one is the biennial transparency report that contains information on the Party's achievement of its NDC under Article 4 of the Paris Agreement;

(c) A biennial transparency report if recommended in the technical expert review of the Party's previous biennial transparency report;

(d) A biennial transparency report upon the request of the Party under technical expert review.

159. Those developing country Parties that need flexibility in the light of their capacities with respect to paragraph 158 above have the flexibility to instead choose to undergo a centralized instead of an in-country review, but are encouraged to undergo an in-country review.

160. A desk review should not be conducted more often than once every five years, for the first biennial transparency report submitted following a Party's communication or update of its NDC under Article 4 or for a biennial transparency report that contains information on the Party's achievement of its NDC under Article 4.

161. A Party's national inventory report submitted in a year in which a biennial transparency report is not due shall be subject to a simplified review. A follow-up of the findings of the simplified review will form part of the technical expert review in the subsequent year.

## D. Procedures

162. For in-country, centralized and desk reviews:

(a) The secretariat shall commence the preparation of the review process immediately following the submission of the information specified in chapter VII.B above and agree with the Party the dates of the technical expert review week at least 14 weeks prior to the technical expert review week. The secretariat may organize reviews of biennial transparency reports in a staggered manner between two consecutive reports;

(b) The secretariat shall compose a technical expert review team at least 10 weeks prior to the technical expert review week;

(c) The technical expert review team should communicate any preliminary questions to the Party at least four weeks prior to the technical expert review week. The technical expert review team may request additional information before or during the

[2] To be developed by the lead reviewers, with the assistance of the secretariat.

technical expert review week. The Party concerned should make every reasonable effort to provide the requested information within two weeks of the request; those developing country Parties that need flexibility in the light of their capacities with respect to this provision are instead encouraged to provide the information within three weeks of the request;

(d) The technical expert review team shall communicate to the Party concerned draft areas of improvement, constituting preliminary "recommendations" (for "shall" provisions) and/or "encouragements" (for non-"shall" provisions), and, for those developing country Parties that need flexibility in the light of their capacities, any capacity-building needs identified in consultation with the Party concerned, at the end of the technical expert review week;

(e) The technical expert review team shall, under its collective responsibility, prepare a draft technical expert review report and through the secretariat send it to the Party concerned for comment within two months of the technical expert review week;

(f) The Party concerned shall then be given up to one month from its receipt to provide comments; those developing country Parties that need flexibility in the light of their capacities with respect to this provision have the flexibility to instead provide comments within three months of receipt of the draft technical expert review report;

(g) The technical expert review team shall prepare the final version of the technical expert review report, taking into account the comments of the Party, within one month of receipt of the comments;

(h) Taking into account the procedures in the preceding paragraphs, the technical expert review team shall make every effort to complete the technical expert review report as early as possible and no later than 12 months from the start of the technical expert review process.

163. For simplified reviews, the secretariat should prepare a draft initial assessment and send it to the Party within six weeks of the submission of a Party's information specified in chapter VII.B above. The Party may then provide comments within four weeks of receipt of the draft initial assessment. The secretariat should address the Party's comments and publish the final initial assessment on the UNFCCC website within four weeks of receipt of the Party's comments.

## E. Confidentiality

164. A Party may designate information provided to the technical expert review teams during the review as confidential. In such a case, the Party should provide the basis for protecting such information. In this case, technical expert review teams and the secretariat shall not make the information publicly available. The obligation of the members of the technical expert review team to maintain confidentiality continues after the completion of the technical expert review.

## F. Role of the Party

165. The Party concerned shall cooperate with the technical expert review team and the secretariat and make every reasonable effort to respond to all questions and provide additional clarifying information and comments to the technical expert review report in a timely manner.

## G. Role of the technical expert review team

166. Technical experts, in conducting reviews, shall adhere to these MPGs.

167. Technical experts shall participate in the technical expert review in their individual expert capacity.

## H. Role of the secretariat

168. The secretariat shall organize technical expert reviews, including the coordination of a schedule, logistical and administrative arrangements of the review and provision of review tools and materials to the technical expert review team.

169. The secretariat, together with the lead reviewers referred to in chapter VII.I.3 below, shall facilitate communication between the Party and the technical expert review team.

170. The secretariat, under the guidance of the lead reviewers, shall compile and edit the final technical expert review reports.

171. The secretariat shall facilitate annual meetings of the lead reviewers.

## I. Technical expert review team and institutional arrangements

### 1. General

172. Technical experts shall be nominated to the UNFCCC roster of experts by Parties and, as appropriate, by intergovernmental organizations.

173. Technical experts shall complete the training programme referred to in decision 18/CMA.1, paragraph 12(c), prior to serving on a technical expert review team.

174. Each transparency report submitted will be assigned to a single technical expert review team with members selected from the UNFCCC roster of experts.

### 2. Composition

175. Technical experts shall have recognized competence in the areas to be reviewed.

176. The secretariat shall compose a technical review team in such a way that the collective skills and competencies of the technical expert review teams correspond to the information to be reviewed, as specified in chapter VII.B above, and that the teams include experts for each significant GHG inventory sector, mitigation and support, cooperative approaches and internationally transferred mitigation outcomes under Article 6, and LULUCF, as relevant.

177. At least one team member should be fluent in a language of the Party under review, to the extent possible.

178. The secretariat shall select the members of the technical expert review team with a view to achieving a balance between experts from developed and developing country Parties. The secretariat shall ensure geographical and gender balance among the technical review experts, to the extent possible. When selecting members of the technical expert review team for centralized group reviews of biennial transparency reports from the LDCs and SIDS, the secretariat shall strive to include technical experts from the LDCs and SIDS.

179. Two successive reviews of a Party's submission cannot be performed by the same technical expert review team.

180. Every effort should be made to select lead reviewers who have participated in reviews under the Convention or Article 13 of the Paris Agreement.

181. The technical expert review team shall include two lead reviewers, one from a developed country Party and another from a developing country Party.

182. Experts from developing country Parties participating in the technical expert review team shall be funded according to the existing procedures for participation in UNFCCC activities.

### 3. Lead reviewers

183. Lead reviewers shall oversee the work of the technical expert review team and act as co-lead reviewers, in accordance with these MPGs.

184. Lead reviewers should ensure that the technical expert reviews in which they participate are conducted in accordance with the MPGs contained in this chapter. The lead reviewers should also ensure the quality and objectivity of the technical expert review and provide for the continuity, consistency across Parties and timeliness of the technical expert reviews.

185. Lead reviewers shall communicate necessary information to the technical expert review team; monitor the progress of the technical expert review; coordinate the submission of queries of the technical expert review team to the Party concerned and coordinate the inclusion of the answers in the technical expert review report; give priority to issues raised in previous technical expert review reports; and provide technical advice to the members of the technical expert review team.

186. Lead reviewers shall meet annually at a lead reviewers' meeting to discuss how to improve the quality, efficiency and consistency of technical expert reviews, and develop conclusions on these meetings.

### J. Technical expert review report

187. A technical expert review report shall contain the results of a technical expert review in accordance with the scope identified in chapter VII.A above.

188. Technical expert review reports shall be made publicly available on the UNFCCC website.

## VIII. Facilitative, multilateral consideration of progress

### A. Scope

189. A facilitative, multilateral consideration of progress is undertaken with respect to the Party's efforts under Article 9 of the Paris Agreement and the Party's respective implementation and achievement of its NDC.

### B. Information to be considered

190. Information to be considered in a facilitative, multilateral consideration of progress includes:

(a) Information submitted by the Party as referred to in paragraph 10(a) and (b) and paragraph 10(d) and (e) above, as applicable;

(b) The Party's technical expert review report pursuant to chapter VII.J above;

(c) Any additional information provided by the Party for the purpose of the facilitative, multilateral consideration of progress.

### C. Format and steps

191. A facilitative, multilateral consideration of progress shall include two phases: a written question and answer phase, followed by a working group session phase.

192. The written question and answer phase shall consist of the following steps:

(a) Any Party may submit written questions to the Party concerned, consistent with the scope identified in chapter VIII.A above;

(b) Such questions shall be submitted through an online platform that opens three months prior to the working group session. The Party concerned may respond to questions that are received later than two months prior to the working group session at its discretion;

(c) The Party in question shall make best efforts to respond in writing to the questions no later than one month prior to the working group session through the online platform; those developing country Parties that need flexibility in the light of their capacities with respect to this provision have the flexibility to instead submit written responses up to two weeks prior to the working group session. The Party may indicate in its response if it considers the written question to be outside the scope of a facilitative, multilateral consideration of progress;

(d) The secretariat shall compile the questions and answers and publish them on the UNFCCC website prior to the working group session phase.

193. The working group session phase shall take place during sessions of the Subsidiary Body for Implementation (SBI) and consist of the following steps:

(a) A presentation by the Party;

(b) A discussion session focused on the Party's presentation and the information identified in chapter VIII.B above. All Parties may participate in the discussion session and raise questions to the Party concerned. Working group sessions shall be open to observation by registered observers and shall be made publicly accessible through an online live recording;

(c) A Party may provide additional written responses to questions raised during the discussion session in writing through the online platform within 30 days following the session.

194. During the working group session phase of a facilitative, multilateral consideration of progress, the LDCs and SIDS may choose to participate as a group.

195. The secretariat shall establish an online platform to, inter alia:

(a) Allow a Party to hold a webinar ahead of and/or after an SBI session;

(b) Facilitate the written question and answer phase;

(c) Facilitate the working group session phase, including by allowing participation during the working group session by experts in remote locations.

196. The secretariat shall also coordinate the practical arrangements of a facilitative, multilateral consideration of progress.

## D. Frequency and timing

197. A facilitative, multilateral consideration of progress will take place as soon as possible following the publication of a Party's technical expert review report. Should the technical expert review report not be available within 12 months of the submission of the Party's biennial transparency report, the secretariat will make arrangements for the Party to participate in a facilitative, multilateral consideration of progress at the next available opportunity.

198. If a Party does not submit a biennial transparency report within 12 months of the due date identified in decision 18/CMA.1, the secretariat, in consultation with the Party concerned, will make arrangements for the Party to participate in a facilitative, multilateral consideration of progress at the next available opportunity.

## E. Record

199. Within one month of the working group session, the secretariat shall prepare and publish on the UNFCCC website a record of the facilitative, multilateral consideration of progress for the Party concerned, which will include:

(a) Questions submitted and responses provided;

(b) A copy of the Party's presentation;

(c) A recording of the working group session;

(d) A procedural summary of the Party's facilitative, multilateral consideration of progress;

(e) Any additional information generated through the online platform, as available.

*26th plenary meeting*
*15 December 2018*

# Decision 19/CMA.1

# Matters relating to Article 14 of the Paris Agreement and paragraphs 99–101 of decision 1/CP.21

*The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*,

*Recalling* Articles 2 and 14 of the Paris Agreement, decision 1/CP.21, paragraphs 99–101, and other relevant Articles of the Paris Agreement and paragraphs of decision 1/CP.21,

*Recognizing* that the global stocktake referred to in Article 14 of the Paris Agreement is crucial for enhancing the collective ambition of action and support towards achieving the purpose and long-term goals of the Paris Agreement,

## I. Modalities

*Overarching elements*

1. *Recalls*, as provided in Article 14, paragraph 1, of the Paris Agreement, that the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall periodically take stock of the implementation of the Paris Agreement to assess the collective progress towards achieving the purpose of the Agreement and its long-term goals, and that it shall do so in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science;

2. *Decides* that equity and the best available science will be considered in a Party-driven and cross-cutting manner, throughout the global stocktake;

3. *Also decides* that the global stocktake will consist of the following components:

(a) Information collection and preparation, focusing on gathering, compiling and synthesizing information and preparing for conducting the technical assessment referred to in paragraph 3(b) below;

(b) Technical assessment, focusing on taking stock of the implementation of the Paris Agreement to assess the collective progress towards achieving the purpose and long-term goals of the Paris Agreement, as well as opportunities for enhanced action and support to achieve its purpose and goals;

(c) Consideration of outputs, focusing on discussing the implications of the findings of the technical assessment with a view to achieving the outcome of the global stocktake of informing Parties in updating and enhancing, in a nationally determined manner, their actions and support, in accordance with relevant provisions of the Paris Agreement, as well as in enhancing international cooperation for climate action;

4. *Further* decides that the global stocktake will be conducted with the assistance of the Subsidiary Body for Implementation and the Subsidiary Body for Scientific and Technological Advice, which will establish a joint contact group on the matter;

5. *Resolves* to engage in a technical dialogue that aims to support the work of the joint contact group referred to in paragraph 4 above through expert consideration of inputs, as identified in the sources of input referred to in paragraphs 36 and 37 below for the global stocktake;

6. *Decides* to establish the technical dialogue referred to in paragraph 5 above, which will:

(a) Undertake its work through a focused exchange of views, information and ideas in in-session round tables, workshops or other activities;

(b) Organize its work in line with taking stock of the implementation of the Paris Agreement to assess the collective progress towards achieving its purpose and long-term goals, including under Article 2, paragraph 1(a–c), in the thematic areas of mitigation, adaptation and means of implementation and support, noting, in this context, that the global stocktake may take into account, as appropriate, efforts related to its work that:

(i) Address the social and economic consequences and impacts of response measures;

(ii) Avert, minimize and address loss and damage associated with the adverse effects of climate change;

(c) Be facilitated by two co-facilitators,[1] who will be responsible for conducting the dialogue and for preparing a factual synthesis report and other outputs of the technical assessment, with the assistance of the secretariat;

7. *Requests* the Chairs of the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation to develop guiding questions for all components of the global stocktake, including specific thematic and cross-cutting questions, one session of the subsidiary bodies prior to the relevant activities under the global stocktake being carried out;

8. *Decides* that the information collection and preparation component of the global stocktake will commence one session before the start of the technical assessment, which will take place during the two (or depending on the timing of the publication of the Intergovernmental Panel on Climate Change reports, three) successive sessions of the subsidiary bodies preceding the sixth session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (November 2023), during which the consideration of outputs will take place, with the cycle repeating every five years thereafter;

9. *Also* decides that the global stocktake will be conducted in a comprehensive, facilitative, effective and efficient manner, avoiding duplication of work and taking into account the results of relevant work conducted under the Paris Agreement, the Convention and the Kyoto Protocol;

10. *Further decides* that the global stocktake will be a Party-driven process conducted in a transparent manner and with the participation of non-Party stakeholders, and that, to support such effective and equitable participation, all inputs will be fully accessible by Parties, including online, as referred to in paragraph 21 below;

11. *Decides* that the participation of Parties in the global stocktake should be ensured through the provision of adequate funding for the participation and representation of developing country Parties in all activities under the global stocktake, including the technical dialogue, workshops, round tables and sessions of the subsidiary bodies and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement that feature global stocktake activities, in accordance with existing practices;

12. *Invites* developed country Parties to mobilize support for capacity-building so that the least developed countries, small island developing States and other developing countries can effectively participate in the global stocktake and take up relevant global stocktake information;

13. *Decides* that the outputs of the components of the global stocktake referred to in paragraph 3 above should summarize opportunities and challenges for enhancing action and support in the light of equity and the best available science, as well as lessons learned and good practices, with a view to achieving the outcome identified in Article 14, paragraph 3, of the Paris Agreement;

14. *Emphasizes* that the outputs of the global stocktake should focus on taking stock of the implementation of the Paris Agreement to assess collective progress, have no individual Party focus, and include non-policy prescriptive consideration of collective progress that Parties can use to inform the updating and enhancing, in a nationally determined manner, of

[1] One from a developing country Party and one from a developed country Party selected by Parties.

their actions and support in accordance with relevant provisions of the Paris Agreement as well as in enhancing international cooperation for climate action;

15. *Decides* to consider refining the procedural and logistical elements of the overall global stocktake process on the basis of experience gained from the first and subsequent global stocktakes, as appropriate;

16. *Requests* the Chairs of the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation to organize the global stocktake in a flexible and appropriate manner, to work on identifying opportunities for learning-by-doing, including for assessing collective progress, and to take the necessary steps for the consideration of inputs as they become available;

17. *Invites* Parties to present their nationally determined contributions, informed by the outcome of the global stocktake, at a special event held under the auspices of the Secretary-General of the United Nations;

18. *Recognizes* that other related events within and outside the UNFCCC can contribute to the global stocktake and the implementation of its outcome;

*Information collection and preparation*

19. *Requests* the Chairs of the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation to issue a call for the inputs referred to in paragraphs 36 and 37 below, taking into account that such inputs should be submitted at least three months before their consideration in the technical assessment;

20. *Decides* that the information collection and preparation component of the global stocktake will end no later than six months before the consideration of outputs to ensure timely consideration of inputs, unless critical information that requires consideration emerges after the cut-off date;

21. *Requests* the secretariat to facilitate online availability of all inputs to the global stocktake from Parties, by thematic area, and to organize a webinar to clarify the methodologies and assumptions used to aggregate the inputs, to be held after the deadline for submission of inputs referred to in paragraph 19 above and prior to the commencement of the technical assessment;

22. *Invites* the secretariat to start compiling for the technical assessment the most up-to-date inputs from the sources identified in paragraph 37 below two sessions of the subsidiary bodies prior to the assessment;

23. *Requests* the secretariat, under the guidance of the co-facilitators referred to in paragraph 6(c) above, to prepare for the technical assessment:

(a) A synthesis report on the information identified in paragraph 36(a) below, taking into account previous experience in preparing such reports;

(b) A synthesis report on the state of adaptation efforts, experience and priorities, summarizing the most recent information identified in paragraph 36(c) below;

(c) A synthesis report on the overall effect of nationally determined contributions communicated by Parties, summarizing the most recent information identified in paragraph 36(b) below;

(d) A synthesis report on the information identified in paragraph 36(d) below;

24. *Invites* the relevant constituted bodies and forums and other institutional arrangements under or serving the Paris Agreement and/or the Convention[2] to prepare for the technical

[2] Currently, the constituted bodies and forums are the Adaptation Committee, the Least Developed Country Expert Group, the Technology Executive Committee, the Standing Committee on Finance, the Paris Committee on Capacity-building, the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, the Consultative Group of Experts, the forum on the impact of the implementation of response measures, and the Local Communities and Indigenous Peoples Platform Facilitative Working Group.

assessment, with the assistance of the secretariat, synthesis reports on the information identified in paragraph 36 below in their areas of expertise;

25. *Requests* the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation to identify potential information gaps in relation to the global stocktake and, where necessary and feasible, to make requests for additional input, taking into account the cut-off date for the information collection and preparation component of the global stocktake and the need to consider critical information, and taking into account the relevant gaps identified in the reports of the Intergovernmental Panel on Climate Change and their impacts in relation to the purpose and long-term goals of the Paris Agreement;

*Technical assessment*

26. *Notes* that, to make effective use of time, the technical assessment could overlap with the information collection and preparation component of the global stocktake;

27. *Confirms* that all the inputs and topics, in particular the linkage among various issues, should be discussed in a balanced, holistic and comprehensive manner with a balanced allocation of time between thematic areas, taking into account equity considerations and the best available science;

28. *Recognizes*, taking into consideration the advice provided by the Subsidiary Body for Scientific and Technological Advice[3] pursuant to decision 1/CP.21, paragraph 100, that the assessments of the Intergovernmental Panel on Climate Change should be considered in an effective and balanced manner, taking into account lessons learned from past experience;

29. *Also recognizes* that a dialogue between Intergovernmental Panel on Climate Change experts and Parties through Subsidiary Body for Scientific and Technological Advice–Intergovernmental Panel on Climate Change special events should be used to enable a focused scientific and technical exchange of information on the findings in Intergovernmental Panel on Climate Change products in an open and transparent manner, and that the Subsidiary Body for Scientific and Technological Advice–Intergovernmental Panel on Climate Change Joint Working Group should continue to be used to enhance communication and coordination between the Subsidiary Body for Scientific and Technological Advice and the Intergovernmental Panel on Climate Change in the context of the global stocktake;

30. *Decides* that the technical dialogue referred to in paragraph 6 above will be open, inclusive, transparent and facilitative, and will allow Parties to engage and hold discussions with the constituted bodies and forums and other institutional arrangements under or serving the Paris Agreement and/or the Convention and experts and to consider inputs and assess collective progress;

31. *Also decides* that the co-facilitators of the technical dialogue will summarize its outputs in summary reports, taking into account equity and the best available science, for each thematic area referred to in paragraph 6(b) above and an overarching factual synthesis of these reports in a cross-cutting manner;

32. *Further* decides that the forum on the impact of the implementation of response measures will summarize its outcome in accordance with the relevant elements of its modalities, work programme and functions pursuant to decision 1/CP.21, paragraph 34;

*Consideration of outputs*

33. *Decides* that the consideration of outputs will consist of high-level events where the findings of the technical assessment will be presented and their implications discussed and considered by Parties, and that the events will be chaired by a high-level committee consisting of the Presidencies of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement and the Chairs of the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation;

[3] See document FCCC/SBSTA/2016/4, paragraph 56.

34. *Also decides* that the outputs of this component of the global stocktake should:

(a) Identify opportunities for and challenges in enhancing action and support for collective progress in relation to the thematic areas of the global stocktake referred to in paragraph 6(b) above, as well as possible measures and good practices and international cooperation and related good practices;

(b) Summarize key political messages, including recommendations arising from the events referred to in paragraph 33 above for strengthening action and enhancing support;

(c) Be referenced in a decision for consideration and adoption by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement and/or a declaration;

# II. Sources of input

35. *Decides* that the sources of input for the global stocktake should inform the thematic areas referred to in paragraph 6(b) above;

36. *Also decides* that the sources of input for the global stocktake will consider information at a collective level on:

(a) The state of greenhouse gas emissions by sources and removals by sinks and mitigation efforts undertaken by Parties, including the information referred to in Article 13, paragraph 7(a), and Article 4, paragraphs 7, 15 and 19, of the Paris Agreement;

(b) The overall effect of Parties' nationally determined contributions and overall progress made by Parties towards the implementation of their nationally determined contributions, including the information referred to in Article 13, paragraph 7(b), of the Paris Agreement;

(c) The state of adaptation efforts, support, experience and priorities, including the information referred to in Article 7, paragraphs 2, 10, 11 and 14, of the Paris Agreement, and the reports referred to in Article 13, paragraph 8, of the Paris Agreement;

(d) The finance flows, including the information referred to in Article 2, paragraph 1(c), and means of implementation and support and mobilization and provision of support, including the information referred to in Article 9, paragraphs 4 and 6, Article 10, paragraph 6, Article 11, paragraph 3, and Article 13, in particular paragraphs 9 and 10, of the Paris Agreement. This should include information from the latest biennial assessment and overview of climate finance flows of the Standing Committee on Finance;

(e) Efforts to enhance understanding, action and support, on a cooperative and facilitative basis, related to averting, minimizing and addressing loss and damage associated with the adverse effects of climate change;

(f) Barriers and challenges, including finance, technology[4] and capacity-building gaps, faced by developing countries;

(g) Good practices, experience and potential opportunities to enhance international cooperation on mitigation and adaptation and to increase support under Article 13, paragraph 5, of the Paris Agreement;

(h) Fairness considerations, including equity, as communicated by Parties in their nationally determined contributions;

37. *Decides* that the sources of input for the global stocktake include:

(a) Reports and communications from Parties, in particular those submitted under the Paris Agreement and the Convention;

(b) The latest reports of the Intergovernmental Panel on Climate Change, pursuant to decision 1/CP.21, paragraph 99;

[4] Including outputs of the periodic assessment of the Technology Mechanism as referred to in decision 16/CMA.1.

(c) Reports of the subsidiary bodies, pursuant to decision 1/CP.21, paragraph 99;

(d) Reports from relevant constituted bodies and forums and other institutional arrangements under or serving the Paris Agreement and/or the Convention;

(e) The synthesis reports by the secretariat referred to in paragraph 23 above;

(f) Relevant reports from United Nations agencies and other international organizations, which should be supportive of the UNFCCC process;

(g) Voluntary submissions from Parties, including on inputs to inform equity considerations under the global stocktake;

(h) Relevant reports from regional groups and institutions;

(i) Submissions from non-Party stakeholders and UNFCCC observer organizations;

38. *Invites* the Subsidiary Body for Scientific and Technological Advice to complement the non-exhaustive lists in paragraphs 36 and 37 above at its session held prior to the information collection and preparation component of the global stocktake, as appropriate, taking into account the thematic areas of the global stocktake and the importance of leveraging national-level reporting.

*26th plenary meeting*
*15 December 2018*

# Decision 20/CMA.1

# Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement

*The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*,

*Recalling* Article 15 of the Paris Agreement and decision 1/CP.21, paragraphs 102 and 103,

1. *Adopts* the modalities and procedures for the effective operation of the committee referred to in Article 15, paragraph 2, of the Paris Agreement as contained in the annex;

2. *Decides* to undertake, at the seventh session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (2024), the first review of the modalities and procedures referred to in paragraph 1 above on the basis of experience gained with their implementation and taking into account any recommendations of the committee referred to in paragraph 1 above, and to consider conducting further reviews on a regular basis;

3. *Takes note* of the estimated budgetary implications of the activities to be undertaken by the secretariat pursuant to the provisions contained in the annex;

4. *Requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.

# Annex

## Modalities and procedures for the effective operation of the committee referred to in Article 15, paragraph 2, of the Paris Agreement

## I. Purpose, principles, nature, functions and scope

1. The mechanism to facilitate implementation of and promote compliance with the provisions of the Paris Agreement established under Article 15 of the Agreement consists of a committee (hereinafter referred to as the Committee).

2. The Committee shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The Committee shall pay particular attention to the respective national capabilities and circumstances of Parties.

3. The Committee's work shall be guided by the provisions of the Paris Agreement, including its Article 2.

4. In carrying out its work, the Committee shall strive to avoid duplication of effort, shall neither function as an enforcement or dispute settlement mechanism, nor impose penalties or sanctions, and shall respect national sovereignty.

## II. Institutional arrangements

5. The Committee shall consist of 12 members with recognized competence in relevant scientific, technical, socioeconomic or legal fields to be elected by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) on the basis of equitable geographical representation, with 2 members each from the five regional groups of the United Nations and 1 member each from the small island developing States and the least developed countries, taking into account the goal of gender balance.

6. The CMA shall elect members of the Committee as well as an alternate for each member, taking into account the expert-based nature of the Committee and striving to reflect the diversity of expertise referred to in paragraph 5 above.

7. Members and alternate members shall be elected to the Committee to serve for a period of three years and for a maximum of two consecutive terms.

8. At CMA 2 (December 2019), six members and six alternate members shall be elected to the Committee for an initial term of two years and six members and six alternate members for a term of three years. Thereafter, the CMA shall elect at its relevant regular sessions six members and six alternate members for a term of three years. The members and alternate members shall remain in office until their successors are elected.

9. If a member of the Committee resigns or is otherwise unable to complete the assigned term or to perform the functions in the Committee, an expert from the same Party shall be named by that Party to replace said member for the remainder of the unexpired term.

10. Members and alternate members of the Committee shall serve in their individual expert capacity.

11. The Committee shall elect from among its members two Co-Chairs for a period of three years, taking into account the need to ensure equitable geographical representation. The Co-Chairs shall perform the functions to be elaborated in the rules of procedure of the Committee referred to in paragraphs 17 and 18 below.

12. Unless otherwise decided, the Committee shall meet at least twice a year, beginning in 2020. In scheduling its meetings, the Committee should take into account the desirability of holding its meetings in conjunction with sessions of the subsidiary bodies serving the Paris Agreement, as appropriate.

13. Only members and alternate members of the Committee and secretariat officials shall be present during the elaboration and adoption of a decision of the Committee.

14. The Committee, any Party or others involved in the process of the consideration by the Committee shall protect the confidentiality of information received in confidence.

15. The adoption of decisions by the Committee shall require a quorum of 10 of the members to be present.

16. The Committee shall make every effort to reach agreement on any decision by consensus. If all efforts at reaching consensus have been exhausted, as a last resort, the decision may be adopted by at least three quarters of the members present and voting.

17. The Committee shall develop rules of procedure with a view to recommending them to the CMA for consideration and adoption at CMA 3 (November 2020), informed by the principles of transparency, facilitation, the non-adversarial and non-punitive function, and paying particular attention to the respective national capabilities and circumstances of Parties.

18. The rules of procedure referred to in paragraph 17 above will address any matters necessary for the proper and effective functioning of the Committee, including the role of the Committee Co-Chairs, conflict of interest, any additional timelines related to the Committee's work, procedural stages and timelines for the Committee's work, and reasoning in decisions of the Committee.

# III. Initiation and process

19. In exercising its functions referred to in paragraphs 20 and 22 below, and subject to these modalities and procedures, the Committee shall apply the relevant rules of procedure to be developed pursuant to paragraphs 17 and 18 above and shall be guided by the following:

(a) Nothing in the work of the Committee may change the legal character of the provisions of the Paris Agreement;

(b) In considering how to facilitate implementation and promote compliance, the Committee shall endeavour to constructively engage with and consult the Party concerned at all stages of the process, including by inviting written submissions and providing opportunities to comment;

(c) The Committee shall pay particular attention to the respective national capabilities and circumstances of Parties, recognizing the special circumstances of the least developed countries and small island developing States, at all stages of the process, in accordance with the provisions of the Paris Agreement, including in determining how to consult with the Party concerned, what assistance can be provided to the Party concerned to support its engagement with the Committee, and what measures are appropriate to facilitate implementation and promote compliance in each situation;

(d) The Committee should take into account the work being undertaken by other bodies and under other arrangements as well as through forums serving or established under the Paris Agreement with a view to avoiding duplication of mandated work;

(e) The Committee should take into account considerations related to the impacts of response measures.

20. The Committee should consider issues related to, as appropriate, a Party's implementation of or compliance with the provisions of the Paris Agreement on the basis of a written submission from that Party with respect to its own implementation of and/or compliance with any provision of the Paris Agreement.

21. The Committee will undertake a preliminary examination of the submission within the timeline to be elaborated in the rules of procedure referred to in paragraphs 17 and 18 above with a view to verifying that the submission contains sufficient information, including on whether the matter relates to the Party's own implementation of or compliance with a provision of the Paris Agreement.

22. The Committee:

(a) Will initiate the consideration of issues in cases where a Party has not:

(i) Communicated or maintained a nationally determined contribution under Article 4 of the Paris Agreement, based on the most up-to-date status of communication in the public registry referred to in Article 4, paragraph 12, of the Paris Agreement;

(ii) Submitted a mandatory report or communication of information under Article 13, paragraphs 7 and 9, or Article 9, paragraph 7, of the Paris Agreement;

(iii) Participated in the facilitative, multilateral consideration of progress, based on information provided by the secretariat;

(iv) Submitted a mandatory communication of information under Article 9, paragraph 5, of the Paris Agreement;

(b) May, with the consent of the Party concerned, engage in a facilitative consideration of issues in cases of significant and persistent inconsistencies of the information submitted by a Party pursuant to Article 13, paragraphs 7 and 9, of the Paris Agreement with the modalities, procedures and guidelines referred to in Article 13, paragraph 13, of the Paris Agreement. This consideration will be based on the recommendations made in the final technical expert review reports, prepared under Article 13, paragraphs 11 and 12, of the Agreement, together with any written comments provided by the Party during the review. In its consideration of such matters, the Committee shall take into account Article 13, paragraphs 14 and 15, of the Agreement, as well as the flexibilities provided in the provisions of the modalities, procedures and guidelines under Article 13 of the Paris Agreement for those developing country Parties that need it in the light of their capacities.

23. The consideration of the issues referred to in paragraph 22(a) above will not address the content of the contributions, communications, information and reports referred to in paragraph 22(a)(i–iv) above.

24. Where the Committee decides to initiate a consideration as referred to in paragraph 22 above, it shall notify the Party concerned and request it to provide the necessary information on the matter.

25. With respect to the consideration by the Committee of matters initiated in accordance with the provisions of paragraphs 20 or 22 above and further to the rules of procedure referred to in paragraphs 17 and 18 above:

(a) The Party concerned may participate in the discussions of the Committee, except during the Committee's elaboration and adoption of a decision;

(b) If so requested in writing by the Party concerned, the Committee shall hold a consultation during the meeting at which the matter with respect to that Party is to be considered;

(c) In the course of its consideration, the Committee may obtain additional information as referred to in paragraph 35 below or, as appropriate and in consultation with the Party concerned, invite representatives of relevant bodies and arrangements under or serving the Paris Agreement to participate in its relevant meetings;

(d) The Committee shall send a copy of its draft findings, draft measures and any draft recommendations to the Party concerned and shall take into account any comments made by the Party when finalizing those findings, measures and recommendations.

26. The Committee will accord flexibility with regard to timelines of the procedures under Article 15 as may be needed by Parties, paying particular attention to their respective national capabilities and circumstances.

27. Subject to the availability of financial resources, assistance should be provided, upon request, to developing country Parties concerned to enable their necessary participation in the relevant meetings of the Committee.

# IV. Measures and outputs

28. In identifying the appropriate measures, findings or recommendations, the Committee shall be informed by the legal nature of the relevant provisions of the Paris Agreement, shall take into account the comments received from the Party concerned and shall pay particular attention to the national capabilities and circumstances of the Party concerned. Special circumstances of small island developing States and the least developed countries, as well as situations of force majeure, should also be recognized, where relevant.

29. The Party concerned may provide to the Committee information on particular capacity constraints, needs or challenges, including in relation to support received, for the Committee's consideration in its identification of appropriate measures, findings or recommendations.

30. With a view to facilitating implementation and promoting compliance, the Committee shall take appropriate measures. These may include the following:

(a) Engage in a dialogue with the Party concerned with the purpose of identifying challenges, making recommendations and sharing information, including in relation to accessing finance, technology and capacity-building support, as appropriate;

(b) Assist the Party concerned in the engagement with the appropriate finance, technology and capacity-building bodies or arrangements under or serving the Paris Agreement in order to identify possible challenges and solutions;

(c) Make recommendations to the Party concerned with regard to challenges and solutions referred to in paragraph 30(b) above and communicate such recommendations, with the consent of the Party concerned, to the relevant bodies or arrangements, as appropriate;

(d) Recommend the development of an action plan and, if so requested, assist the Party concerned in developing the plan;

(e) Issue findings of fact in relation to matters of implementation and compliance referred to in paragraph 22(a) above.

31. The Party concerned is encouraged to provide information to the Committee on the progress made in implementing the action plan referred to in paragraph 30(d) above.

# V. Consideration of systemic issues

32. The Committee may identify issues of a systemic nature with respect to the implementation of and compliance with the provisions of the Paris Agreement faced by a number of Parties and bring such issues and, as appropriate, any recommendations to the attention of the CMA for its consideration.

33. The CMA may, at any time, request the Committee to examine issues of a systemic nature. Following its consideration of the issue, the Committee shall report back to the CMA and, where appropriate, make recommendations.

34. In addressing systemic issues, the Committee shall not address matters that relate to the implementation of and compliance with the provisions of the Paris Agreement by an individual Party.

# VI. Information

35. In the course of its work, the Committee may seek expert advice, and seek and receive information from processes, bodies, arrangements and forums under or serving the Paris Agreement.

## VII. Relationship with the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement

36. Pursuant to Article 15 of the Paris Agreement, the Committee shall report annually to the CMA.

## VIII. Secretariat

37. The secretariat referred to in Article 17 of the Paris Agreement shall serve as the secretariat of the Committee.

*26th plenary meeting*
*15 December 2018*

# Resolution 3/CMA.1

# Expression of gratitude to the Government of the Republic of Poland and the people of the city of Katowice

## Resolution submitted by Fiji

*The Conference of the Parties, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement*,

*Having met* in Katowice from 2 to 14 December 2018,

1. *Express their profound gratitude* to the Government of the Republic of Poland for having made it possible for the twenty-fourth session of the Conference of the Parties, the fourteenth session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the third part of the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement to be held in Katowice;

2. *Request* the Government of the Republic of Poland to convey to the city and people of Katowice the gratitude of the Conference of the Parties, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement for the hospitality and warmth extended to the participants.

*28th plenary meeting*
*15 December 2018*

# Annex 27

# Draft articles on
# Responsibility of States for Internationally Wrongful Acts, with commentaries

**2001**

Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected.

## RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

*General commentary*

(1) These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law.

(2) Roberto Ago, who was responsible for establishing the basic structure and orientation of the project, saw the articles as specifying:

> the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility … [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.[32]

(3) Given the existence of a primary rule establishing an obligation under international law for a State, and assuming that a question has arisen as to whether that State has complied with the obligation, a number of further issues of a general character arise. These include:

(*a*) The role of international law as distinct from the internal law of the State concerned in characterizing conduct as unlawful;

(*b*) Determining in what circumstances conduct is to be attributed to the State as a subject of international law;

(*c*) Specifying when and for what period of time there is or has been a breach of an international obligation by a State;

(*d*) Determining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter;

(*e*) Defining the circumstances in which the wrongfulness of conduct under international law may be precluded;

(*f*) Specifying the content of State responsibility, i.e. the new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done;

(*g*) Determining any procedural or substantive preconditions for one State to invoke the responsibility of another State, and the circumstances in which the right to invoke responsibility may be lost;

(*h*) Laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfilment of the obligations of the responsible State under these articles.

This is the province of the secondary rules of State responsibility.

(4) A number of matters do not fall within the scope of State responsibility as dealt with in the present articles:

(*a*) As already noted, it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, *mutatis mutandis*, for other "sources" of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.

(*b*) The consequences dealt with in the articles are those which flow from the commission of an internationally wrongful act as such.[33] No attempt is made to deal with the consequences of a breach for the continued validity or binding effect of the primary rule (e.g. the right of an injured State to terminate or suspend a treaty for material breach, as reflected in article 60 of the 1969 Vienna Convention). Nor do the articles cover such indirect or additional consequences as may flow from the responses of international organizations to wrongful conduct. In carrying out their functions it may be necessary for international organizations to take a position on whether a State has breached an international obligation. But even where this is so, the consequences will be those determined by or within the framework of the constituent instrument of the organization, and these fall outside the scope of the articles. This is particularly the case with action of the United Nations under the Charter, which is specifically reserved by article 59.

(*c*) The articles deal only with the responsibility for conduct which is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited, and may even be expressly permitted, by international law (e.g. compensation for property duly taken for a public purpose). There may also be cases where a State is obliged to restore the *status quo ante* after some lawful activity has been completed. These requirements of compensation or restoration would involve primary obligations; it would be the failure to pay compensation, or to restore the *status*

[32] *Yearbook ... 1970*, vol. II, p. 306, document A/8010/Rev.l, para. 66 (*c*).

[33] For the purposes of the articles, the term "internationally wrongful act" includes an omission and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See paragraph (1) of the commentary to article 1.

*quo* which would engage the international responsibility of the State concerned. Thus for the purposes of these articles, international responsibility results exclusively from a wrongful act contrary to international law. This is reflected in the title of the articles.

(*d*) The articles are concerned only with the responsibility of States for internationally wrongful conduct, leaving to one side issues of the responsibility of international organizations or of other non-State entities (see articles 57 and 58).

(5) On the other hand, the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole. Being general in character, they are also for the most part residual. In principle, States are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences and thereby to exclude the ordinary rules of responsibility. This is made clear by article 55.

(6) The present articles are divided into four parts. Part One is entitled "The internationally wrongful act of a State". It deals with the requirements for the international responsibility of a State to arise. Part Two, "Content of the international responsibility of a State", deals with the legal consequences for the responsible State of its internationally wrongful act, in particular as they concern cessation and reparation. Part Three is entitled "The implementation of the international responsibility of a State". It identifies the State or States which may react to an internationally wrongful act and specifies the modalities by which this may be done, including, in certain circumstances, by the taking of countermeasures as necessary to ensure cessation of the wrongful act and reparation for its consequences. Part Four contains certain general provisions applicable to the articles as a whole.

## Part One

## THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Part One defines the general conditions necessary for State responsibility to arise. Chapter I lays down three basic principles for responsibility from which the articles as a whole proceed. Chapter II defines the conditions under which conduct is attributable to the State. Chapter III spells out in general terms the conditions under which such conduct amounts to a breach of an international obligation of the State concerned. Chapter IV deals with certain exceptional cases where one State may be responsible for the conduct of another State not in conformity with an international obligation of the latter. Chapter V defines the circumstances precluding the wrongfulness for conduct not in conformity with the international obligations of a State.

### Chapter I

### GENERAL PRINCIPLES

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

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

*Commentary*

(1) Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part One. The term "international responsibility" covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.

(2) PCIJ applied the principle set out in article 1 in a number of cases. For example, in the *Phosphates in Morocco* case, PCIJ affirmed that when a State commits an internationally wrongful act against another State international responsibility is established "immediately as between the two States".[34] ICJ has applied the principle on several occasions, for example in the *Corfu Channel* case,[35] in the *Military and Paramilitary Activities in and against Nicaragua* case,[36] and in the *Gabčíkovo-Nagymaros Project* case.[37] The Court also referred to the principle in its advisory opinions on *Reparation for Injuries*,[38] and on the *Interpretation of Peace Treaties (Second Phase)*,[39] in which it stated that "refusal to fulfil a treaty obligation involves international responsibility".[40] Arbitral tribunals have repeatedly affirmed the principle, for example in the *Claims of Italian Nationals Resident in Peru* cases,[41] in

[34] *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10, at p. 28. See also *S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 15, at p. 30; *Factory at Chorzów, Jurisdiction*, *Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21; and *ibid., Merits*, *Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 29.

[35] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4, at p. 23.

[36] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 142, para. 283, and p. 149, para. 292.

[37] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), at p. 38, para. 47.

[38] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 184.

[39] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 221.

[40] *Ibid.*, p. 228.

[41] Seven of these awards rendered in 1901 reiterated that "a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents" (UNRIAA, vol. XV (Sales No. 66.V.3), pp. 399 (Chiessa claim), 401 (Sessarego claim), 404 (Sanguinetti claim), 407 (Vercelli claim), 408 (Queirolo claim), 409 (Roggero claim), and 411 (Miglia claim)).

the *Dickson Car Wheel Company* case,[42] in the *International Fisheries Company* case,[43] in the *British Claims in the Spanish Zone of Morocco* case[44] and in the *Armstrong Cork Company* case.[45] In the *"Rainbow Warrior"* case,[46] the arbitral tribunal stressed that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility".[47]

(3) That every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized, both before[48] and since[49] article 1 was first formulated by the Commission. It is true that there were early differences of opinion over the definition of the legal relationships arising from an internationally wrongful act. One approach, associated with Anzilotti, described the legal consequences deriving from an internationally wrongful act exclusively in terms of a binding bilateral relationship thereby established between the wrongdoing State and the injured State, in which the obligation of the former State to make reparation is set against the "subjective" right of the latter State to require reparation. Another view, associated with Kelsen, started from the idea that the legal order is a coercive order and saw the authorization accorded to the injured State to apply a coercive sanction against the responsible State as the primary legal consequence flowing directly from the wrongful act.[50] According to this view, general international law empowered the injured State to react to a wrong; the obligation to make reparation was treated as subsidiary, a way by which the responsible State could avoid the application of coercion. A third view, which came to prevail, held that the consequences of an internationally wrongful act cannot be limited either to reparation or to a "sanction".[51] In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances.

(4) Opinions have also differed on the question whether the legal relations arising from the occurrence of an internationally wrongful act were essentially bilateral, i.e. concerned only the relations of the responsible State and the injured State *inter se*. Increasingly it has been recognized that some wrongful acts engage the responsibility of the State concerned towards several or many States or even towards the international community as a whole. A significant step in this direction was taken by ICJ in the *Barcelona Traction* case when it noted that:

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[52]

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations. Among these the Court instanced "the outlawing of acts of aggression, and of genocide, as also … the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[53] In later cases the Court has reaffirmed this idea.[54] The consequences of a broader conception of international responsibility must necessarily be reflected in the articles which, although they include standard bilateral situations of responsibility, are not limited to them.

(5) Thus the term "international responsibility" in article 1 covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law, and whether they are centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of countermeasures.

(6) The fact that under article 1 every internationally wrongful act of a State entails the international responsibility of that State does not mean that other States may not also be held responsible for the conduct in question, or for injury caused as a result. Under chapter II the same

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[42] *Dickson Car Wheel Company (U.S.A.)* v. *United Mexican States*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 669, at p. 678 (1931).

[43] *International Fisheries Company (U.S.A.)* v. *United Mexican States*, *ibid.*, p. 691, at p. 701 (1931).

[44] According to the arbitrator, Max Huber, it is an indisputable principle that "responsibility is the necessary corollary of rights. All international rights entail international responsibility", UNRIAA, vol. II (Sales No. 1949.V.1), p. 615, at p. 641 (1925).

[45] According to the Italian-United States Conciliation Commission, no State may "escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law", UNRIAA, vol. XIV (Sales No. 65.V.4), p. 159, at p. 163 (1953).

[46] 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, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990).

[47] *Ibid.*, p. 251, para. 75.

[48] See, e.g., D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955) vol. I, p. 385; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 499; G. I. Tunkin, *Teoria mezhdunarodnogo prava* (Moscow, Mezhdunarodnye otnoshenia, 1970), p. 470, trans. W. E. Butler, *Theory of International Law* (London, George Allen and Unwin, 1974), p. 415; and E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sørensen, ed. (London, Macmillan, 1968), p. 533.

[49] See, e.g., I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press, 1998), p. 435; B. Conforti, *Diritto internazionale*, 4th ed. (Milan, Editoriale Scientifica, 1995), p. 332; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 6th ed. (Paris, Librairie générale de droit et de jurisprudence, 1999), p. 742; P.-M. Dupuy, *Droit international public*, 4th ed. (Paris, Dalloz, 1998), p. 414; and R. Wolfrum, "Internationally wrongful acts", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, North-Holland, 1995), vol. II, p. 1398.

[50] See H. Kelsen, *Principles of International Law*, 2nd ed., R. W. Tucker, ed. (New York, Holt, Rinehart and Winston, 1966), p. 22.

[51] See, e.g., R. Ago, "Le délit international", *Recueil des cours..., 1939–II* (Paris, Sirey, 1947), vol. 68, p. 415, at pp. 430–440; and L. Oppenheim, *International Law: A Treatise*, vol. I, *Peace*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green and Co., 1955), pp. 352–354.

[52] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[53] *Ibid.*, para. 34.

[54] See *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 258, para. 83; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595, at pp. 615–616, paras. 31–32.

conduct may be attributable to several States at the same time. Under chapter IV, one State may be responsible for the internationally wrongful act of another, for example if the act was carried out under its direction and control. Nonetheless the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.

(7) The articles deal only with the responsibility of States. Of course, as ICJ affirmed in the *Reparation for Injuries* case, the United Nations "is a subject of international law and capable of possessing international rights and duties … it has capacity to maintain its rights by bringing international claims".[55] The Court has also drawn attention to the responsibility of the United Nations for the conduct of its organs or agents.[56] It may be that the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality. Nonetheless, special considerations apply to the responsibility of other international legal persons, and these are not covered in the articles.[57]

(8) As to terminology, the French term *fait internationalement illicite* is preferable to *délit* or other similar expressions which may have a special meaning in internal law. For the same reason, it is best to avoid, in English, such terms as "tort", "delict" or "delinquency", or in Spanish the term *delito*. The French term *fait internationalement illicite* is better than *acte internationalement illicite*, since wrongfulness often results from omissions which are hardly indicated by the term *acte*. Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reasons, the term *hecho internacionalmente ilícito* is adopted in the Spanish text. In the English text, it is necessary to maintain the expression "internationally wrongful act", since the French *fait* has no exact equivalent; nonetheless, the term "act" is intended to encompass omissions, and this is made clear in article 2.

### *Article 2. Elements of an internationally wrongful act of a State*

**There is an internationally wrongful act of a State when conduct consisting of an action or omission:**

**(*a*) is attributable to the State under international law; and**

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

*Commentary*

(1) Article 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, i.e. the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.

(2) These two elements were specified, for example, by PCIJ in the *Phosphates in Morocco* case. The Court explicitly linked the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty right[s] of another State".[58] ICJ has also referred to the two elements on several occasions. In the *United States Diplomatic and Consular Staff in Tehran* case, it pointed out that, in order to establish the responsibility of the Islamic Republic of Iran:

> [f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.[59]

Similarly in the *Dickson Car Wheel Company* case, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is "that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard".[60]

(3) The element of attribution has sometimes been described as "subjective" and the element of breach as "objective", but the articles avoid such terminology.[61] Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be "subjective". For example, article II of the Convention on the Prevention and Punishment of the Crime of Genocide states that: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such …" In other cases, the standard for breach of an obligation may be "objective", in the sense that the advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is "objective" or "subjective" in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different

[55] *Reparation for Injuries* (see footnote 38 above), p. 179.

[56] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at pp. 88–89, para. 66.

[57] For the position of international organizations, see article 57 and commentary.

[58] See footnote 34 above.

[59] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 29, para. 56. Cf. page 41, para. 90. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), pp. 117–118, para. 226; and *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 54, para. 78.

[60] See footnote 42 above.

[61] Cf. *Yearbook ... 1973*, vol. II, p. 179, document A/9010/Rev.1, paragraph (1) of the commentary to article 3.

possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

(4) Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two. Moreover, it may be difficult to isolate an "omission" from the surrounding circumstances which are relevant to the determination of responsibility. For example, in the *Corfu Channel* case, ICJ held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.[62] In the *United States Diplomatic and Consular Staff in Tehran* case, the Court concluded that the responsibility of the Islamic Republic of Iran was entailed by the "inaction" of its authorities which "failed to take appropriate steps", in circumstances where such steps were evidently called for.[63] In other cases it may be the combination of an action and an omission which is the basis for responsibility.[64]

(5) For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An "act of the State" must involve some action or omission by a human being or group: "States can act only by and through their agents and representatives."[65] The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an "act of the State" for the purposes of State responsibility.

(6) In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.

(7) The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations. In its judgment on jurisdiction in the *Factory at Chorzów* case, PCIJ used the words "breach of an engagement".[66] It employed the same expression in its subsequent judgment on the merits.[67] ICJ referred explicitly to these words in the *Reparation for Injuries* case.[68] The arbitral tribunal in the *"Rainbow Warrior"* affair referred to "any violation by a State of any obligation".[69] In practice, terms such as "non-execution of international obligations", "acts incompatible with international obligations", "violation of an international obligation" or "breach of an engagement" are also used.[70] All these formulations have essentially the same meaning. The phrase preferred in the articles is "breach of an international obligation" corresponding as it does to the language of Article 36, paragraph 2 (*c*), of the ICJ Statute.

(8) In international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others. PCIJ spoke of an act "contrary to the treaty right[s] of another State" in its judgment in the *Phosphates in Morocco* case.[71] That case concerned a limited multilateral treaty which dealt with the mutual rights and duties of the parties, but some have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole). But different incidents may attach to a right which is held in common by all other subjects of international law, as compared with a specific right of a given State or States. Different States may be beneficiaries of an obligation in different ways, or may have different interests in respect of its performance. Multilateral obligations may thus differ from bilateral ones, in view of the diversity of legal rules and institutions and the wide variety of interests sought to be protected by them. But whether any obligation has been breached still raises the two basic questions identified in article 2, and this is so whatever the character or provenance of the obligation breached. It is a separate question who may invoke the responsibility arising from the breach of an obligation: this question is dealt with in Part Three.[72]

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[62] *Corfu Channel, Merits* (see footnote 35 above), pp. 22–23.

[63] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 31–32, paras. 63 and 67. See also *Velásquez Rodríguez* v. *Honduras* case, Inter-American Court of Human Rights, Series C, No. 4, para. 170 (1988): "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions"; and *Affaire relative à l'acquisition de la nationalité polonaise*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 401, at p. 425 (1924).

[64] For example, under article 4 of the Convention relative to the Laying of Automatic Submarine Contact Mines (Hague Convention VIII of 18 October 1907), a neutral Power which lays mines off its coasts but omits to give the required notice to other States parties would be responsible accordingly.

[65] *German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6*, p. 22.

[66] *Factory at Chorzów, Jurisdiction* (see footnote 34 above).

[67] *Factory at Chorzów, Merits* (*ibid.*).

[68] *Reparation for Injuries* (see footnote 38 above), p. 184.

[69] *"Rainbow Warrior"* (see footnote 46 above), p. 251, para. 75.

[70] At the Conference for the Codification of International Law, held at The Hague in 1930, the term "any failure ... to carry out the international obligations of the State" was adopted (see *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3, article 1).

[71] See footnote 34 above.

[72] See also article 33, paragraph 2, and commentary.

(9) Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, "damage" to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.[73]

(10) A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by "fault" one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.

(11) Article 2 introduces and places in the necessary legal context the questions dealt with in subsequent chapters of Part One. Subparagraph (*a*)—which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act—corresponds to chapter II, while chapter IV deals with the specific cases where one State is responsible for the internationally wrongful act of another State. Subparagraph (*b*)—which states that such conduct must constitute a breach of an international obligation—corresponds to the general principles stated in chapter III, while chapter V deals with cases where the wrongfulness of conduct, which would otherwise be a breach of an obligation, is precluded.

(12) In subparagraph (*a*), the term "attribution" is used to denote the operation of attaching a given action or omission to a State. In international practice and judicial decisions, the term "imputation" is also used.[74] But the term "attribution" avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is "really" that of someone else.

(13) In subparagraph (*b*), reference is made to the breach of an international obligation rather than a rule or a norm of international law. What matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State. The term "obligation" is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities. The reference to an "obligation" is limited to an obligation under international law, a matter further clarified in article 3.

### *Article 3. Characterization of an act of a State as internationally wrongful*

**The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.**

*Commentary*

(1) Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law—even if, under that law, the State was actually bound to act in that way.

(2) As to the first of these elements, perhaps the clearest judicial decision is that of PCIJ in the *Treatment of Polish Nationals* case.[75] The Court denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the Constitution of the Free City of Danzig, on the ground that:

> according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted ... [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force ... The application of the Danzig Constitution may ... result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law ... However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City.[76]

(3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled. Interna-

[73] For examples of analysis of different obligations, see *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above), pp. 30–33, paras. 62–68; *"Rainbow Warrior"* (footnote 46 above), pp. 266–267, paras. 107–110; and WTO, Report of the Panel, United States–Sections 301–310 of the Trade Act of 1974 (WT/DS152/R), 22 December 1999, paras. 7.41 et seq.

[74] See, e.g., *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above), p. 29, paras. 56 and 58; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 51, para. 86.

[75] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 4.

[76] *Ibid.*, pp. 24–25. See also *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 24.

tional judicial decisions leave no doubt on that subject. In particular, PCIJ expressly recognized the principle in its first judgment, in the *S.S. "Wimbledon"* case. The Court rejected the argument of the German Government that the passage of the ship through the Kiel Canal would have constituted a violation of the German neutrality orders, observing that:

a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace. ... under Article 380 of the Treaty of Versailles, it was [Germany's] definite duty to allow [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article.[77]

The principle was reaffirmed many times:

it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty;[78]

... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations;[79]

... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.[80]

A different facet of the same principle was also affirmed in the advisory opinions on *Exchange of Greek and Turkish Populations*[81] and *Jurisdiction of the Courts of Danzig*.[82]

(4) ICJ has often referred to and applied the principle.[83] For example, in the *Reparation for Injuries* case, it noted that "[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible … the Member cannot contend that this obligation is governed by municipal law".[84] In the *ELSI* case, a Chamber of the Court emphasized this rule, stating that:

Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.[85]

Conversely, as the Chamber explained:

the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness … Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.[86]

The principle has also been applied by numerous arbitral tribunals.[87]

(5) The principle was expressly endorsed in the work undertaken under the auspices of the League of Nations on the codification of State responsibility,[88] as well as in the work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. The Commission's draft Declaration on Rights and Duties of States, article 13, provided that:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.[89]

(6) Similarly this principle was endorsed in the 1969 Vienna Convention, article 27 of which provides that:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.[90]

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[77] *S.S. "Wimbledon"* (see footnote 34 above), pp. 29–30.

[78] *Greco-Bulgarian "Communities"*, *Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 32.

[79] *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 12; and *ibid., Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 167.

[80] *Treatment of Polish Nationals* (see footnote 75 above), p. 24.

[81] *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 20.

[82] *Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, P.C.I.J., Series B, No. 15*, pp. 26–27. See also the observations of Lord Finlay in *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 26.

[83] See *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116, at p. 132; *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111, at p. 123; *Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1958*, p. 55, at p. 67; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12, at pp. 34–35, para. 57.

[84] *Reparation for Injuries* (see footnote 38 above), at p. 180.

[85] *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15, at p. 51, para. 73.

[86] *Ibid.*, p. 74, para. 124.

[87] See, e.g., the Geneva Arbitration (the *"Alabama"* case), in Moore, *History and Digest*, vol. IV, p. 4144, at pp. 4156 and 4157 (1872); *Norwegian Shipowners' Claims (Norway* v. *United States of America)*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 307, at p. 331 (1922); *Aguilar-Amory and Royal Bank of Canada Claims* (*Tinoco* case) *(Great Britain* v. *Costa Rica), ibid.*, p. 369, at p. 386 (1923); *Shufeldt Claim*, *ibid.*, vol. II (Sales No. 1949.V.1), p. 1079, at p. 1098 ("it is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject") (1930); *Wollemborg Case*, *ibid.*, vol. XIV (Sales No. 65.V.4), p. 283, at p. 289 (1956); and *Flegenheimer*, *ibid.*, p. 327, at p. 360 (1958).

[88] In point I of the request for information on State responsibility sent to States by the Preparatory Committee for the 1930 Hague Conference it was stated:

"In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law."

In their replies, States agreed expressly or implicitly with this principle (see League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (document C.75.M.69.1929.V), p. 16). During the debate at the 1930 Hague Conference, States expressed general approval of the idea embodied in point I and the Third Committee of the Conference adopted article 5 to the effect that "A State cannot avoid international responsibility by invoking the state of its municipal law" (document C.351(c) M.145(c).1930.V; reproduced in *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3).

[89] See General Assembly resolution 375 (IV) of 6 December 1949, annex. For the debate in the Commission, see *Yearbook ... 1949*, pp. 105–106, 150 and 171. For the debate in the Assembly, see *Official Records of the General Assembly, Fourth Session, Sixth Committee*, 168th–173rd meetings, 18–25 October 1949; 175th–183rd meetings, 27 October–3 November 1949; and *ibid.*, *Fourth Session, Plenary Meetings*, 270th meeting, 6 December 1949.

[90] Article 46 of the Convention provides for the invocation of provisions of internal law regarding competence to conclude treaties in limited circumstances, viz., where the violation of such provisions "was manifest and concerned a rule of … internal law of fundamental importance".

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(8) As regards the wording of the rule, the formulation "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law", which is similar to article 5 of the draft adopted on first reading at the 1930 Hague Conference and also to article 27 of the 1969 Vienna Convention, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, such a formulation sounds like a rule of procedure and is inappropriate for a statement of principle. Issues of the invocation of responsibility belong to Part Three, whereas this principle addresses the underlying question of the origin of responsibility. In addition, there are many cases where issues of internal law are relevant to the existence or otherwise of responsibility. As already noted, in such cases it is international law which determines the scope and limits of any reference to internal law. This element is best reflected by saying, first, that the characterization of State conduct as internationally wrongful is governed by international law, and secondly by affirming that conduct which is characterized as wrongful under international law cannot be excused by reference to the legality of that conduct under internal law.

(9) As to terminology, in the English version the term "internal law" is preferred to "municipal law", because the latter is sometimes used in a narrower sense, and because the 1969 Vienna Convention speaks of "internal law". Still less would it be appropriate to use the term "national law", which in some legal systems refers only to the laws emanating from the central legislature, as distinct from provincial, cantonal or local authorities. The principle in article 3 applies to all laws and regulations adopted within the framework of the State, by whatever authority and at whatever level.[91] In the French version the expression *droit interne* is preferred to *législation interne* and *loi interne*, because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.

[91] Cf. *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 9, at p. 16, para. 28.

## Chapter II

## ATTRIBUTION OF CONDUCT TO A STATE

### *Commentary*

(1) In accordance with article 2, one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. Chapter II defines the circumstances in which such attribution is justified, i.e. when conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.

(2) In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.[92]

(3) As a corollary, the conduct of private persons is not as such attributable to the State. This was established, for example, in the *Tellini* case of 1923. The Council of the League of Nations referred to a Special Commission of Jurists certain questions arising from an incident between Italy and Greece.[93] This involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. In reply to question five, the Commission stated that:

> The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.[94]

(4) The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link

[92] See, e.g., I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), pp. 132–166; D. D. Caron, "The basis of responsibility: attribution and other trans-substantive rules", *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. Magraw, eds. (Irvington-on-Hudson, N.Y., Transnational, 1998), p. 109; L. Condorelli, "L'imputation à l'État d'un fait internationalement illicite : solutions classiques et nouvelles tendances", *Recueil des cours…, 1984–VI* (Dordrecht, Martinus Nijhoff, 1988), vol. 189, p. 9; H. Dipla, *La responsabilité de l'État pour violation des droits de l'homme: problèmes d'imputation* (Paris, Pedone, 1994); A. V. Freeman, "Responsibility of States for unlawful acts of their armed forces", *Recueil des cours…, 1955–II* (Leiden, Sijthoff, 1956), vol. 88, p. 261; and F. Przetacznik, "The international responsibility of States for the unauthorized acts of their organs", *Sri Lanka Journal of International Law*, vol. 1 (June 1989), p. 151.

[93] League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1349.

[94] *Ibid.*, 5th Year, No. 4 (April 1924), p. 524. See also the *Janes* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 82 (1925).

of factual causality. As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.[95] In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.

(5) The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. Thus the Head of State or Government or the minister of foreign affairs is regarded as having authority to represent the State without any need to produce full powers.[96] Such rules have nothing to do with attribution for the purposes of State responsibility. In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.[97] Thus, the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government.

(6) In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.[98] Conduct engaged in by organs of the State in excess of their competence may also be attributed to the State under international law, whatever the position may be under internal law.[99]

(7) The purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. In internal law, it is common for the "State" to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.

(8) Chapter II consists of eight articles. Article 4 states the basic rule attributing to the State the conduct of its organs. Article 5 deals with conduct of entities empowered to exercise the governmental authority of a State, and article 6 deals with the special case where an organ of one State is placed at the disposal of another State and empowered to exercise the governmental authority of that State. Article 7 makes it clear that the conduct of organs or entities empowered to exercise governmental authority is attributable to the State even if it was carried out outside the authority of the organ or person concerned or contrary to instructions. Articles 8 to 11 then deal with certain additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State in international law. Article 8 deals with conduct carried out on the instructions of a State organ or under its direction or control. Article 9 deals with certain conduct involving elements of governmental authority, carried out in the absence of the official authorities. Article 10 concerns the special case of responsibility in defined circumstances for the conduct of insurrectional movements. Article 11 deals with conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own.

(9) These rules are cumulative but they are also limitative. In the absence of a specific undertaking or guarantee (which would be a *lex specialis*[100]), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter. As the Iran-United States Claims Tribunal has affirmed, "in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State".[101] This follows already from the provisions of article 2.

[95] See *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above).

[96] See articles 7, 8, 46 and 47 of the 1969 Vienna Convention.

[97] The point was emphasized, in the context of federal States, in *LaGrand* (see footnote 91 above). It is not of course limited to federal States. See further article 5 and commentary.

[98] See paragraph (11) of the commentary to article 4; see also article 5 and commentary.

[99] See article 7 and commentary.

[100] See article 55 and commentary.

[101] *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 17 , p. 92, at pp. 101–102 (1987).

### *Article 4. Conduct of organs of a State*

**1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.**

**2. An organ includes any person or entity which has that status in accordance with the internal law of the State.**

*Commentary*

(1) *Paragraph 1* of article 4 states the first principle of attribution for the purposes of State responsibility in international law—that the conduct of an organ of the State is attributable to that State. The reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.

(2) Certain acts of individuals or entities which do not have the status of organs of the State may be attributed to the State in international law, and these cases are dealt with in later articles of this chapter. But the rule is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, under article 8 conduct which is authorized by the State, so as to be attributable to it, must have been authorized by an organ of the State, either directly or indirectly.

(3) That the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions. In the *Moses* case, for example, a decision of a Mexico-United States Mixed Claims Commission, Umpire Lieber said: "An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority."[102] There have been many statements of the principle since then.[103]

(4) The replies by Governments to the Preparatory Committee for the 1930 Hague Conference[104] were unanimously of the view that the actions or omissions of organs of the State must be attributed to it. The Third Committee of the Conference adopted unanimously on first reading an article 1, which provided that international responsibility shall be incurred by a State as a consequence of "any failure on the part of its organs to carry out the international obligations of the State".[105]

(5) The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility. It goes without saying that there is no category of organs specially designated for the commission of internationally wrongful acts, and virtually any State organ may be the author of such an act. The diversity of international obligations does not permit any general distinction between organs which can commit internationally wrongful acts and those which cannot. This is reflected in the closing words of paragraph 1, which clearly reflect the rule of international law in the matter.

(6) Thus, the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs. Thus, in the *Salvador Commercial Company* case, the tribunal said that:

> a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.[106]

ICJ has also confirmed the rule in categorical terms. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it said:

> According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule … is of a customary character.[107]

In that case the Court was principally concerned with decisions of State courts, but the same principle applies to legislative and executive acts.[108] As PCIJ said in *Certain German Interests in Polish Upper Silesia (Merits)*:

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[102] Moore, *History and Digest*, vol. III, p. 3127, at p. 3129 (1871).

[103] See, e.g., *Claims of Italian Nationals* (footnote 41 above); *Salvador Commercial Company*, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455, at p. 477 (1902); and *Finnish Shipowners (Great Britain/Finland)*, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1479, at p. 1501 (1934).

[104] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), pp. 25, 41 and 52; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points; Replies of Canada and the United States of America* (document C.75(a)M.69(a).1929.V), pp. 2–3 and 6.

[105] Reproduced in *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

[106] See *Salvador Commercial Company* (footnote 103 above). See also *Chattin* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 282, at pp. 285–286 (1927); and *Dispute concerning the interpretation of article 79 of the Treaty of Peace*, *ibid.*, vol. XIII (Sales No. 64.V.3), p. 389, at p. 438 (1955).

[107] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 56 above), p. 87, para. 62, referring to the draft articles on State responsibility, article 6, now embodied in article 4.

[108] As to legislative acts, see, e.g., *German Settlers in Poland* (footnote 65 above), at pp. 35–36; *Treatment of Polish Nationals* (footnote 75 above), at pp. 24–25; *Phosphates in Morocco* (footnote 34 above), at pp. 25–26; and *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 176, at pp. 193–194. As to executive acts, see, e.g., *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above); and *ELSI* (footnote 85 above). As to judicial acts, see, e.g., *"Lotus"* (footnote 76 above); *Jurisdiction of the Courts of Danzig* (footnote 82 above); and *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 10, at pp. 21–22. In some cases, the conduct in question may involve both executive and judicial acts; see, e.g., *Application of the Convention of 1902* (footnote 83 above) at p. 65.

From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.[109]

Thus, article 4 covers organs, whether they exercise "legislative, executive, judicial or any other functions". This language allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character. Moreover, the term is one of extension, not limitation, as is made clear by the words "or any other functions".[110] It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as *acta iure gestionis*. Of course, the breach by a State of a contract does not as such entail a breach of international law.[111] Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4,[112] and it might in certain circumstances amount to an internationally wrongful act.[113]

(7) Nor is any distinction made at the level of principle between the acts of "superior" and "subordinate" officials, provided they are acting in their official capacity. This is expressed in the phrase "whatever position it holds in the organization of the State" in article 4. No doubt lower-level officials may have a more restricted scope of activity and they may not be able to make final decisions. But conduct carried out by them in their official capacity is nonetheless attributable to the State for the purposes of article 4. Mixed commissions after the Second World War often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officers, and consistently treated the acts of such persons as attributable to the State.[114]

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units. This principle has long been recognized. For example, the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise* case said:

For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.[115]

This principle was strongly supported during the preparatory work for the 1930 Hague Conference. Governments were expressly asked whether the State became responsible as a result of "[a]cts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)". All answered in the affirmative.[116]

(9) It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations. The award in the *"Montijo"* case is the starting point for a consistent series of decisions to this effect.[117] The French-Mexican Claims Commission in the *Pellat* case reaffirmed "the principle of the international responsibility ... of a federal State for all the acts of its separate States which give rise to claims by foreign States" and noted specially that such responsibility "... cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law".[118] That rule has since been consistently applied. Thus, for example, in the *LaGrand* case, ICJ said:

Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.[119]

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[109] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, at p. 19.

[110] These functions might involve, e.g. the giving of administrative guidance to the private sector. Whether such guidance involves a breach of an international obligation may be an issue, but as "guidance" it is clearly attributable to the State. See, e.g., GATT, Report of the Panel, Japan–Trade in Semi-conductors, 24 March 1988, paras. 110–111; and WTO, Report of the Panel, Japan–Measures affecting Consumer Photographic Film and Paper (WT/DS44/R), paras. 10.12–10.16.

[111] See article 3 and commentary.

[112] See, e.g., the decisions of the European Court of Human Rights in *Swedish Engine Drivers' Union* v. *Sweden, Eur. Court H.R., Series A, No. 20* (1976), at p. 14; and *Schmidt and Dahlström* v. *Sweden, ibid., Series A, No. 21* (1976), at p. 15.

[113] The irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the Commission (see *Yearbook ... 1998*, vol. II (Part Two), p. 17, para. 35).

[114] See, e.g., the *Currie* case, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 21, at p. 24 (1954); *Dispute concerning the interpretation of article 79* (footnote 106 above), at pp. 431–432; and *Mossé* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 486, at pp. 492–493 (1953). For earlier decisions, see the *Roper* case, *ibid.*, vol. IV (Sales No. 1951.V.1), p. 145 (1927); *Massey, ibid.*, p. 155 (1927); *Way, ibid.*, p. 391, at p. 400 (1928); and *Baldwin, ibid.*, vol. VI (Sales No. 1955.V.3), p. 328 (1933). Cf. the consideration of the requisition of a plant by the Mayor of Palermo in *ELSI* (see footnote 85 above), e.g. at p. 50, para. 70.

[115] UNRIAA, vol. XIII (Sales No. 64.V.3), p. 150, at p. 161 (1951). For earlier decisions, see, e.g., the *Pieri Dominique and Co.* case, *ibid.*, vol. X (Sales No. 60.V.4), p. 139, at p. 156 (1905).

[116] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 104 above), p. 90; *Supplement to Vol. III …* (*ibid.*), pp. 3 and 18.

[117] See Moore, *History and Digest*, vol. II, p. 1440, at p. 1440 (1874). See also *De Brissot and others*, Moore, *History and Digest*, vol. III, p. 2967, at pp. 2970–2971 (1855); *Pieri Dominique and Co.* (footnote 115 above), at pp. 156–157; *Davy* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 467, at p. 468 (1903); *Janes* case (footnote 94 above); *Swinney*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 101 (1925); *Quintanilla*, *ibid.*, p. 101, at p. 103 (1925); *Youmans*, *ibid.*, p. 110, at p. 116 (1925); *Mallén*, *ibid.*, p. 173, at p. 177 (1927); *Venable*, *ibid.*, p. 218, at p. 230 (1925); and *Tribolet*, *ibid.*, p. 598, at p. 601 (1925).

[118] UNRIAA, vol. V (Sales No. 1952.V.3), p. 534, at p. 536 (1929).

[119] *LaGrand, Provisional Measures* (see footnote 91 above). See also *LaGrand (Germany* v. *United States of America), Judgment, I.C.J.Reports 2001*, p. 466, at p. 495, para. 81.

(10) The reasons for this position are reinforced by the fact that federal States vary widely in their structure and distribution of powers, and that in most cases the constituent units have no separate international legal personality of their own (however limited), nor any treaty-making power. In those cases where the constituent unit of a federation is able to enter into international agreements on its own account,[120] the other party may well have agreed to limit itself to recourse against the constituent unit in the event of a breach. In that case the matter will not involve the responsibility of the federal State and will fall outside the scope of the present articles. Another possibility is that the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty.[121] This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty and in the matters which the treaty covers. It has effect by virtue of the *lex specialis* principle, dealt with in article 55.

(11) *Paragraph 2* explains the relevance of internal law in determining the status of a State organ. Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law will not itself perform the task of classification. Even if it does so, the term "organ" used in internal law may have a special meaning, and not the very broad meaning it has under article 4. For example, under some legal systems the term "government" refers only to bodies at the highest level such as the Head of State and the cabinet of ministers. In others, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the State.[122] Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word "includes" in paragraph 2.

(12) The term "person or entity" is used in article 4, paragraph 2, as well as in articles 5 and 7. It is used in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc. The term "entity" is used in a similar sense[123] in the draft articles on jurisdictional immunities of States and their property, adopted in 1991.

(13) Although the principle stated in article 4 is clear and undoubted, difficulties can arise in its application. A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct of a State organ and purely private conduct has been clearly drawn in international arbitral decisions. For example, the award of the Mexico-United States General Claims Commission in the *Mallén* case involved, first, the act of an official acting in a private capacity and, secondly, another act committed by the same official in his official capacity, although in an abusive way.[124] The latter action was, and the former was not, held attributable to the State. The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where "the act had no connexion with the official function and was, in fact, merely the act of a private individual".[125] The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.[126] In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.

### *Article 5. Conduct of persons or entities exercising elements of governmental authority*

**The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.**

*Commentary*

(1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.

[120] See, e.g., articles 56, paragraph 3, and 172, paragraph 3, of the Constitution of the Swiss Confederation of 18 April 1999.

[121] See, e.g., article 34 of the Convention for the Protection of the World Cultural and Natural Heritage.

[122] See, e.g., the *Church of Scientology* case, Germany, Federal Supreme Court, Judgment of 26 September 1978, case No. *VI ZR* 267/76, *Neue Juristische Wochenschrift*, No. 21 (May 1979), p. 1101; ILR, vol. 65, p. 193; and *Propend Finance Pty Ltd.* v. *Sing*, England, Court of Appeal, ILR, vol. 111, p. 611 (1997). These were State immunity cases, but the same principle applies in the field of State responsibility.

[123] See *Yearbook … 1991*, vol. II (Part Two), pp. 14–18.

[124] *Mallén* (see footnote 117 above), at p. 175.

[125] UNRIAA, vol. V (Sales No. 1952.V.3), p. 516, at p. 531 (1929). See also the *Bensley* case in Moore, *History and Digest*, vol. III, p. 3018 (1850) ("a wanton trespass … under no color of official proceedings, and without any connection with his official duties"); and the *Castelain* case *ibid.*, p. 2999 (1880). See further article 7 and commentary.

[126] See paragraph (7) of the commentary to article 7.

(2) The generic term "entity" reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the tribunal's jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.[127]

(3) The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.

(4) Parastatal entities may be considered a relatively modern phenomenon, but the principle embodied in article 5 has been recognized for some time. For example, the replies to the request for information made by the Preparatory Committee for the 1930 Hague Conference indicated strong support from some Governments for the attribution to the State of the conduct of autonomous bodies exercising public functions of an administrative or legislative character. The German Government, for example, asserted that:

> when, by delegation of powers, bodies act in a public capacity, *e.g.*, police an area … the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.[128]

The Preparatory Committee accordingly prepared the following basis of discussion, though the Third Committee of the Conference was unable in the time available to examine it:

> A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such … autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.[129]

(5) The justification for attributing to the State under international law the conduct of "parastatal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling stock).

(6) Article 5 does not attempt to identify precisely the scope of "governmental authority" for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. On the other hand, article 5 does not extend to cover, for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; i.e. where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.

### *Article 6. Conduct of organs placed at the disposal of a State by another State*

**The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is**

[127] *Hyatt International Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 9, p. 72, at pp. 88–94 (1985).

[128] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), p. 90. The German Government noted that these remarks would extend to the situation where "the State, as an exceptional measure, invests private organisations with public powers and duties or authorities [*sic*] them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force", *ibid.*

[129] *Ibid.*, p. 92.

**acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.**

*Commentary*

(1) Article 6 deals with the limited and precise situation in which an organ of a State is effectively put at the disposal of another State so that the organ may temporarily act for its benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

(2) The words "placed at the disposal of" in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ "placed at the disposal of" the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise.[130]

(3) Examples of situations that could come within this limited notion of a State organ "placed at the disposal" of another State might include a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State. On the other hand, mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by article 6. For example, armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter.[131]

(4) Thus, what is crucial for the purposes of article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving State. The notion of an organ "placed at the disposal" of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status: for example, cultural missions, diplomatic or consular missions, foreign relief or aid organizations. Also excluded from the ambit of article 6 are situations in which functions of the "beneficiary" State are performed without its consent, as when a State placed in a position of dependence, territorial occupation or the like is compelled to allow the acts of its own organs to be set aside and replaced to a greater or lesser extent by those of the other State.[132]

(5) There are two further criteria that must be met for article 6 to apply. First, the organ in question must possess the status of an organ of the sending State; and secondly its conduct must involve the exercise of elements of the governmental authority of the receiving State. The first of these conditions excludes from the ambit of article 6 the conduct of private entities or individuals which have never had the status of an organ of the sending State. For example, experts or advisers placed at the disposal of a State under technical assistance programmes do not usually have the status of organs of the sending State. The second condition is that the organ placed at the disposal of a State by another State must be "acting in the exercise of elements of the governmental authority" of the receiving State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, article 6 covers only a specific and limited notion of "transferred responsibility". Yet, in State practice the situation is not unknown.

(6) In the *Chevreau* case, a British consul in Persia, temporarily placed in charge of the French consulate, lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that: "the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power."[133] It is implicit in the Arbitrator's finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for the Consul's acts. If a third State had brought a claim, the proper respondent in accordance with article 6 would have been the State on whose behalf the conduct in question was carried out.

(7) Similar issues were considered by the European Commission of Human Rights in two cases relating to the exercise by Swiss police in Liechtenstein of "delegated" powers.[134] At the relevant time Liechtenstein was not

[130] Thus, the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania: *Xhavara and Others* v. *Italy and Albania*, application No. 39473/98, *Eur. Court H.R.*, decision of 11 January 2001. Conversely, the conduct of Turkey taken in the context of the Turkey-European Communities customs union was still attributable to Turkey: see WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (WT/DS34/R), 31 May 1999, paras. 9.33–9.44.

[131] See also article 47 and commentary.

[132] For the responsibility of a State for directing, controlling or coercing the internationally wrongful act of another, see articles 17 and 18 and commentaries.

[133] UNRIAA, vol. II (Sales No. 1949.V.1), p. 1113, at p. 1141 (1931).

[134] *X and Y* v. *Switzerland*, application Nos. 7289/75 and 7349/76, decision of 14 July 1977; Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 9, p. 57; and *Yearbook of the European Convention on Human Rights, 1977*, vol. 20 (1978), p. 372, at pp. 402–406.

a party to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), so that if the conduct was attributable only to Liechtenstein no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter's consent and in their mutual interest. The officers in question were governed exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not "placed at the disposal" of the receiving State.[135]

(8) A further, long-standing example of a situation to which article 6 applies is the Judicial Committee of the Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth. Decisions of the Privy Council on appeal from an independent Commonwealth State will be attributable to that State and not to the United Kingdom. The Privy Council's role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.[136] There are many examples of judges seconded by one State to another for a time: in their capacity as judges of the receiving State, their decisions are not attributable to the sending State, even if it continues to pay their salaries.

(9) Similar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State's governmental authority. This is even more exceptional than the inter-State cases to which article 6 is limited. It also raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these articles. Article 57 accordingly excludes from the ambit of the articles all questions of the responsibility of international organizations or of a State for the acts of an international organization. By the same token, article 6 does not concern those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty.[137] In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct.

### *Article 7. Excess of authority or contravention of instructions*

**The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.**

*Commentary*

(1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.

(2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question.[138] Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.

(3) The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals,[139] State practice came to support the proposition, articulated by the British Government in response to an Italian request, that "all Governments should always be held responsible for all acts committed by their agents by virtue of their official capacity".[140] As the Spanish Government pointed out: "If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received."[141] At this time the United States supported "a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but

[135] See also *Drozd and Janousek* v. *France and Spain, Eur. Court H.R., Series A, No. 240* (1992), paras. 96 and 110. See also *Controller and Auditor-General* v. *Davison* (New Zealand, Court of Appeal), ILR, vol. 104 (1996), p. 526, at pp. 536–537 (Cooke, P.) and pp. 574–576 (Richardson, J.). An appeal to the Privy Council on other grounds was dismissed, *Brannigan* v. *Davison*, *ibid.*, vol. 108, p. 622.

[136] For example, Agreement relating to Appeals to the High Court of Australia from the Supreme Court of Nauru (Nauru, 6 September 1976) (United Nations, *Treaty Series*, vol. 1216, No. 19617, p. 151).

[137] See, e.g., article 89 of the Rome Statute of the International Criminal Court.

[138] See, e.g., the "Star and Herald" controversy, Moore, *Digest*, vol. VI, p. 775.

[139] In a number of early cases, international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority: see, e.g., the following cases: *"Only Son"*, Moore, *History and Digest*, vol. IV, pp. 3404–3405; *"William Lee"*, *ibid.*, p. 3405; and *Donoughho's*, *ibid.*, vol. III, p. 3012. Where the question was expressly examined, tribunals did not consistently apply any single principle: see, e.g., the *Lewis's* case, *ibid.*, p. 3019; the *Gadino* case, UNRIAA, vol. XV (Sales No. 66.V.3), p. 414 (1901); the *Lacaze* case, Lapradelle-Politis, vol. II, p. 290, at pp. 297–298; and the *"William Yeaton"* case, Moore, *History and Digest*, vol. III, p. 2944, at p. 2946.

[140] For the opinions of the British and Spanish Governments given in 1898 at the request of Italy in respect of a dispute with Peru, see *Archivio del Ministero degli Affari esteri italiano*, serie politica P, No. 43.

[141] Note verbale by Duke Almodóvar del Río, 4 July 1898, *ibid.*

of their apparent authority".[142] It is probable that the different formulations had essentially the same effect, since acts falling outside the scope of both real and apparent authority would not be performed "by virtue of … official capacity". In any event, by the time of the 1930 Hague Conference, a majority of States responding to the Preparatory Committee's request for information were clearly in favour of the broadest formulation of the rule, providing for attribution to the State in the case of "[a]cts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority".[143] The Basis of Discussion prepared by the Committee reflected this view. The Third Committee of the Conference adopted an article on first reading in the following terms:

> International responsibility is … incurred by a State if damage is sustained by a foreigner as a result of unauthorised acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.[144]

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.[145] It is confirmed, for example, in article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which provides that: "A Party to the conflict … shall be responsible for all acts committed by persons forming part of its armed forces": this clearly covers acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and "correspond[s] to the general principles of law on international responsibility".[146]

(5) A definitive formulation of the modern rule is found in the *Caire* case. The case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him. The Commission held:

> that the two officers, even if they are deemed to have acted outside their competence … and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.[147]

(6) International human rights courts and tribunals have applied the same rule. For example, the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case said:

> This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.[148]

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been "carried out by persons cloaked with governmental authority".[149]

(8) The problem of drawing the line between unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression "if the organ, person or entity acts in that capacity" in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.[150] In short, the question is whether they were acting with apparent authority.

(9) As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, i.e.

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[142] "American Bible Society" incident, statement of United States Secretary of State, 17 August 1885, Moore, *Digest*, vol. VI, p. 743; "Shine and Milligen", G. H. Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1943), vol. V, p. 575; and "Miller", *ibid.*, pp. 570–571.

[143] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), point V, No. 2 (*b*), p. 74, and *Supplement to Vol. III …* (see footnote 104 above), pp. 3 and 17.

[144] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* ..., document C.351(c)M.145(c).1930. V (see footnote 88 above), p. 237. For a more detailed account of the evolution of the modern rule, see *Yearbook … 1975*, vol. II, pp. 61–70.

[145] For example, the 1961 revised draft by the Special Rapporteur, Mr. García Amador, provided that "an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity" (*Yearbook ... 1961*, vol. II, p. 53).

[146] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), pp. 1053–1054.

[147] *Caire* (see footnote 125 above). For other statements of the rule, see *Maal*, UNRIAA, vol. X (Sales No. 60.V.4), pp. 732–733 (1903); *La Masica, ibid.*, vol. XI (Sales No. 61.V.4), p. 560 (1916); *Youmans* (footnote 117 above); *Mallén*, *ibid.*; *Stephens*, UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 267–268 (1927); and *Way* (footnote 114 above), pp. 400–401. The decision of the United States Court of Claims in *Royal Holland Lloyd* v. *United States*, 73 Ct. Cl. 722 (1931) (*Annual Digest of Public International Law Cases* (London, Butterworth, 1938), vol. 6, p. 442) is also often cited.

[148] *Velásquez Rodríguez* (see footnote 63 above); see also ILR, vol. 95, p. 232, at p. 296.

[149] *Petrolane, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 27, p. 64, at p. 92 (1991). See also paragraph (13) of the commentary to article 4.

[150] One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The articles are not concerned with questions that would then arise as to the validity of the transaction (cf. the 1969 Vienna Convention, art. 50). So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

only to those cases of attribution covered by articles 4, 5 and 6. Problems of unauthorized conduct by other persons, groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.

(10) As a rule of attribution, article 7 is not concerned with the question whether the conduct amounted to a breach of an international obligation. The fact that instructions given to an organ or entity were ignored, or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.[151] Equally, article 7 is not concerned with the admissibility of claims arising from internationally wrongful acts committed by organs or agents acting *ultra vires* or contrary to their instructions. Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim.[152]

### *Article 8. Conduct directed or controlled by a State*

**The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.**

*Commentary*

(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control.[153] Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery.

(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence.[154] In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves "governmental activity". Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.

(3) More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

(4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary Activities in and against Nicaragua* case. The question was whether the conduct of the contras was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the contras. This was analysed by ICJ in terms of the notion of "control". On the one hand, it held that the United States was responsible for the "planning, direction and support" given by the United States to Nicaraguan operatives.[155] But it rejected the broader claim of Nicaragua that all the conduct of the contras was attributable to the United States by reason of its control over them. It concluded that:

> [D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.
>
> …
>
> All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[156]

Thus while the United States was held responsible for its own support for the contras, only in certain individual instances were the acts of the contras themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be

[151] See *ELSI* (footnote 85 above), especially at pp. 52, 62 and 74.

[152] See further article 44, subparagraph (*b*), and commentary.

[153] Separate issues are raised where one State engages in internationally wrongful conduct at the direction or under the control of another State: see article 17 and commentary, and especially paragraph (7) for the meaning of the words "direction" and "control" in various languages.

[154] See, e.g., the *Zafiro* case, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 160 (1925); the *Stephens* case (footnote 147 above), p. 267; and *Lehigh Valley Railroad Company and Others (U.S.A.)* v. *Germany (Sabotage* cases*)*: "*Black Tom"* and *"Kingsland"* incidents, *ibid*., vol. VIII (Sales No. 58.V.2), p. 84 (1930) and p. 458 (1939).

[155] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 51, para. 86.

[156] *Ibid.*, pp. 62 and 64–65, paras. 109 and 115. See also the concurring opinion of Judge Ago, *ibid.*, p. 189, para. 17.

insufficient to justify attribution of the conduct to the State.

(5) The Appeals Chamber of the International Tribunal for the Former Yugoslavia has also addressed these issues. In the *Tadić*, case, the Chamber stressed that:

> The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.[157]

The Appeals Chamber held that the requisite degree of control by the Yugoslavian "authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations".[158] In the course of their reasoning, the majority considered it necessary to disapprove the ICJ approach in the *Military and Paramilitary Activities in and against Nicaragua* case. But the legal issues and the factual situation in the *Tadić* case were different from those facing the Court in that case. The tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law.[159] In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.[160]

(6) Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion.[161] The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.[162] Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property.[163] On the other hand, where there was evidence that the corporation was exercising public powers,[164] or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,[165] the conduct in question has been attributed to the State.[166]

(7) It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms "instructions", "direction" and "control" are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.

(8) Where a State has authorized an act, or has exercised direction or control over it, questions can arise as to the State's responsibility for actions going beyond the scope of the authorization. For example, questions might arise if the agent, while carrying out lawful instructions or directions, engages in some activity which contravenes both the instructions or directions given and the international obligations of the instructing State. Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored.

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[157] *Prosecutor* v. *Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1518, at p. 1541, para. 117. For the judgment of the Trial Chamber (Case IT-94-1-T (1997)), see ILR, vol. 112, p. 1.

[158] ILM, vol. 38, No. 6 (November 1999), p. 1546, para. 145.

[159] See the explanation given by Judge Shahabuddeen, *ibid.*, pp. 1614–1615.

[160] The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by the Iran-United States Claims Tribunal and the European Court of Human Rights: *Yeager* (see footnote 101 above), p. 103. See also *Starrett Housing Corporation* v. *Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 4, p. 122, at p. 143 (1983); *Loizidou* v. *Turkey, Merits, Eur. Court H.R., Reports*, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and *ibid., Preliminary Objections, Eur. Court H.R., Series A, No. 310*, p. 23, para. 62 (1995).

[161] *Barcelona Traction* (see footnote 25 above), p. 39, paras. 56–58.

[162] For example, the Workers' Councils considered in *Schering Corporation* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 5, p. 361 (1984); *Otis Elevator Company* v. *The Islamic Republic of Iran, ibid.*, vol. 14, p. 283 (1987); and *Eastman Kodak Company* v. *The Government of Iran, ibid.*, vol. 17, p. 153 (1987).

[163] *SEDCO, Inc.* v. *National Iranian Oil Company*, *ibid*., vol. 15, p. 23 (1987). See also *International Technical Products Corporation* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 9, p. 206 (1985); and *Flexi-Van Leasing, Inc.* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 12, p. 335, at p. 349 (1986).

[164] *Phillips Petroleum Company Iran* v. *The Islamic Republic of Iran*, *ibid.*, vol. 21, p. 79 (1989); and *Petrolane* (see footnote 149 above).

[165] *Foremost Tehran, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. *ibid.*, vol. 10, p. 228 (1986); and *American Bell International Inc.* v. *The Islamic Republic of Iran*, *ibid.*, vol. 12, p. 170 (1986).

[166] See *Hertzberg et al.* v. *Finland* (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex XIV, communication No. R.14/61, p. 161, at p. 164, para. 9.1) (1982). See also *X* v. *Ireland*, application No. 4125/69, *Yearbook of the European Convention on Human Rights, 1971*, vol. 14 (1973), p. 199; and *Young, James and Webster* v. *the United Kingdom, Eur. Court H.R., Series A, No. 44* (1981).

The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with article 8.

(9) Article 8 uses the words "person or group of persons", reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a *de facto* basis. Thus, while a State may authorize conduct by a legal entity such as a corporation, it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective.

### *Article 9. Conduct carried out in the absence or default of the official authorities*

**The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.**

*Commentary*

(1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase "in circumstances such as to call for". Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g. after foreign occupation.

(2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces:[167] in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State responsibility. Thus, the position of the Revolutionary Guards or "Komitehs" immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as covered by the principle expressed in article 9. *Yeager* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The tribunal held the conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards:

at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.[168]

(3) Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.

(4) As regards the first condition, the person or group acting must be performing governmental functions, though they are doing so on their own initiative. In this respect, the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State. It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* Government. The cases envisaged by article 9 presuppose the existence of a Government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* Government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a Government is covered by article 4 rather than article 9.[169]

(5) In respect of the second condition, the phrase "in the absence or default of" is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality. The phrase "absence or default" seeks to capture both situations.

(6) The third condition for attribution under article 9 requires that the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons. The term "call for" conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority. There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.[170]

[167] This principle is recognized as legitimate by article 2 of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land); and by article 4, paragraph A (6), of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

[168] *Yeager* (see footnote 101 above), p. 104, para. 43.

[169] See, e.g., the award of 18 October 1923 by Arbitrator Taft in the *Tinoco* case (footnote 87 above), pp. 381–382. On the responsibility of the State for the conduct of *de facto* Governments, see also J. A. Frowein, *Das de facto-Regime im Völkerrecht* (Cologne, Heymanns, 1968), pp. 70–71. Conduct of a Government in exile might be covered by article 9, depending on the circumstances.

[170] See, e.g., the *Sambiaggio* case, UNRIAA, vol. X (Sales No. 60.V.4), p. 499, at p. 512 (1904); see also article 10 and commentary.

### *Article 10. Conduct of an insurrectional or other movement*

**1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.**

**2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.**

**3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.**

*Commentary*

(1) Article 10 deals with the special case of attribution to a State of conduct of an insurrectional or other movement which subsequently becomes the new Government of the State or succeeds in establishing a new State.

(2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals. It can be placed on the same footing as that of persons or groups who participate in a riot or mass demonstration and it is likewise not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9.

(3) Ample support for this general principle is found in arbitral jurisprudence. International arbitral bodies, including mixed claims commissions[171] and arbitral tribunals[172] have uniformly affirmed what Commissioner Nielsen in the *Solis* case described as a "well-established principle of international law", that no Government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.[173] Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to the State. This can be seen, for example, from the preparatory work for the 1930 Hague Conference. Replies of Governments to point IX of the request for information addressed to them by the Preparatory Committee indicated substantial agreement that: (*a*) the conduct of organs of an insurrectional movement could not be attributed as such to the State or entail its international responsibility; and (*b*) only conduct engaged in by organs of the State in connection with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility, and then only if such conduct constituted a breach of an international obligation of that State.[174]

(4) The general principle that the conduct of an insurrectional or other movement is not attributable to the State is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State. This will be the case where the State successfully puts down the revolt. In contrast, where the movement achieves its aims and either installs itself as the new Government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual Government. Thus the term "conduct" only concerns the conduct of the movement as such and not the individual acts of members of the movement, acting in their own capacity.

(5) Where the insurrectional movement, as a new Government, replaces the previous Government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. In such a case, the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. Moreover, it is the only subject of international law to which responsibility can be attributed. The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established Government.

(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity be-

[171] See the decisions of the various mixed commissions: *Zuloaga and Miramon Governments*, Moore, *History and Digest*, vol. III, p. 2873; *McKenny* case, *ibid.*, p. 2881; *Confederate States*, *ibid.*, p. 2886; *Confederate Debt*, *ibid.*, p. 2900; and *Maximilian Government*, *ibid.*, p. 2902, at pp. 2928–2929.

[172] See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote 44 above), p. 642; and the *Iloilo Claims*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 158, at pp. 159–160 (1925).

[173] UNRIAA, vol. IV (Sales No. 1951.V.1), p. 358, at p. 361 (1928) (referring to *Home Frontier and Foreign Missionary Society*, *ibid.*, vol. VI (Sales No. 1955.V.3), p. 42 (1920)); cf. the *Sambiaggio* case (footnote 170 above), p. 524.

[174] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (see footnote 88 above), p. 108; and *Supplement to Volume III* … (see footnote 104 above), pp. 3 and 20.

tween the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the Government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule.

(7) *Paragraph 1* of article 10 covers the scenario in which the insurrectional movement, having triumphed, has substituted its structures for those of the previous Government of the State in question. The phrase "which becomes the new Government" is used to describe this consequence. However, the rule in paragraph 1 should not be pressed too far in the case of Governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement. The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed Government. Thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming.

(8) *Paragraph 2* of article 10 addresses the second scenario, where the structures of the insurrectional or other revolutionary movement become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the predecessor State. The expression "or in a territory under its administration" is included in order to take account of the differing legal status of different dependent territories.

(9) A comprehensive definition of the types of groups encompassed by the term "insurrectional movement" as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement's actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) may be taken as a guide. Article 1, paragraph 1, refers to "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol", and it contrasts such groups with "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (art. 1, para. 2). This definition of "dissident armed forces" reflects, in the context of the Protocols, the essential idea of an "insurrectional movement".

(10) As compared with paragraph 1, the scope of the attribution rule articulated by paragraph 2 is broadened to include "insurrectional or other" movements. This terminology reflects the existence of a greater variety of movements whose actions may result in the formation of a new State. The words do not, however, extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State. Nor does it cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. This is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be.

(11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international "legitimacy" or of any illegality in respect of their establishment as a Government, despite the potential importance of such distinctions in other contexts.[175] From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new Government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.[176] Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.

(12) Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10. The international arbitral decisions, e.g. those of the mixed commissions established in respect of Venezuela (1903) and Mexico (1920–1930), support the attribution of conduct by insurgents where the movement is successful in achieving its revolutionary aims. For example, in the *Bolívar Railway Company* claim, the principle is stated in the following terms:

> The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result.[177]

The French-Venezuelan Mixed Claims Commission in its decision concerning the *French Company of Venezuelan Railroads* case emphasized that the State cannot be held responsible for the acts of revolutionaries "unless the revolution was successful", since such acts then involve the responsibility of the State "under the well-recognized rules of public law".[178] In the *Pinson* case, the French-Mexican Claims Commission ruled that:

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[175] See H. Atlam, "National liberation movements and international responsibility", *United Nations Codification of State Responsibility*, B. Simma and M. Spinedi, eds. (New York, Oceana, 1987), p. 35.

[176] As ICJ said, "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States", *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*, p. 16, at p. 54, para. 118.

[177] UNRIAA, vol. IX (Sales No. 59.V.5), p. 445, at p. 453 (1903). See also *Puerto Cabello and Valencia Railway Company*, *ibid.*, p. 510, at p. 513 (1903).

[178] *Ibid.*, vol. X (Sales No. 60.V.4), p. 285, at p. 354 (1902). See also the *Dix* case, *ibid.*, vol. IX (Sales No. 59.V.5), p. 119 (1902).

if the injuries originated, for example, in requisitions or forced contributions demanded ... by revolutionaries before their final success, or if they were caused ... by offences committed by successful revolutionary forces, the responsibility of the State ... cannot be denied.[179]

(13) The possibility of holding the State responsible for the conduct of a successful insurrectional movement was brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Hague Conference. On the basis of replies received from a number of Governments, the Preparatory Committee drew up the following Basis of Discussion: "A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops." [180] Although the proposition was never discussed, it may be considered to reflect the rule of attribution now contained in paragraph 2.

(14) More recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in article 10. In one case, the Supreme Court of Namibia went even further in accepting responsibility for "anything done" by the predecessor administration of South Africa.[181]

(15) Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but improperly failed to do so. This possibility is preserved by paragraph 3 of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of other provisions in chapter II. The term "however related to that of the movement concerned" is intended to have a broad meaning. Thus, the failure by a State to take available steps to protect the premises of diplomatic missions, threatened from attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3.

(16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present articles, which are concerned only with the responsibility of States.

[179] *Ibid.*, vol. V (Sales No. 1952.V.3), p. 327, at p. 353 (1928).

[180] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (see footnote 88 above), pp. 108 and 116; and Basis of discussion No. 22 (*c*), *ibid.*, p. 118; reproduced in *Yearbook ... 1956*, vol. II, p. 223, at p. 224, document A/CN.4/96.

[181] Guided in particular by a constitutional provision, the Supreme Court of Namibia held that "the new government inherits responsibility for the acts committed by the previous organs of the State", *Minister of Defence, Namibia* v. *Mwandinghi, South African Law Reports*, 1992 (2), p. 355, at p. 360; and ILR, vol. 91, p. 341, at p. 361. See, on the other hand, *44123 Ontario Ltd.* v. *Crispus Kiyonga and Others*, 11 *Kampala Law Reports* 14, pp. 20–21 (1992); and ILR, vol. 103, p. 259, at p. 266 (High Court, Uganda).

### *Article 11. Conduct acknowledged and adopted by a State as its own*

**Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.**

*Commentary*

(1) All the bases for attribution covered in chapter II, with the exception of the conduct of insurrectional or other movements under article 10, assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act. Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.

(2) In many cases, the conduct which is acknowledged and adopted by a State will be that of private persons or entities. The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law. This conclusion holds irrespective of the circumstances in which the private person acts and of the interests affected by the person's conduct.

(3) Thus, like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction … and eventually continued by her, even after the acquisition of territorial sovereignty over the island".[182] In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.[183] However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.

(4) Outside the context of State succession, the *United States Diplomatic and Consular Staff in Tehran* case provides a further example of subsequent adoption by a

[182] *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIAA, vol. XII (Sales No. 63.V.3), p. 155, at p. 198 (1956).

[183] The matter is reserved by article 39 of the Vienna Convention on Succession of States in respect of Treaties (hereinafter "the 1978 Vienna Convention").

State of particular conduct. There ICJ drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court:

> The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.[184]

In that case it made no difference whether the effect of the "approval" of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.[185] In other cases no such prior responsibility will exist. Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the tribunal did in the *Lighthouses* arbitration.[186] This is consistent with the position established by article 10 for insurrectional movements and avoids gaps in the extent of responsibility for what is, in effect, the same continuing act.

(5) As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann's capture, a charge neither admitted nor denied by Israeli Foreign Minister Golda Meir, during the discussion in the Security Council of the complaint. She referred to Eichmann's captors as a "volunteer group".[187] Security Council resolution 138 (1960) of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann's captors were "in fact acting on the instructions of, or under the direction or control of" Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State.

(6) The phrase "acknowledges and adopts the conduct in question as its own" is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.[188] ICJ in the *United States Diplomatic and Consular Staff in Tehran* case used phrases such as "approval", "endorsement", "the seal of official governmental approval" and "the decision to perpetuate [the situation]".[189] These were sufficient in the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies, States often take positions which amount to "approval" or "endorsement" of conduct in some general sense but do not involve any assumption of responsibility. The language of "adoption", on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct. Indeed, provided the State's intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases where a State has accepted responsibility for conduct of which it did not approve, which it had sought to prevent and which it deeply regretted. However such acceptance may be phrased in the particular case, the term "acknowledges and adopts" in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.

(7) The principle established by article 11 governs the question of attribution only. Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law. By the same token, a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity. Such an assumption of responsibility would have to go further and amount to an agreement to indemnify for the wrongful act of another.

(8) The phrase "if and to the extent that" is intended to convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State. Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words, a State may elect to acknowledge and adopt only some of the conduct in question. Thirdly, the act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.

(9) The conditions of acknowledgement and adoption are cumulative, as indicated by the word "and". The order of the two conditions indicates the normal sequence of

[184] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 35, para. 74.

[185] *Ibid.*, pp. 31–33, paras. 63–68.

[186] *Lighthouses* arbitration (see footnote 182 above), pp. 197–198.

[187] *Official Records of the Security Council, Fifteenth Year*, 866th meeting, 22 June 1960, para. 18.

[188] The separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.

[189] See footnote 59 above.

events in cases in which article 11 is relied on. Acknowledgement and adoption of conduct by a State might be express (as for example in the *United States Diplomatic and Consular Staff in Tehran* case), or it might be inferred from the conduct of the State in question.

## CHAPTER III

## BREACH OF AN INTERNATIONAL OBLIGATION

*Commentary*

(1) There is a breach of an international obligation when conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it or, to use the language of article 2, subparagraph (*b*), when such conduct constitutes "a breach of an international obligation of the State". This chapter develops the notion of a breach of an international obligation, to the extent that this is possible in general terms.

(2) It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States.[190] In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc. There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration. Nonetheless, a number of basic principles can be stated.

(3) The essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. Such conduct gives rise to the new legal relations which are grouped under the common denomination of international responsibility. Chapter III, therefore, begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (art. 12). The basic concept having been defined, the other provisions of the chapter are devoted to specifying how this concept applies to various situations. In particular, the chapter deals with the question of the intertemporal law as it applies to State responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach (art. 13), with the equally important question of continuing breaches (art. 14), and with the special problem of determining whether and when there has been a breach of an obligation which is directed not at single but at composite acts, i.e. where the essence of the breach lies in a series of acts defined in aggregate as wrongful (art. 15).

[190] See paragraphs (2) to (4) of the general commentary.

(4) For the reason given in paragraph (2) above, it is neither possible nor desirable to deal in the framework of this Part with all the issues that can arise in determining whether there has been a breach of an international obligation. Questions of evidence and proof of such a breach fall entirely outside the scope of the articles. Other questions concern rather the classification or typology of international obligations. These have only been included in the text where they can be seen to have distinct consequences within the framework of the secondary rules of State responsibility.[191]

### *Article 12. 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 is not in conformity with what is required of it by that obligation, regardless of its origin or character.**

*Commentary*

(1) As stated in article 2, a breach by a State of an international obligation incumbent upon it gives rise to its international responsibility. It is first necessary to specify what is meant by a breach of an international obligation. This is the purpose of article 12, which defines in the most general terms what constitutes a breach of an international obligation by a State. In order to conclude that there is a breach of an international obligation in any specific case, it will be necessary to take account of the other provisions of chapter III which specify further conditions relating to the existence of a breach of an international obligation, as well as the provisions of chapter V dealing with circumstances which may preclude the wrongfulness of an act of a State. But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.

(2) In introducing the notion of a breach of an international obligation, it is necessary again to emphasize the autonomy of international law in accordance with the principle stated in article 3. In the terms of article 12, the breach of an international obligation consists in the disconformity between the conduct required of the State by that obligation and the conduct actually adopted by the State—i.e. between the requirements of international law and the facts of the matter. This can be expressed in different ways. For example, ICJ has used such expressions as "incompatibility with the obligations" of a State,[192] acts "contrary to" or "inconsistent with" a given rule,[193] and

[191] See, e.g., the classification of obligations of conduct and results, paragraphs (11) to (12) of the commentary to article 12.

[192] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 29, para. 56.

[193] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 64, para. 115, and p. 98, para. 186, respectively.

"failure to comply with its treaty obligations".[194] In the *ELSI* case, a Chamber of the Court asked the "question whether the requisition was in conformity with the requirements … of the FCN Treaty".[195] The expression "not in conformity with what is required of it by that obligation" is the most appropriate to indicate what constitutes the essence of a breach of an international obligation by a State. It allows for the possibility that a breach may exist even if the act of the State is only partly contrary to an international obligation incumbent upon it. In some cases precisely defined conduct is expected from the State concerned; in others the obligation only sets a minimum standard above which the State is free to act. Conduct proscribed by an international obligation may involve an act or an omission or a combination of acts and omissions; it may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition. In every case, it is by comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation that one can determine whether or not there is a breach of that obligation. The phrase "is not in conformity with" is flexible enough to cover the many different ways in which an obligation can be expressed, as well as the various forms which a breach may take.

(3) Article 12 states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation "regardless of its origin". As this phrase indicates, the articles are of general application. They apply to all international obligations of States, whatever their origin may be. International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. States may assume international obligations by a unilateral act.[196] An international obligation may arise from provisions stipulated in a treaty (a decision of an organ of an international organization competent in the matter, a judgment given between two States by ICJ or another tribunal, etc.). It is unnecessary to spell out these possibilities in article 12, since the responsibility of a State is engaged by the breach of an international obligation whatever the particular origin of the obligation concerned. The formula "regardless of its origin" refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law. The word "source" is sometimes used in this context, as in the preamble to the Charter of the United Nations which stresses the need to respect "the obligations arising from treaties and other sources of international law". The word "origin", which has the same meaning, is not attended by the doubts and doctrinal debates the term "source" has provoked.

(4) According to article 12, the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State, nor does it, as such, affect the regime of State responsibility thereby arising. Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act.[197] Moreover, these various grounds of obligation interact with each other, as practice clearly shows. Treaties, especially multilateral treaties, can contribute to the formation of general international law; customary law may assist in the interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on. Thus, international courts and tribunals have treated responsibility as arising for a State by reason of any "violation of a duty imposed by an international juridical standard".[198] In the *"Rainbow Warrior"* arbitration, the tribunal said that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation".[199] In the *Gabčíkovo-Nagymaros Project* case, ICJ referred to the relevant draft article provisionally adopted by the Commission in 1976 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".[200]

(5) Thus, there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, i.e. for responsibility arising *ex contractu* or *ex delicto*. In the *"Rainbow Warrior"* arbitration, the tribunal affirmed that "in the field of international law there is no distinction between contractual and tortious responsibility".[201] As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the "civil" and "criminal" responsibility as is the case in internal legal systems.

(6) State responsibility can arise from breaches of bilateral obligations or of obligations owed to some States

[194] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 46, para. 57.

[195] *ELSI* (see footnote 85 above), p. 50, para. 70.

[196] Thus, France undertook by a unilateral act not to engage in further atmospheric nuclear testing: *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand* v. *France)*, *ibid.*, p. 457. The extent of the obligation thereby undertaken was clarified in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand* v. *France) Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 288.

[197] ICJ has recognized "[t]he existence of identical rules in international treaty law and customary law" on a number of occasions, *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 95, para. 177; see also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38–39, para. 63.

[198] *Dickson Car Wheel Company* (see footnote 42 above); cf. the *Goldenberg* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 901, at pp. 908–909 (1928); *International Fisheries Company* (footnote 43 above), p. 701 ("some principle of international law"); and *Armstrong Cork Company* (footnote 45 above), p. 163 ("any rule whatsoever of international law").

[199] *"Rainbow Warrior"* (see footnote 46 above), p. 251, para. 75. See also *Barcelona Traction* (footnote 25 above), p. 46, para. 86 ("breach of an international obligation arising out of a treaty or a general rule of law").

[200] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 38, para. 47. The qualification "likely to be involved" may have been inserted because of possible circumstances precluding wrongfulness in that case.

[201] *"Rainbow Warrior"* (see footnote 46 above), p. 251, para. 75.

or to the international community as a whole. It can involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law. Questions of the gravity of the breach and the peremptory character of the obligation breached can affect the consequences which arise for the responsible State and, in certain cases, for other States also. Certain distinctions between the consequences of certain breaches are accordingly drawn in Parts Two and Three of these articles.[202] But the regime of State responsibility for breach of an international obligation under Part One is comprehensive in scope, general in character and flexible in its application: Part One is thus able to cover the spectrum of possible situations without any need for further distinctions between categories of obligation concerned or the category of the breach.

(7) Even fundamental principles of the international legal order are not based on any special source of law or specific law-making procedure, in contrast with rules of constitutional character in internal legal systems. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is "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". Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts. But this is an issue belonging to the content of State responsibility.[203] So far at least as Part One of the articles is concerned, there is a unitary regime of State responsibility which is general in character.

(8) Rather similar considerations apply with respect to obligations arising under the Charter of the United Nations. Since the Charter is a treaty, the obligations it contains are, from the point of view of their origin, treaty obligations. The special importance of the Charter, as reflected in its Article 103,[204] derives from its express provisions as well as from the virtually universal membership of States in the United Nations.

(9) The general scope of the articles extends not only to the conventional or other origin of the obligation breached but also to its subject matter. International awards and decisions specifying the conditions for the existence of an internationally wrongful act speak of the breach of an international obligation without placing any restriction on the subject matter of the obligation breached.[205] Courts and tribunals have consistently affirmed the principle that there is no *a priori* limit to the subject matters on which States may assume international obligations. Thus, PCIJ stated in its first judgment, in the *S.S. "Wimbledon"* case, that "the right of entering into international engagements is an attribute of State sovereignty".[206] That proposition has often been endorsed.[207]

(10) In a similar perspective, it has sometimes been argued that an obligation dealing with a certain subject matter could only have been breached by conduct of the same description. That proposition formed the basis of an objection to the jurisdiction of ICJ in the *Oil Platforms* case. It was argued that a treaty of friendship, commerce and navigation could not in principle have been breached by conduct involving the use of armed force. The Court responded in the following terms:

> 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 reach of the Treaty of 1955.[208]

Thus, the breach by a State of an international obligation constitutes an internationally wrongful act, whatever the subject matter or content of the obligation breached, and whatever description may be given to the non-conforming conduct.

(11) Article 12 also states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation, "regardless of its … character". In practice, various classifications of international obligations have been adopted. For example, a distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive,[209] and it does not seem to bear specific or direct consequences as far as the present articles are concerned. In the *Colozza* case, for example, the European Court of Human Rights was concerned with the trial in absentia of a person who, without actual notice of his trial, was sentenced to six years' imprisonment and was not allowed subsequently to contest his conviction.

[202] See Part Three, chapter II and commentary; see also article 48 and commentary.

[203] See articles 40 and 41 and commentaries.

[204] According to which "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

[205] See, e.g., *Factory at Chorzów, Jurisdiction* (footnote 34 above); *Factory at Chorzów, Merits* (*ibid.*); and *Reparation for Injuries* (footnote 38 above). In these decisions it is stated that "any breach of an international engagement" entails international responsibility. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (footnote 39 above), p. 228.

[206] *S.S. "Wimbledon"* (see footnote 34 above), p. 25.

[207] See, e.g., *Nottebohm, Second Phase*, *Judgment, I.C.J. Reports 1955*, p. 4, at pp. 20–21; *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6, at p. 33; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 131, para. 259.

[208] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at pp. 811–812, para. 21.

[209] Cf. *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 77, para. 135, where the Court referred to the parties having accepted "obligations of conduct, obligations of performance, and obligations of result".

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" ... 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*.[210]

The Court thus considered that article 6, paragraph 1, imposed an obligation of result.[211] But, in order to decide whether there had been a breach of the Convention in the circumstances of the case, it did not simply compare 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, it examined what more Italy could have done to make the applicant's right "effective".[212] The distinction between obligations of conduct and result was not determinative of the actual decision that there had been a breach of article 6, paragraph 1.[213]

(12) The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation *prima facie* conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down that is applicable to all cases.[214] Certain obligations may be breached by the mere passage of incompatible legislation.[215] Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the legislature itself being an organ of the State for the purposes of the attribution of responsibility.[216] In other circumstances, the enactment of legislation may not in and of itself amount to a breach,[217] especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.[218]

### *Article 13. International obligation in force for a State*

**An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.**

*Commentary*

(1) Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when the State is bound by the obligation. This is but the application in the field of State responsibility of the general principle of intertemporal law, as stated by Judge 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.[219]

Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation ("does not constitute … unless …") is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.

(2) International tribunals have applied the principle stated in article 13 in many cases. An instructive example is provided by the decision of Umpire Bates of the United States-Great Britain Mixed Commission concerning the

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[210] *Colozza* v. *Italy, Eur. Court H.R., Series A, No. 89* (1985), pp. 15–16, para. 30, citing *De Cubber* v. *Belgium, ibid., No. 86* (1984), p. 20, para. 35.

[211] Cf. *Plattform "Ärzte für das Leben"* v. *Austria*, 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" (*Eur. Court H.R., Series A, No. 139*, p. 12, para. 34 (1988)).

In the *Colozza* case (see footnote 210 above), the Court used similar language but concluded that the obligation was an obligation of result. Cf. C. Tomuschat, "What is a 'breach' of the European Convention on Human Rights?", *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, Lawson and de Blois, eds. (Dordrecht, Martinus Nijhoff, 1994), vol. 3, p. 315, at p. 328.

[212] *Colozza* case (see footnote 210 above), para. 28.

[213] See also *The Islamic Republic of Iran* v. *The United States of America*, cases A15 (IV) and A24, Iran-U.S. C.T.R., vol. 32, p. 115 (1996).

[214] Cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (footnote 83 above), p. 30, para. 42.

[215] A uniform law treaty will generally be construed as requiring immediate implementation, i.e. as embodying an obligation to make the provisions of the uniform law a part of the law of each State party: see, e.g., B. Conforti, "Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme", *Rivista di diritto internazionale privato e processuale*, vol. 24 (1988), p. 233.

[216] See article 4 and commentary. For illustrations, see, e.g., the findings of the European Court of Human Rights in *Norris* v. *Ireland*, *Eur. Court H.R., Series A, No. 142*, para. 31 (1988), citing *Klass and Others* v. *Germany, ibid., No. 28*, para. 33 (1978); *Marckx* v. *Belgium, ibid., No. 31*, para. 27 (1979); *Johnston and Others* v. *Ireland, ibid., No. 112*, para. 42 (1986); *Dudgeon* v. *the United Kingdom, ibid., No. 45*, para. 41 (1981); and *Modinos* v. *Cyprus, ibid., No. 259*, para. 24 (1993). See also *International responsibility for the promulgation and enforcement of laws in violation of the Convention (arts. 1 and 2 American Convention on Human Rights)*, Advisory Opinion OC–14/94, Inter-American Court of Human Rights, Series A, No. 14 (1994). The Inter-American Court also considered it possible to determine whether draft legislation was compatible with the provisions of human rights treaties: *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC–3/83, Series A, No. 3 (1983).

[217] As ICJ held in *LaGrand*, *Judgment* (see footnote 119 above), p. 497, paras. 90–91.

[218] See, e.g., WTO, Report of the Panel (footnote 73 above), paras. 7.34–7.57.

[219] *Island of Palmas* (Netherlands/United States of America), UNRIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845 (1928). Generally on intertemporal law, see resolution I adopted in 1975 by the Institute of International Law at its Wiesbaden session, *Annuaire de l'Institut de droit international*, vol. 56 (1975), pp. 536–540; for the debate, *ibid.*, pp. 339–374; for M. Sørensen's reports, *ibid.*, vol. 55 (1973), pp. 1–116. See further W. Karl, "The time factor in the law of State responsibility", Spinedi and Simma, eds., *op. cit*. (footnote 175 above), p. 95.

conduct of British authorities who had seized United States vessels engaged in the slave trade and freed slaves belonging to United States nationals. The incidents referred to the Commission had taken place at different times and the umpire had to determine whether, at the time each incident took place, slavery was "contrary to the law of nations". Earlier incidents, dating back to a time when the slave trade was considered lawful, amounted to a breach on the part of the British authorities of the international obligation to respect and protect the property of foreign nationals.[220] The later incidents occurred when the slave trade had been "prohibited by all civilized nations" and did not involve the responsibility of Great Britain.[221]

(3) Similar principles were applied by Arbitrator Asser in deciding whether the seizure and confiscation by Russian authorities of United States vessels engaged in seal hunting outside Russia's territorial waters should be considered internationally wrongful. In his award in the *"James Hamilton Lewis"* case, he observed that the question had to be settled "according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the vessel".[222] Since, under the principles in force at the time, Russia had no right to seize the United States vessel, the seizure and confiscation of the vessel were unlawful acts for which Russia was required to pay compensation.[223] The same principle has consistently been applied by the European Commission and the European Court of Human Rights to deny claims relating to periods during which the European Convention on Human Rights was not in force for the State concerned.[224]

(4) State practice also supports the principle. A requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place is a common stipulation in arbitration agreements,[225] and undoubtedly is made by way of explicit confirmation of a generally recognized principle. International law writers who have dealt with the question recognize that the wrongfulness of an act must be established on the basis of the obligations in force at the time when the act was performed.[226]

(5) State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence, as contemplated by article 64 of the 1969 Vienna Convention, this does not entail any retrospective assumption of responsibility. Article 71, paragraph 2 (*b*), provides that such a new peremptory norm "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".

(6) Accordingly, it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application. It is, however, without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State. In fact, cases of the retrospective assumption of responsibility are rare. The *lex specialis* principle (art. 55) is sufficient to deal with any such cases where it may be agreed or decided that responsibility will be assumed retrospectively for conduct which was not a breach of an international obligation at the time it was committed.[227]

(7) In international law, the principle stated in article 13 is not only a necessary but also a sufficient basis for responsibility. In other words, once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law. Thus, as ICJ said in the *Northern Cameroons* case:

> [I]f during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust.[228]

Similarly, in the *"Rainbow Warrior"* arbitration, the arbitral tribunal held that, although the relevant treaty obli-

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[220] See the *"Enterprize"* case, Lapradelle-Politis (footnote 139 above), vol. I, p. 703 (1855); and Moore, *History and Digest*, vol. IV, p. 4349, at p. 4373. See also the *"Hermosa"* and *"Créole"* cases, Lapradelle-Politis, *op. cit*., p. 704 (1855); and Moore, *History and Digest*, vol. IV, pp. 4374–4375.

[221] See the *"Lawrence"* case, Lapradelle-Politis, *op. cit*., p. 741; and Moore, *History and Digest*, vol. III, p. 2824. See also the *"Volusia"* case, Lapradelle-Politis, *op. cit*., p. 741.

[222] *Affaire des navires Cape Horn Pigeon, James Hamilton Lewis, C. H. White et Kate and Anna*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 66, at p. 69 (1902).

[223] See also the *"C. H. White"* case, *ibid.*, p. 74. In these cases the arbitrator was required by the arbitration agreement itself to apply the law in force at the time the acts were performed. Nevertheless, the intention of the parties was clearly to confirm the application of the general principle in the context of the arbitration agreement, not to establish an exception. See further the *S.S. "Lisman"* case, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1767, at p. 1771 (1937).

[224] See, e.g., *X* v. *Germany*, application No. 1151/61, Council of Europe, European Commission of Human Rights, *Recueil des décisions*, No. 7 (March 1962), p. 119 (1961) and many later decisions.

[225] See, e.g., Declarations exchanged between the Government of the United States of America and the Imperial Government of Russia, for the submission to arbitration of certain disputes concerning the international responsibility of Russia for the seizure of American ships, UNRIAA, vol. IX (Sales No. 59.V.5), p. 57 (1900).

[226] See, e.g., P. Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public: problèmes de droit intertemporel ou de droit transitoire* (Paris, Librairie générale de droit et de jurisprudence, 1970), pp. 119, 135 and 292; D. Bindschedler-Robert, "De la rétroactivité en droit international public", *Recueil d'études de droit international en hommage à Paul Guggenheim* (University of Geneva Law Faculty/Graduate Institute of International Studies, 1968), p. 184; M. Sørensen, "Le problème intertemporel dans l'application de la Convention européenne des droits de l'homme", *Mélanges offerts à Polys Modinos* (Paris, Pedone, 1968), p. 304; T. O. Elias, "The doctrine of intertemporal law", AJIL, vol. 74, No. 2 (April 1980), p. 285; and R. Higgins, "Time and the law: international perspectives on an old problem", *International and Comparative Law Quarterly*, vol. 46 (July 1997), p. 501.

[227] As to the retroactive effect of the acknowledgement and adoption of conduct by a State, see article 11 and commentary, especially paragraph (4). Such acknowledgement and adoption would not, without more, give retroactive effect to the obligations of the adopting State.

[228] *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15, at p. 35.

gation had terminated with the passage of time, France's responsibility for its earlier breach remained.[229]

(8) Both aspects of the principle are implicit in the ICJ decision in the *Certain Phosphate Lands in Nauru* case. 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.[230] 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 [*sic*] 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.[231]

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. 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 subsequently terminated.[232]

(9) The basic principle stated in article 13 is thus well established. One possible qualification concerns the progressive interpretation of obligations, by a majority of the Court in the *Namibia* case.[233] But the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permissible in certain cases,[234] 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. Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation.[235]

[229] *"Rainbow Warrior"* (see footnote 46 above), pp. 265–266.

[230] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at pp. 253–255, paras. 31–36. See article 45, subparagraph (*b*), and commentary.

[231] *Certain Phosphate Lands in Nauru*, *ibid.*, p. 255, para. 36.

[232] The case was settled before the Court had the opportunity to consider the merits: *Certain Phosphate Lands in Nauru, Order of 13 September 1993, I.C.J. Reports 1993*, p. 322; for the settlement agreement, see Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru (Nauru, 10 August 1993) (United Nations, *Treaty Series*, vol. 1770, No. 30807, p. 379).

[233] *Namibia* case (see footnote 176 above), pp. 31–32, para. 53.

[234] See, e.g., *Tyrer* v. *the United Kingdom, Eur. Court H.R., Series A, No. 26*, pp. 15–16 (1978).

[235] See, e.g., *Zana* v. *Turkey*, *Eur. Court H.R., Reports*, 1997–VII, p. 2533 (1997); and J. Pauwelyn, "The concept of a 'continuing violation' of an international obligation: selected problems", BYBIL, *1995*, vol. 66, p. 415, at pp. 443–445.

### *Article 14. Extension in time of the breach of an international obligation*

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

**2. The breach of an international obligation by an act of a State having a continuing character extends 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 remains not in conformity with that obligation.**

*Commentary*

(1) The problem of identifying when a wrongful act begins and how long it continues is one which arises frequently[236] and has consequences in the field of State responsibility, including the important question of cessation of continuing wrongful acts dealt with in article 30. Although the existence and duration of a breach of an international obligation depends for the most part on the existence and content of the obligation and on the facts of the particular breach, certain basic concepts are established. These are introduced in article 14. Without seeking to be comprehensive in its treatment of the problem, article 14 deals with several related questions. In particular, it develops the distinction between breaches not extending in time and continuing wrongful acts (see paragraphs (1) and (2) respectively), and it also deals with the application of that distinction to the important case of obligations of prevention. In each of these cases it takes into account the question of the continuance in force of the obligation breached.

(2) Internationally wrongful acts usually take some time to happen. The critical distinction for the purpose of article 14 is between a breach which is continuing and one which has already been completed. In accordance with *paragraph 1*, a completed act occurs "at the moment when the act is performed", even though its effects or consequences may continue. The words "at the moment" are intended to provide a more precise description of the time frame when a completed wrongful act is performed,

[236] See, e.g., *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35; *Phosphates in Morocco* (footnote 34 above), pp. 23–29; *Electricity Company of Sofia and Bulgaria, Judgment, 1939*, *P.C.I.J., Series A/B, No. 77*, p. 64, at pp. 80–82; and *Right of Passage over Indian Territory* (footnote 207 above), pp. 33–36. The issue has often been raised before the organs of the European Convention on Human Rights. See, e. g., the decision of the European Commission of Human Rights in the *De Becker* v. *Belgium* case, application No. 214/56, *Yearbook of the European Convention on Human Rights, 1958–1959*, p. 214, at pp. 234 and 244; and the Court's judgments in *Ireland* v. *the United Kingdom, Eur. Court H.R., Series A, No. 25*, p. 64 (1978); *Papamichalopoulos and Others* v. *Greece, ibid., No. 260–B*, para. 40 (1993); and *Agrotexim and Others* v. *Greece, ibid., No. 330–A*, p. 22, para. 58 (1995). See also E. Wyler, "Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite", RGDIP, vol. 95, p. 881 (1991).

without requiring that the act necessarily be completed in a single instant.

(3) In accordance with *paragraph 2*, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period.[237] Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent.

(4) Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. For example, the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for.[238] The question whether a wrongful taking of property is a completed or continuing act likewise depends to some extent on the content of the primary rule said to have been violated. Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act. The position with a *de facto*, "creeping" or disguised occupation, however, may well be different.[239] Exceptionally, 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.[240]

(5) Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin. In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect, it is covered by paragraph 1 of article 14.

(6) An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.

(7) The notion of continuing wrongful acts is common to many national legal systems and owes its origins in international law to Triepel.[241] It has been repeatedly referred to by ICJ and by other international tribunals. For example, in the *United States Diplomatic and Consular Staff in Tehran* case, the Court referred to "successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963".[242]

(8) The consequences of a continuing wrongful act will depend on the context, as well as on the duration of the obligation breached. For example, 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. The arbitral tribunal referred with approval to the Commission's draft articles (now amalgamated in article 14) and to the distinction between instantaneous and continuing wrongful acts, and said:

> 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.[243]

The tribunal went on to draw further legal consequences from the distinction in terms of the duration of French obligations under the agreement.[244]

(9) 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. The issue arises because the Court's jurisdiction may be limited to events occurring after the respondent State became a party to the Convention or the relevant Protocol and accepted the right of individual petition. Thus, in the *Papamichalopoulos* case, 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 to the European Convention on Human Rights,

[237] See article 13 and commentary, especially para. (2).

[238] *Blake*, Inter-American Court of Human Rights, Series C, No. 36, para. 67 (1998).

[239] *Papamichalopoulos* (see footnote 236 above).

[240] *Loizidou*, *Merits* (see footnote 160 above), p. 2216.

[241] H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 289. The concept was subsequently taken up in various general studies on State responsibility as well as in works on the interpretation of the formula "situations or facts prior to a given date" used in some declarations of acceptance of the compulsory jurisdiction of ICJ.

[242] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 37, para. 80. See also pages 36–37, paras. 78–79.

[243] *"Rainbow Warrior"* (see footnote 46 above), p. 264, para. 101.

[244] *Ibid*., pp. 265–266, paras. 105–106. But see the separate opinion of Sir Kenneth Keith, *ibid*., pp. 279–284.

which continued after the Protocol had come into force; it accordingly upheld its jurisdiction over the claim.[245]

(10) In the *Loizidou* case,[246] similar reasoning was applied by the Court 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 argued that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus 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 Constitution so that the expropriation was not completed at that time and the property continued to belong to the applicant. The conduct of the Turkish Republic 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 after that time.[247]

(11) The Human Rights Committee has likewise endorsed the idea of continuing wrongful acts. For example, in *Lovelace*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a registered member of an Indian group, 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.[248]

It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, was 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 application of article 27 as the most directly relevant provision of the Covenant to the facts in hand.

(12) Thus, conduct which has 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 State responsibility. For example, the obligation of cessation contained in article 30 applies to continuing wrongful acts.

(13) A question common to wrongful acts whether completed or continuing is when a breach of international law occurs, as distinct from being merely apprehended or imminent. As noted in the context of article 12, that question can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct,[249] incitement or attempt,[250] in which case the threat, incitement or attempt is itself a wrongful act. On the other hand, where the internationally wrongful act is the occurrence of some event—e.g. the diversion of an international river—mere preparatory conduct is not necessarily wrongful.[251] In the *Gabčíkovo-Nagymaros Project* case, the question was when the diversion scheme ("Variant C") was put into effect. ICJ held that the breach did not occur until the actual diversion of the Danube. 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". [252]

Thus, the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Preparatory conduct does not itself amount to a

[245] See footnote 236 above.

[246] *Loizidou, Merits* (see footnote 160 above), p. 2216.

[247] *Ibid*., pp. 2230–2232 and 2237–2238, paras. 41–47 and 63–64. See, however, the dissenting opinion of Judge Bernhardt, p. 2242, para. 2 (with whom Judges Lopes Rocha, Jambrek, Pettiti, Baka and Gölcüklü in substance agreed). See also *Loizidou, Preliminary Objections* (footnote 160 above), pp. 33–34, paras. 102–105; and *Cyprus* v. *Turkey*, application No. 25781/94, judgement of 10 May 2001, *Eur. Court H.R., Reports*, 2001–IV.

[248] *Lovelace* v. *Canada*, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), annex XVIII, communication No. R.6/24, p. 172, paras. 10–11 (1981).

[249] 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* (footnote 54 above), pp. 246–247, paras. 47–48; see also R. Sadurska, "Threats of force", AJIL, vol. 82, No. 2 (April 1988), p. 239.

[250] A particularly comprehensive formulation is that of article III of the Convention on the Prevention and Punishment of the Crime of Genocide which prohibits conspiracy, direct and public incitement, attempt and complicity in relation to genocide. See also article 2 of the International Convention for the Suppression of Terrorist Bombings and article 2 of the International Convention for the Suppression of the Financing of Terrorism.

[251] 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 K. Zweigert and H. Kötz, *Introduction to Comparative Law*, 3rd rev. ed., trans. T. Weir (Oxford, Clarendon Press, 1998), p. 508. Other systems achieve similar results without using this concept, e.g. by construing a refusal to perform in advance of the time for performance as a "positive breach of contract", *ibid*., p. 494 (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". Such a repudiation could occur in advance of the time for performance.

[252] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 54, para. 79, citing the draft commentary to what is now article 30.

breach if it does not "predetermine the final decision to be taken". Whether that is so in any given case will depend on the facts and on the content of the primary obligation. 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 various possibilities are intended to be covered by the use of the term "occurs" in paragraphs 1 and 3 of article 14.

(14) *Paragraph 3* of article 14 deals with the temporal dimensions of a particular category of breaches of international obligations, namely the breach of obligations to prevent the occurrence of a given event. Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur. The breach of an obligation of prevention may well be a continuing wrongful act, although, as for other continuing wrongful acts, the effect of article 13 is that the breach only continues if the State is bound by the obligation for the period during which the event continues and remains not in conformity with what is required by the obligation. For example, the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration,[253] was breached for as long as the pollution continued to be emitted. Indeed, in such cases the breach may be progressively aggravated by the failure to suppress it. However, not all obligations directed to preventing an act from occurring will be of this kind. If the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act.[254] If the obligation in question has ceased, any continuing conduct by definition ceases to be wrongful at that time.[255] Both qualifications are intended to be covered by the phrase in paragraph 3, "and remains not in conformity with that obligation".

### *Article 15. Breach consisting of a composite act*

**1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.**

**2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.**

*Commentary*

(1) Within the basic framework established by the distinction between completed and continuing acts in article 14, article 15 deals with a further refinement, viz. the notion of a composite wrongful act. Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.

(2) Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is "a series of acts or omissions defined in aggregate as wrongful". Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc. Some of the most serious wrongful acts in international law are defined in terms of their composite character. The importance of these obligations in international law justifies special treatment in article 15.[256]

(3) Even though it has special features, the prohibition of genocide, formulated in identical terms in the Convention on the Prevention and Punishment of the Crime of Genocide and in later instruments,[257] may be taken as an illustration of a "composite" obligation. It implies that the responsible entity (including a State) will have adopted a systematic policy or practice. According to article II, subparagraph (*a*), of the Convention, the prime case of genocide is "[k]illing members of the [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. Genocide has also to be carried out with the relevant intention, aimed at physically eliminating the group "as such". 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. Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide.[258]

(4) It is necessary to distinguish composite obligations from simple obligations breached by a "composite" act. Composite acts may be more likely to give rise to

[253] *Trail Smelter*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905 (1938, 1941).

[254] An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation 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.

[255] See the *"Rainbow Warrior"* case (footnote 46 above), p. 266.

[256] See further J. J. A. Salmon, "Le fait étatique complexe: une notion contestable", *Annuaire français de droit international*, vol. 28 (1982), p. 709.

[257] See, e.g., article 4 of the statute of the International Tribunal for the Former Yugoslavia, originally published as an annex to document S/25704 and Add.1, approved by the Security Council in its resolution 827 (1993) of 25 May 1993, and amended on 13 May 1998 by resolution 1166 (1998) and on 30 November 2000 by resolution 1329 (2000); article 2 of the statute of the International Tribunal for Rwanda, approved by the Security Council in its resolution 955 (1994) of 8 November 1994; and article 6 of the Rome Statute of the International Criminal Court.

[258] The intertemporal principle does not apply to the Convention, which according to its article I is declaratory. Thus, the obligation to prosecute relates to genocide whenever committed. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (footnote 54 above), p. 617, para. 34.

continuing breaches, but simple acts can cause continuing breaches as well. The position is different, however, where the obligation itself is defined in terms of the cumulative character of the conduct, i.e. where the cumulative conduct constitutes 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 or racially motivated killing.

(5) In *Ireland* v. *the United Kingdom*, Ireland complained of a practice of unlawful treatment of detainees in Northern Ireland which was said to amount to torture or inhuman or degrading treatment, and the case 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 VII of the Convention on the Prevention and Punishment of the Crime of Genocide, 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.[259]

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.

(6) A further distinction must be drawn 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 by a State is internationally wrongful,[260] even though 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 its essence such discrimination is not a composite act, but it may be necessary for the purposes of proving it to produce evidence of a practice amounting to such an act.

(7) A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.

(8) *Paragraph 1* of article 15 defines the time at which a composite act "occurs" as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series. Similar considerations apply as for completed and continuing wrongful acts in determining when a breach of international law exists; the matter is dependent upon the precise facts and the content of the primary obligation. The number of actions or omissions which must occur to constitute a breach of the obligation is also determined by the formulation and purpose of the primary rule. The actions or omissions must be part of a series but the article does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided a sufficient number of acts has occurred to constitute a breach. At the time when the act occurs which is sufficient to constitute the breach it may not be clear that further acts are to follow and that the series is not complete. Further, the fact that the series of actions or omissions was interrupted so that it was never completed will not necessarily prevent those actions or omissions which have occurred being classified as a composite wrongful act if, taken together, they are sufficient to constitute the breach.

(9) While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation. For example, the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful. Nor does it affect the temporal element in the commission of the acts: a series of acts or omissions may occur at the same time or sequentially, at different times.

(10) *Paragraph 2* of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined.

(11) The word "remain" in paragraph 2 is inserted to deal with the intertemporal principle set out in article 13. In accordance with that principle, the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In

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[259] *Ireland* v. *the United Kingdom* (see footnote 236 above), p. 64, para. 159; see also page 63, para. 157. See further the United States counterclaim in *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.

[260] See, e.g., article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination; and article 26 of the International Covenant on Civil and Political Rights.

cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).

## Chapter IV

## RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

### *Commentary*

(1) In accordance with the basic principles laid down in chapter I, each State is responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it under chapter II which is in breach of an international obligation of that State in accordance with chapter III.[261] The principle that State responsibility is specific to the State concerned underlies the present articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities.

(2) However, internationally wrongful conduct often results from the collaboration of several States rather than of one State acting alone.[262] This may involve independent conduct by several States, each playing its own role in carrying out an internationally wrongful act. Or it may be that a number of States act through a common organ to commit a wrongful act.[263] Internationally wrongful conduct can also arise out of situations where a State acts on behalf of another State in carrying out the conduct in question.

(3) Various forms of collaborative conduct can coexist in the same case. For example, three States, Australia, New Zealand and the United Kingdom, together constituted the Administering Authority for the Trust Territory of Nauru. In the *Certain Phosphate Lands in Nauru* case, proceedings were commenced against Australia alone in respect of acts performed on the "joint behalf" of the three States.[264] The acts performed by Australia involved both "joint" conduct of several States and day-to-day administration of a territory by one State acting on behalf of other States as well as on its own behalf. By contrast, if the relevant organ of the acting State is merely "placed at the disposal" of the requesting State, in the sense provided for in article 6, only the requesting State is responsible for the act in question.

(4) In certain circumstances the wrongfulness of a State's conduct may depend on the independent action of another State. A State may engage in conduct in a situation where another State is involved and the conduct of the other State may be relevant or even decisive in assessing whether the first State has breached its own international obligations. For example, in the *Soering* case the European Court of Human Rights held that the proposed extradition of a person to a State not party to the European Convention on Human Rights where he was likely to suffer inhuman or degrading treatment or punishment involved a breach of article 3 of the Convention by the extraditing State.[265] Alternatively, 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. Thus, the basis of responsibility in the *Corfu Channel* case[266] was Albania's failure to warn the United Kingdom of the presence of mines in Albanian waters which had been laid by a third State. Albania's responsibility in the circumstances was original and not derived from the wrongfulness of the conduct of any other State.

(5) In most cases of collaborative conduct by States, responsibility for the wrongful act will be determined according to the principle of independent responsibility referred to in paragraph (1) above. But there may be cases where conduct of the organ of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, and this may be so 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 defines these exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another.

(6) Three situations are covered in chapter IV. Article 16 deals with cases where one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter. Article 17 deals with cases where one State is responsible for the internationally wrongful act of another State because it has exercised powers of direction and control over the commission of an internationally wrongful act by the latter. Article 18 deals with the extreme case where one State deliberately coerces another into committing an act which is, or but for

[261] See, in particular, article 2 and commentary.

[262] See M. L. Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (Milan, Giuffrè, 1990); Brownlie, *System of the Law of Nations …* (footnote 92 above), pp. 189–192; J. Quigley, "Complicity in international law: a new direction in the law of State responsibility", BYBIL, *1986*, vol. 57, p. 77; J. E. Noyes and B. D. Smith, "State responsibility and the principle of joint and several liability", *Yale Journal of International Law*, vol. 13 (1988), p. 225; and B. Graefrath, "Complicity in the law of international responsibility", *Revue belge de droit international*, vol. 29 (1996), p. 370.

[263] In some cases, the act in question may be committed by the organs of an international organization. This raises issues of the international responsibility of international organizations which fall outside the scope of the present articles. See article 57 and commentary.

[264] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 258, para. 47; see also the separate opinion of Judge Shahabuddeen, *ibid*., p. 284.

[265] *Soering* v. *the United Kingdom*, *Eur. Court H.R., Series A, No. 161*, pp. 33–36, paras. 85–91 (1989). See also *Cruz Varas and Others* v. *Sweden*, *ibid.*, *No. 201*, p. 28, paras. 69–70 (1991); and *Vilvarajah and Others* v. *the United Kingdom, ibid.*, *No. 215*, p. 37, paras. 115–116 (1991).

[266] *Corfu Channel, Merits* (see footnote 35 above), p. 22.

the coercion would be,[267] an internationally wrongful act on the part of the coerced State. 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 be, 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 and control over or its coercion of the acting State. But there are important differences between the three cases. Under article 16, the State primarily responsible is the acting State and the assisting State has a mere supporting role. Similarly under article 17, the acting State commits the internationally wrongful act, albeit under the direction and control of another State. By contrast, in the case of coercion under article 18, the coercing State is the prime mover in respect of the conduct and the coerced State is merely its instrument.

(7) A feature of this chapter is that it specifies certain conduct as internationally wrongful. This may seem to blur the distinction maintained in the articles between the primary or substantive obligations of the State and its secondary obligations of responsibility.[268] It is justified on the basis that responsibility under chapter IV is in a sense derivative.[269] 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 obligations. 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.

(8) On the other hand, the situations covered in chapter IV have a special character. They are exceptions to the principle of independent responsibility and they only cover certain cases. In formulating these exceptional cases where one State is responsible for the internationally wrongful acts of another, it is necessary to bear in mind certain features of the international system. First, there is the possibility that the same conduct may be internationally wrongful so far as one State is concerned but not for another State having regard to its own international obligations. Rules of derived responsibility cannot be allowed to undermine the principle, stated in article 34 of the 1969 Vienna Convention, that a "treaty does not create either obligations or rights for a third State without its consent"; similar issues arise with respect to unilateral obligations and even, in certain cases, rules of general international law. Hence it is only in the extreme case of coercion that a State may become responsible under this chapter for conduct which would not have been internationally wrongful if performed by that State. Secondly, States engage in a wide variety of activities through a multiplicity of organs and agencies. For example, a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be internationally unlawful. Thus, it is necessary to establish a close connection between the action of the assisting, directing or coercing State on the one hand and that of the State committing the internationally wrongful act on the other. Thus, the articles in this chapter require that the former State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of the assisting, directing or coercing State. This is done without prejudice to the general question of "wrongful intent" in matters of State responsibility, on which the articles are neutral.[270]

(9) Similar considerations dictate the exclusion of certain situations of "derived responsibility" from chapter IV. One of these is incitement. The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State.[271] However, there can be specific treaty obligations prohibiting incitement under certain circumstances.[272] Another concerns the issue which is described in some systems of internal law as being an "accessory after the fact". It seems that there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred. Again it is a matter for specific treaty obligations to establish any such obligation of suppression after the event. There are, however, two important qualifications here. First, in some circumstances assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that act by the former State. In such cases responsibility for that act potentially arises pursuant to article 11. Secondly, special obligations of cooperation in putting an end to an unlawful situation arise in the case of serious breaches of obligations under peremptory norms of general international law. By definition, in such cases States will have agreed that no derogation from such obligations is to be permitted and, faced with a serious breach of such an obligation, certain obligations of cooperation arise. These are dealt with in article 41.

### *Article 16. Aid or assistance in the commission of an internationally wrongful act*

**A State which aids or assists another State in the commission of an internationally wrongful act by the latter 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.**

[267] If a State has been coerced, the wrongfulness of its act may be precluded by *force majeure*: see article 23 and commentary.

[268] See paras. (1)–(2) and (4) of the general commentary for an explanation of the distinction.

[269] Cf. the term *responsabilité dérivée* used by Arbitrator Huber in *British Claims in the Spanish Zone of Morocco* (footnote 44 above), p. 648.

[270] See above, the commentary to paragraphs (3) and (10) of article 2.

[271] See the statement of the United States-French Commissioners relating to the *French Indemnity of 1831* case in Moore, *History and Digest*, vol. V, p. 4447, at pp. 4473–4476. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 129, para. 255, and the dissenting opinion of Judge Schwebel, p. 389, para. 259.

[272] See, e.g., article III (*c*) of the Convention on the Prevention and Punishment of the Crime of Genocide; and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

*Commentary*

(1) Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term "by the latter" in the *chapeau* to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, 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.[273] Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as 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 16.

(3) Article 16 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.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase "knowledge of the circumstances of the internationally wrongful act". A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. 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.

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State *vis-à-vis* third States. This basic principle is also embodied in articles 34 and 35 of the 1969 Vienna Convention. Correspondingly, a State is free to act for itself in a way which is inconsistent with the obligations of another State *vis-à-vis* third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided *vis-à-vis* the injured State. Thus, it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 the Islamic Republic of Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.[274] The Government of the United Kingdom denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.[275] In 1998, a similar allegation surfaced that the Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq's representative to the United Nations.[276]

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic of Germany

[273] See, e.g., the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex); and article 3 (*f*) of the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

[274] *The New York Times*, 6 March 1984, p. A1.

[275] *Ibid*., 5 March 1984, p. A3.

[276] *Ibid*., 26 August 1998, p. A8.

in response to an allegation that Germany had participated in an armed attack by allowing United States military aircraft to use airfields in its territory in connection with the United States intervention in Lebanon. While denying that the measures taken by the United States and the United Kingdom in the Near East constituted intervention, the Federal Republic of Germany nevertheless seems to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act.[277] Another example arises from the Tripoli bombing incident in April 1986. The Libyan Arab Jamahiriya charged the United Kingdom with responsibility for the event, based on the fact that the United Kingdom had allowed several of its air bases to be used for the launching of United States fighter planes to attack Libyan targets.[278] The Libyan Arab Jamahiriya asserted that the United Kingdom "would be held partly responsible" for having "supported and contributed in a direct way" to the raid.[279] The United Kingdom denied responsibility on the basis that the raid by the United States was lawful as an act of self-defence against Libyan terrorist attacks on United States targets.[280] A proposed Security Council resolution concerning the attack was vetoed, but the General Assembly issued a resolution condemning the "military attack" as "a violation of the Charter of the United Nations and of international law", and calling upon all States "to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya".[281]

(9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the Security Council[282] or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.[283] Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.

[277] For the text of the note from the Federal Government, see *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 20 (August 1960), pp. 663–664.

[278] See United States of America, *Department of State Bulletin*, No. 2111 (June 1986), p. 8.

[279] See the statement of Ambassador Hamed Houdeiry, Libyan People's Bureau, Paris, *The Times*, 16 April 1986, p. 6.

[280] Statement of Mrs. Margaret Thatcher, Prime Minister, *House of Commons Debates*, 6th series, vol. 95, col. 737 (15 April 1986), reprinted in BYBIL, *1986*, vol. 57, pp. 637–638.

[281] General Assembly resolution 41/38 of 20 November 1986, paras. 1 and 3.

[282] See, e.g., Report by President Clinton, AJIL, vol. 91, No. 4 (October 1997), p. 709.

[283] Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII (A/37/745), p. 50.

(10) In accordance with article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State. In some cases this may be a distinction without a difference: where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State.[284] In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct.

(11) Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State. ICJ has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, "it would have to rule, as a prerequisite, on the lawfulness"[285] of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle.[286] That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter. This may present practical difficulties in some cases in establishing the responsibility of the aiding or assisting State, but it does not vitiate the purpose of article 16. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such. Moreover, that principle is not all-embracing, and the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case. In any event, wrongful assistance given to another State has frequently led to diplomatic protests. States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.

### *Article 17. Direction and control exercised over the commission of an internationally wrongful act*

**A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:**

**(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and**

[284] For the question of concurrent responsibility of several States for the same injury, see article 47 and commentary.

[285] *East Timor* (see footnote 54 above), p. 105, para. 35.

[286] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19, at p. 32; *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 261, para. 55.

**(*b*) the act would be internationally wrongful if committed by that State.**

*Commentary*

(1) Article 17 deals with a second case of derived responsibility, the exercise of direction and control by one State over the commission of an internationally wrongful act by another. Under article 16, a State providing aid or assistance with a view to the commission of an internationally wrongful act incurs international responsibility only to the extent of the aid or assistance given. By contrast, a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety.

(2) Some examples of international responsibility flowing from the exercise of direction and control over the commission of a wrongful act by another State are now largely of historical significance. International dependency relationships such as "suzerainty" or "protectorate" warranted treating the dominant State as internationally responsible for conduct formally attributable to the dependent State. For example, in *Rights of Nationals of the United States of America in Morocco*,[287] France commenced proceedings under the Optional Clause in respect of a dispute concerning the rights of United States nationals in Morocco under French protectorate. The United States objected that any eventual judgment might not be considered as binding upon Morocco, which was not a party to the proceedings. France confirmed that it was acting both in its own name and as the protecting power over Morocco, with the result that the Court's judgment would be binding both on France and on Morocco,[288] and the case proceeded on that basis.[289] The Court's judgment concerned questions of the responsibility of France in respect of the conduct of Morocco which were raised both by the application and by the United States counterclaim.

(3) With the developments in international relations since 1945, and in particular the process of decolonization, older dependency relationships have been terminated. Such links do not involve any legal right to direction or control on the part of the representing State. In cases of representation, the represented entity remains responsible for its own international obligations, even though diplomatic communications may be channelled through another State. The representing State in such cases does not, merely because it is the channel through which communications pass, assume any responsibility for their content. This is not in contradiction to the *British Claims in the Spanish Zone of Morocco* arbitration, which affirmed that "the responsibility of the protecting State … proceeds … from the fact that the protecting State alone represents the protected territory in its international relations",[290] and that the protecting State is answerable "in place of the protected State".[291] The principal concern in the arbitration was to ensure that, in the case of a protectorate which put an end to direct international relations by the protected State, international responsibility for wrongful acts committed by the protected State was not erased to the detriment of third States injured by the wrongful conduct. The acceptance by the protecting State of the obligation to answer in place of the protected State was viewed as an appropriate means of avoiding that danger.[292] The justification for such an acceptance was not based on the relationship of "representation" as such but on the fact that the protecting State was in virtually total control over the protected State. It was not merely acting as a channel of communication.

(4) Other relationships of dependency, such as dependent territories, fall entirely outside the scope of article 17, which is concerned only with the responsibility of one State for the conduct of another State. In most relationships of dependency between one territory and another, the dependent territory, even if it may possess some international personality, is not a State. 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 State: the normal principles specified in articles 4 to 9 of the draft articles apply, 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.[293]

(5) Nonetheless, instances exist or can be envisaged where one State exercises the power to direct and control the activities of another State, whether by treaty or as a result of a military occupation or for some other reason. For example, during the belligerent occupation of Italy by Germany in the Second World War, it was generally acknowledged that the Italian police in Rome operated under the control of the occupying Power. Thus, the protest by the Holy See in respect of wrongful acts committed by Italian police who forcibly entered the Basilica of St. Paul in Rome in February 1944 asserted the responsibility of the German authorities.[294] In such cases the occupying State is responsible for acts of the occupied State which it directs and controls.

(6) Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State. International tribunals have consistently refused to infer responsibility on the part of a dominant State merely because

[287] *Rights of Nationals of the United States of America in Morocco* (see footnote 108 above), p. 176.

[288] *Ibid., I.C.J. Pleadings*, vol. I, p. 235; and vol. II, pp. 431–433; the United States thereupon withdrew its preliminary objection: *ibid*., p. 434.

[289] See *Rights of Nationals of the United States of America in Morocco* (footnote 108 above), p. 179.

[290] *British Claims in the Spanish Zone of Morocco* (see footnote 44 above), p. 649.

[291] *Ibid*., p. 648.

[292] *Ibid*.

[293] See, e.g., *LaGrand, Provisional Measures* (footnote 91 above).

[294] See R. Ago, "L'occupazione bellica di Roma e il Trattato lateranense", *Comunicazioni e Studi* (Milan, Giuffrè, 1945), vol. II, pp. 167–168.

the latter may have the power to interfere in matters of administration internal to a dependent State, if that power is not exercised in the particular case. In the *Brown* case, for example, the arbitral tribunal 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".[295] It went on to deny that Great Britain possessed power to interfere in matters of internal administration and continued that there was no evidence "that Great Britain ever did undertake to interfere in this way".[296] Accordingly, the relation of suzerainty "did not operate to render Great Britain liable for the acts complained of".[297] In the *Heirs of 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. Its decision was not based on the absence of Allied power to requisition the property, or to stop Italy from doing so. 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".[298] The mere fact that a State may have power to exercise direction and control over another State in some field is not a sufficient basis for attributing to it any wrongful acts of the latter State in that field.[299]

(7) In the formulation of article 17, the term "controls" refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word "directs" does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind. Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility. The choice of the expression, common in English, "*direction and control*", raised some problems in other languages, owing in particular to the ambiguity of the term "*direction*" which may imply, as is the case in French, complete power, whereas it does not have this implication in English.

(8) Two further conditions attach to responsibility under article 17. First, the dominant State is only responsible if it has knowledge of the circumstances making the conduct of the dependent State wrongful. Secondly, it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling State itself. This condition is significant in the context of bilateral obligations, which are not opposable to the directing State. In cases of multilateral obligations and especially of obligations to the international community, it is of much less significance. The essential principle is that a State should not be able to do through another what it could not do itself.

(9) As to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse under chapter V of Part One. If the conduct in question would involve a breach of its international obligations, it is incumbent upon it to decline to comply with the direction. The defence of "superior orders" does not exist for States in international law. This is not to say that the wrongfulness of the directed and controlled State's conduct may not be precluded under chapter V, but this will only be so if it can show the existence of a circumstance precluding wrongfulness, e.g. *force majeure*. In such a case it is to the directing State alone that the injured State must look. But as between States, genuine cases of *force majeure* or coercion are exceptional. Conversely, it is no excuse for the directing State to show that the directed State was a willing or even enthusiastic participant in the internationally wrongful conduct, if in truth the conditions laid down in article 17 are met.

### *Article 18. Coercion of another State*

**A State which coerces another State to commit an act is internationally responsible for that act if:**

**(*a*) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and**

**(*b*) the coercing State does so with knowledge of the circumstances of the act.**

*Commentary*

(1) The third case of derived responsibility dealt with by chapter IV is that of coercion of one State by another. Article 18 is concerned with the specific problem of coercion deliberately exercised in order to procure the breach of one State's obligation to a third State. In such cases the responsibility of the coercing State with respect to the third State derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State. Responsibility for the coercion itself is that of the coercing State *vis-à-vis* the coerced State, whereas responsibility under article 18 is the responsibility of the coercing State *vis-à-vis* a victim of the coerced act, in particular a third State which is injured as a result.

(2) Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct: such questions are covered by the preceding articles. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the

[295] *Robert E. Brown (United States)* v. *Great Britain*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 120, at p. 130 (1923).

[296] *Ibid*., p. 131.

[297] *Ibid*.

[298] *Heirs of the Duc de Guise* (see footnote 115 above). See also, in another context, *Drozd and Janousek* v. *France and Spain* (footnote 135 above); see also *Iribarne Pérez* v. *France*, *Eur. Court H.R., Series A, No. 325–C*, pp. 62–63, paras. 29–31 (1995).

[299] 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 State apparatus does not exclude the possibility that control was exercised in fact by an occupying Power. Cf. *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)*, Kammergericht of Berlin, ILR, vol. 44, p. 301, at pp. 340–342 (1965).

coerced act merely make it more difficult for the coerced State to comply with the obligation.

(3) Though coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion.[300] As a practical matter, most cases of coercion meeting the requirements of the article 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. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in article 49, 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.[301] However, coercion could possibly take other forms, e.g. serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached.

(4) The equation of coercion with *force majeure* means that in most cases where article 18 is applicable, the responsibility of the coerced State will be precluded *vis-à-vis* the injured third State. This is reflected in the phrase "but for the coercion" in subparagraph (*a*) of article 18. Coercion amounting to *force majeure* may be the reason why the wrongfulness of an act is precluded *vis-à-vis* the coerced State. Therefore, the act is not described as an internationally wrongful act in the opening clause of the article, as is done in articles 16 and 17, where no comparable circumstance would preclude the wrongfulness of the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded *vis-à-vis* the coercing State. On the contrary, if the coercing State cannot be held responsible for the act in question, the injured State may have no redress at all.

(5) It is a further requirement for responsibility under article 18 that the coercing State must be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct. The reference to "circumstances" in subparagraph (*b*) is understood as reference to the factual situation rather than to the coercing State's judgement of the legality of the act. This point is clarified by the phrase "circumstances of the act". Hence, while ignorance of the law is no excuse, ignorance of the facts is material in determining the responsibility of the coercing State.

(6) A State which sets out to procure by coercion a breach of another State's obligations to a third State will be held responsible to the third State for the consequences, regardless of whether the coercing State is also bound by the obligation in question. Otherwise, the injured State would potentially be deprived of any redress, because the acting State may be able to rely on *force majeure* as a circumstance precluding wrongfulness. Article 18 thus differs from articles 16 and 17 in that it does not allow for an exemption from responsibility for the act of the coerced State in circumstances where the coercing State is not itself bound by the obligation in question.

(7) State practice lends support to the principle that a State bears responsibility for the internationally wrongful conduct of another State which it coerces. In the *Romano-Americana* case, the claim of the United States Government in respect of the destruction of certain oil storage and other facilities owned by a United States company on the orders of the Government of Romania during the First World War was originally addressed to the British Government. At the time the facilities were destroyed, Romania was at war with Germany, which was preparing to invade the country, and the United States claimed that the Romanian authorities had been "compelled" by Great Britain to take the measures in question. In support of its claim, the United States Government argued that the circumstances of the case revealed "a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, compelled a weaker Ally to acquiesce in an operation which it carried out on the territory of that Ally".[302] The British Government denied responsibility, asserting that its influence over the conduct of the Romanian authorities "did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause".[303] The point of disagreement between the Governments of the United States and of Great Britain was not as to the responsibility of a State for the conduct of another State which it has coerced, but rather the existence of "compulsion" in the particular circumstances of the case.[304]

### *Article 19. Effect of this chapter*

**This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.**

*Commentary*

(1) Article 19 serves three purposes. First, it preserves the responsibility of the State which has committed the internationally wrongful act, albeit with the aid or assistance, under the direction and control or subject to the coercion of another State. It recognizes that the attribution of international responsibility to an assisting, directing or coercing State does not preclude the responsibility of the assisted, directed or coerced State.

(2) Secondly, the article makes 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 under any rule of international law defining particular conduct as wrongful. The phrase "under

[300] P. Reuter, *Introduction to the Law of Treaties*, 2nd rev. ed. (London, Kegan Paul International, 1995), paras. 271–274.

[301] See article 49, para. 2, and commentary.

[302] Note from the United States Embassy in London, dated 16 February 1925, in Hackworth, *op. cit.* (footnote 142 above), p. 702.

[303] Note from the British Foreign Office dated 5 July 1928, *ibid.*, p. 704.

[304] For a different example involving the coercion of a breach of contract in circumstances amounting to a denial of justice, see C. L. Bouvé, "Russia's liability in tort for Persia's breach of contract", AJIL, vol. 6, No. 2 (April 1912), p. 389.

other provisions of these articles" is a reference, *inter alia*, to article 23 (*Force majeure*), which might affect the question of responsibility. The phrase also draws attention to the fact that other provisions of the draft articles may be relevant to the State committing the act in question, and that chapter IV in no way precludes the issue of its responsibility in that regard.

(3) Thirdly, article 19 preserves the responsibility "of any other State" to whom the internationally wrongful conduct might also be attributable under other provisions of the articles.

(4) Thus, article 19 is intended to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance, or from acts otherwise attributable to any State under chapter II. The article covers both the implicated and the acting State. It makes it clear that chapter IV is concerned only with situations in which the act which lies at the origin of the wrong is an act committed by one State and not by the other. If both States commit the act, then that situation would fall within the realm of co-perpetrators, dealt with in chapter II.

## CHAPTER V

## CIRCUMSTANCES PRECLUDING WRONGFULNESS

### *Commentary*

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

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

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

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

(3) This distinction emerges clearly from the decisions of international tribunals. In the *"Rainbow Warrior"* arbitration, the tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while it was in force, including the question whether the wrongfulness of the conduct in question was precluded.[308] In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

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

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

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory

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

[306] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 39, para. 48.

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

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

[309] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para. 101; see also page 38, para. 47.

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

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

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

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

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

### *Article 20. Consent*

**Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.**

*Commentary*

(1) Article 20 reflects the basic international law principle of consent in the particular context of Part One. In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.

(2) It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between consent in relation to a particular situation or a particular course of

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

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

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

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

[314] See article 73 of the Convention.

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

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

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

[318] See, e.g., *Factory at Chorzów, Jurisdiction* (footnote 34 above), p. 31; cf. *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 67, para. 110.

[319] See J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, vol. 10 (1964), p. 225; A. Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux", *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), pp. 392–394.

conduct, and consent in relation to the underlying obligation itself. In the case of a bilateral treaty, the States parties can at any time agree to terminate or suspend the treaty, in which case obligations arising from the treaty will be terminated or suspended accordingly.[320] But quite apart from that possibility, States have the right to dispense with the performance of an obligation owed to them individually, or generally to permit conduct to occur which (absent such permission) would be unlawful so far as they are concerned. In such cases, the primary obligation continues to govern the relations between the two States, but it is displaced on the particular occasion or for the purposes of the particular conduct by reason of the consent given.

(3) Consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. By contrast, cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility. This is dealt with in article 45.

(4) In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be "valid". Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor.[321] Indeed there may be a question whether the State could validly consent at all. The reference to a "valid consent" in article 20 highlights the need to consider these issues in certain cases.

(5) Whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State for the purposes of chapter II. For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central Government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State under article 4.[322] In other cases, the "legitimacy" of the Government which has given the consent has been questioned. Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State's internal law. These questions depend on the rules of international law relating to the expression of the will of the State, as well as rules of internal law to which, in certain cases, international law refers.

(6) Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority. But in any case, certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.

(7) Apart from drawing attention to prerequisites to a valid consent, including issues of the authority to consent, the requirement for consent to be valid serves a further function. It points to the existence of cases in which consent may not be validly given at all. This question is discussed in relation to article 26 (compliance with peremptory norms), which applies to chapter V as a whole.[323]

(8) Examples of consent given by a State which has the effect of rendering certain conduct lawful include commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operations and the arrest or detention of persons on foreign territory. In the *Savarkar* case, the arbitral tribunal considered that the arrest of Savarkar was not a violation of French sovereignty as France had implicitly consented to the arrest through the conduct of its gendarme, who aided the British authorities in the arrest.[324] In considering the application of article 20 to such cases it may be necessary to have regard to the relevant primary rule. For example, only the head of a diplomatic mission can consent to the receiving State's entering the premises of the mission.[325]

(9) Article 20 is concerned with the relations between the two States in question. In circumstances where the consent of a number of States is required, the consent of one State will not preclude wrongfulness in relation to another.[326] Furthermore, where consent is relied on to

[320] 1969 Vienna Convention, art. 54 (*b*).

[321] See, e.g., the issue of Austrian consent to the *Anschluss* of 1938, dealt with by the Nuremberg Tribunal. The tribunal denied that Austrian consent had been given; even if it had, it would have been coerced and did not excuse the annexation. See "International Military Tribunal (Nuremberg), judgment and sentences October 1, 1946: judgment", reprinted in AJIL, vol. 41, No. 1 (January 1947) p. 172, at pp. 192–194.

[322] This issue arose with respect to the dispatch of Belgian troops to the Republic of the Congo in 1960. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, particularly the statement of the representative of Belgium, paras. 186–188 and 209.

[323] See paragraph (6) of the commentary to article 26.

[324] UNRIAA, vol. XI (Sales No. 61.V.4), p. 243, at pp. 252–255 (1911).

[325] Vienna Convention on Diplomatic Relations, art. 22, para. 1.

[326] Austrian consent to the proposed customs union of 1931 would not have precluded its wrongfulness in regard of the obligation to respect Austrian independence owed by Germany to all the parties to the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles). Likewise, Germany's consent would not have precluded the wrongfulness of the customs union in respect of the obligation of the maintenance of its complete independence imposed on Austria by the Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye). See *Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41*, p. 37, at pp. 46 and 49.

preclude wrongfulness, it will be necessary to show that the conduct fell within the limits of the consent. Consent to overflight by commercial aircraft of another State would not preclude the wrongfulness of overflight by aircraft transporting troops and military equipment. Consent to the stationing of foreign troops for a specific period would not preclude the wrongfulness of the stationing of such troops beyond that period.[327] These limitations are indicated by the words "given act" in article 20 as well as by the phrase "within the limits of that consent".

(10) Article 20 envisages only the consent of States to conduct otherwise in breach of an international obligation. International law may also take into account the consent of non-State entities such as 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 Convention on the Settlement of Investment Disputes between States and Nationals of other States (art. 27, para. 1), consent by an investor to arbitration under the Convention has the effect of suspending the right of diplomatic protection by the investor's national State. The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual's free consent may be relevant to their application.[328] In these cases the particular rule of international law itself allows for the consent in question and deals with its effect. By contrast, article 20 states a general principle so far as enjoyment of the rights and performance of the obligations of States are concerned.

### *Article 21. Self-defence*

**The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.**

*Commentary*

(1) The existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed. Article 51 of the Charter of the United Nations preserves a State's "inherent right" of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph 4. Thus, 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.[329]

(2) Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems 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.[330] In the Charter period, 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.[331] 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".

(3) This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions for the protection of war victims of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law.[332] Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.

(4) ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapon*s provided some guidance on this question. One issue before the Court was whether a use of nuclear weapons would necessarily be a breach of environmental obligations because of the massive and long-term damage such weapons can cause. 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.
>
> 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

[327] The non-observance of a condition placed on the consent will not necessarily take conduct outside of the limits of the consent. For example, consent to a visiting force on the territory of a State may be subject to a requirement to pay rent for the use of facilities. While the non-payment of the rent would no doubt be a wrongful act, it would not transform the visiting force into an army of occupation.

[328] See, e.g., International Covenant on Civil and Political Rights, arts. 7; 8, para. 3; 14, para. 3 (*g*); and 23, para. 3.

[329] Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), p. 244, para. 38, and p. 263, para. 96, emphasizing the lawfulness of the use of force in self-defence.

[330] See further Lord McNair and A. D. Watts, *The Legal Effects of War*, 4th ed. (Cambridge University Press, 1966).

[331] In *Oil Platforms, Preliminary Objection* (see footnote 208 above), it was not denied that the 1955 Treaty of Amity, Economic Relations and Consular Rights remained in force, despite many actions by United States naval forces against the Islamic Republic of Iran. In that case both parties agreed that to the extent that any such actions were justified by self-defence they would be lawful.

[332] As the Court said of the rules of international humanitarian law in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 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.

is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.[333]

A State acting in self-defence is "totally restrained" by an international obligation if that obligation is expressed or intended to apply as a definitive constraint even to States in armed conflict.[334]

(5) The essential effect of article 21 is to preclude the wrongfulness of conduct of a State acting in self-defence *vis-à-vis* an attacking State. But there may be effects *vis-à-vis* third States in certain circumstances. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court 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.[335]

The law of neutrality distinguishes between conduct as against a belligerent and conduct as against a neutral. But neutral States are not unaffected by the existence of a state of war. Article 21 leaves open all issues of the effect of action in self-defence *vis-à-vis* third States.

(6) Thus, article 21 reflects the generally accepted position that self-defence precludes the wrongfulness of the conduct taken within the limits laid down by international law. The reference is to action "taken in conformity with the Charter of the United Nations". In addition, the term "lawful" implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.

### *Article 22. Countermeasures in respect of an internationally wrongful act*

**The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.**

*Commentary*

(1) In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury. Article 22 deals with this situation from the perspective of circumstances precluding wrongfulness. Chapter II of Part Three regulates countermeasures in further detail.

(2) Judicial decisions, State practice and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. In the *Gabčíkovo-Nagymaros Project* case, ICJ clearly accepted that countermeasures might justify otherwise unlawful conduct "taken in response to a previous international wrongful act of another State and … directed against that State",[336] provided certain conditions are met. Similar recognition of the legitimacy of measures of this kind in certain cases can be found in arbitral decisions, in particular the *"Naulilaa"*,[337] *"Cysne"*,[338] and *Air Service Agreement*[339] awards.

(3) In the literature concerning countermeasures, reference is sometimes made to the application of a "sanction", or to a "reaction" to a prior internationally wrongful act; historically the more usual terminology was that of "legitimate reprisals" or, more generally, measures of "self-protection" or "self-help". The term "sanctions" has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the Charter of the United Nations—despite the fact that the Charter uses the term "measures", not "sanctions". The term "reprisals" is now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force. At least since the *Air Service Agreement* arbitration,[340] the term "countermeasures" has been preferred, and it has been adopted for the purposes of the present articles.

(4) Where countermeasures are taken in accordance with article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied. These conditions are set out in Part Three, chapter II, to which article 22 refers. As a response to internationally wrongful conduct of another State, countermeasures may be justified only in relation to that State. This is emphasized by the phrases "if and to the extent" and "countermeasures taken against" the responsible State. An act directed against a third State would not fit this definition and could not be justified as a countermeasure. On the other hand, indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside the scope of article 22.

(5) Countermeasures may only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act.

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[333] *Ibid.*, p. 242, para. 30.

[334] See, e.g., the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques.

[335] *I.C.J. Reports 1996* (see footnote 54 above), p. 261, para. 89.

[336] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83.

[337] *Portuguese Colonies* case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1011, at pp. 1025–1026 (1928).

[338] *Ibid.*, p. 1035, at p. 1052 (1930).

[339] *Air Service Agreement* (see footnote 28 above).

[340] *Ibid.*, especially pp. 443–446, paras. 80–98.

The principle is clearly expressed in the *"Cysne"* case, where the tribunal stressed that:

> reprisals, which constitute an act in principle contrary to the law of nations, are defensible only insofar as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible.* Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible.[341]

Accordingly, the wrongfulness of Germany's conduct *vis-à-vis* Portugal was not precluded. Since it involved the use of armed force, this decision concerned belligerent reprisals rather than countermeasures in the sense of article 22. But the same principle applies to countermeasures, as the Court confirmed in the *Gabčíkovo-Nagymaros Project* case when it stressed that the measure in question must be "directed against" the responsible State.[342]

(6) If article 22 had stood alone, it would have been necessary to spell out other conditions for the legitimacy of countermeasures, including in particular the requirement of proportionality, the temporary or reversible character of countermeasures and the status of certain fundamental obligations which may not be subject to countermeasures. Since these conditions are dealt with in Part Three, chapter II, it is sufficient to make a cross reference to them here. Article 22 covers any action which qualifies as a countermeasure in accordance with those conditions. One issue is whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed the obligation which has been breached.[343] For example, in the case of an obligation owed to the international community as a whole ICJ has affirmed that all States have a legal interest in compliance.[344] Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.

### *Article 23.* 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*, that is the occurrence of an irresistible force or of an unforeseen 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 situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or**

**(*b*) the State has assumed the risk of that situation occurring.**

*Commentary*

(1) *Force majeure* is quite often invoked as a ground for precluding the wrongfulness of an act of a State.[345] It involves a situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it. *Force majeure* differs from a situation of distress (art. 24) or necessity (art. 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.

(2) A situation of *force majeure* precluding wrongfulness only arises where three elements are met: (*a*) the act in question must be brought about by an irresistible force or an unforeseen event; (*b*) which is beyond the control of the State concerned; and (*c*) which makes it materially impossible in the circumstances to perform the obligation. The adjective "irresistible" qualifying the word "force" emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been "unforeseen" the event must have been neither foreseen nor of an easily foreseeable kind. Further the "irresistible force" or "unforeseen event" must be causally linked to the situation of material impossibility, as indicated by the words "due to *force majeure* … making it materially impossible". Subject to paragraph 2, where these elements are met, the wrongfulness of the State's conduct is precluded for so long as the situation of *force majeure* subsists.

(3) Material impossibility of performance giving rise to *force majeure* may be due to a natural or physical event (e.g. stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (e.g. loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two. Certain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the various requirements of article 23. In particular, the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects. *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis. Nor does it cover situations brought about by the neglect or

[341] *"Cysne"* (see footnote 338 above), pp. 1056–1057.

[342] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83.

[343] For the distinction between injured States and other States entitled to invoke State responsibility, see articles 42 and 48 and commentaries.

[344] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[345] "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine", study prepared by the Secretariat (*Yearbook … 1978*, vol. II (Part One), p. 61, document A/CN.4/315).

default of the State concerned,[346] even if the resulting injury itself was accidental and unintended.[347]

(4) In drafting what became article 61 of the 1969 Vienna Convention, ILC took the view that *force majeure* was a circumstance precluding wrongfulness in relation to treaty performance, just as supervening impossibility of performance was a ground for termination of a treaty.[348] The same view was taken at the United Nations Conference on the Law of Treaties.[349] But in the interests of the stability of treaties, the Conference insisted on a narrow formulation of article 61 so far as treaty termination is concerned. The degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 for termination of a treaty 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.[350]

(5) In practice, many of the cases where "impossibility" has been relied upon have not involved actual impossibility as distinct from increased difficulty of performance and the plea of *force majeure* has accordingly failed. But cases of material impossibility have occurred, e.g. where a State aircraft is forced, due to damage or loss of control of the aircraft owing to weather, into the airspace of another State without the latter's authorization. In such cases the principle that wrongfulness is precluded has been accepted.[351]

(6) Apart from aerial incidents, the principle in article 23 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 (the United Nations Convention on the Law of the Sea, art. 18, para. 2), as well as in article 7, paragraph 1, of the Convention on Transit Trade of Land-locked States. In these provisions, *force majeure* is incorporated as a constituent element of the relevant primary rule; nonetheless, its acceptance in these cases helps to confirm the existence of a general principle of international law to similar effect.

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited the unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.[352] In the *Lighthouses* arbitration, 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 arbitral tribunal denied the French claim for restoration of the lighthouse on grounds of *force majeur*e.[353] In the *Russian Indemnity* case, the principle was accepted but the plea of *force majeure* failed because the payment of the debt was not materially impossible.[354] *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.[355] More recently, 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

[346] For example, in relation to occurrences such as the bombing of La Chaux-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airman on 26 April 1917, ascribed to negligence on the part of the airmen, the belligerent undertook to punish the offenders and make reparation for the damage suffered (study prepared by the Secretariat, *ibid*., paras. 255–256).

[347] For example, in 1906 an American officer on the USS *Chattanooga* was mortally wounded by a bullet from a French warship as his ship entered the Chinese harbour of Chefoo. The United States Government obtained reparation, having maintained that:

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

M. M. Whiteman, *Damages in International Law* (Washington, D.C., United States Government Printing Office, 1937), vol. I, p. 221. See also the study prepared by the Secretariat (footnote 345 above), para. 130.

[348] *Yearbook … 1966*, vol. II, p. 255.

[349] See, e.g., the proposal of the representative of Mexico, *United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, p. 182, para. 531 (*a*).

[350] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para. 102.

[351] See, e.g., the cases of accidental intrusion into airspace attributable to weather, and the cases of accidental bombing of neutral territory attributable to navigational errors during the First World War discussed in the study prepared by the Secretariat (footnote 345 above), paras. 250–256. See also the exchanges of correspondence between the States concerned in the incidents involving United States military aircraft entering the airspace of Yugoslavia in 1946, United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XV, No. 376 (15 September 1946), p. 502, reproduced in the study prepared by the Secretariat, para. 144, and the incident provoking the application to ICJ in 1954, *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of the United States of America*, p. 14 (note to the Hungarian Government of 17 March 1953). It is not always clear whether these cases are based on distress or *force majeure*.

[352] See, e.g., the decision of the American-British Claims Commission in the *Saint Albans Raid* case, Moore, *History and Digest*, vol. IV, p. 4042 (1873), and the study prepared by the Secretariat (footnote 345 above), para. 339; the decisions of the United States-Venezuela Claims Commission in the *Wipperman* case, Moore, *History and Digest*, vol. III, p. 3039, and the study prepared by the Secretariat, paras. 349–350; *De Brissot and others* case (footnote 117 above), and the study prepared by the Secretariat, para. 352; and the decision of the British-Mexican Claims Commission in the *Gill* case, UNRIAA, vol. V (Sales No. 1952.V.3), p. 157 (1931), and the study prepared by the Secretariat, para. 463.

[353] *Lighthouses* arbitration (see footnote 182 above), pp. 219–220.

[354] UNRIAA, vol. XI (Sales No. 61.V.4), p. 421, at p. 443 (1912).

[355] *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, pp. 39–40; *Brazilian Loans, Judgment No. 15, ibid., No. 21*, p. 120.

absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.[356]

(8) 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 commercial arbitration, and may qualify as a general principle of law.[357]

(9) A State may not invoke *force majeure* if it has caused or induced the situation in question. In *Libyan Arab Foreign Investment Company and The Republic of Burundi*, the arbitral tribunal rejected a plea of *force majeure* because "the alleged impossibility [was] 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 ..."[358] Under the equivalent 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". By analogy with this provision, *paragraph 2* (a) excludes the plea in circumstances where *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it. For paragraph 2 (*a*) to apply it is not enough that the State invoking *force majeure* has contributed to the situation of material impossibility; the situation of *force majeure* must be "due" to the conduct of the State invoking it. This allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen. Paragraph 2 (*a*) requires that the State's role in the occurrence of *force majeure* must be substantial.

(10) *Paragraph 2* (b) deals with situations in which the State has already accepted the risk of the occurrence of *force majeure*, whether it has done so in terms of the obligation itself or by its conduct or by virtue of some unilateral act. This reflects the principle that *force majeure* should not excuse performance if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk.[359] Once a State accepts the responsibility for a particular risk it cannot then claim *force majeure* to avoid responsibility. But the assumption of risk must be unequivocal and directed towards those to whom the obligation is owed.

### *Article 24. 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 has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.**

**2. Paragraph 1 does not apply if:**

**(*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or**

**(*b*) the act in question is likely to create a comparable or greater peril.**

*Commentary*

(1) Article 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. The article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life. Unlike situations of *force majeure* dealt with in article 23, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril.[360] Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterize situations of necessity under article 25. The interest concerned is the immediate one of saving people's lives, irrespective of their nationality.

(2) In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.[361] An example is the entry of United States military aircraft into Yugoslavia's airspace in 1946. On two occasions, United States military aircraft entered Yugoslav airspace without authorization and were attacked by Yugoslav air defences. The United States Government protested the Yugoslav action on the basis that the aircraft had entered Yugoslav airspace solely in order to escape extreme danger. The Yugoslav Government responded by denouncing the systematic violation of its airspace, which it claimed could only be intentional in view of its frequency. A later note from the Yugoslav chargé d'affaires informed the United States Department of State that Marshal Tito had

[356] *"Rainbow Warrior"* (see footnote 46 above), p. 253.

[357] On *force majeure* in the case law of the Iran-United States Claims Tribunal, see G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 306–320. *Force majeure* has also been recognized as a general principle of law by the European Court of Justice: see, e.g., case 145/85, *Denkavit* v. *Belgium*, *Eur. Court H.R., Reports* 1987–2, p. 565; case 101/84, *Commission of the European Communities* v. *Italian Republic*, *ibid*., *Reports* 1985–6, p. 2629. See also article 79 of the United Nations Convention on Contracts for the International Sale of Goods; P. Schlechtriem, ed., *Commentary on the UN Convention on the International Sale of Goods*, 2nd ed. (trans. G. Thomas) (Oxford, Clarendon Press, 1998), pp. 600–626; and article 7.1.7 of the UNIDROIT Principles, *Principles of International Commercial Contracts* (Rome, Unidroit, 1994), pp. 169–171.

[358] ILR, vol. 96 (1994), p. 318, para. 55.

[359] As the study prepared by the Secretariat (footnote 345 above), para. 31, points out, 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.

[360] For this reason, writers who have considered this situation have often defined it as one of "relative impossibility" of complying with the international obligation. See, e.g., O. J. Lissitzyn, "The treatment of aerial intruders in recent practice and international law", AJIL, vol. 47, No. 4 (October 1953), p. 588.

[361] See the study prepared by the Secretariat (footnote 345 above), paras. 141–142 and 252.

forbidden any firing on aircraft which flew over Yugoslav territory without authorization, presuming that, for its part, the United States Government "would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities".[362] The reply of the United States Acting Secretary of State reiterated the assertion that no United States planes had flown over Yugoslavia intentionally without prior authorization from Yugoslav authorities "unless forced to do so in an emergency". However, the Acting Secretary of State added:

> I presume that the Government of Yugoslavia recognizes that *in case a plane and its occupants are jeopardized, the aircraft may change its course so as to seek safety, even though such action may result in flying over Yugoslav territory without prior clearance*.[363]

(3) Claims of distress have also been made in cases of violation of maritime boundaries. For example, in December 1975, after British naval vessels entered Icelandic territorial waters, the British Government claimed that the vessels in question had done so in search of "shelter from severe weather, as they have the right to do under customary international law".[364] Iceland maintained that British vessels were in its waters for the sole purpose of provoking an incident, but did not contest the point that if the British vessels had been in a situation of distress, they could enter Icelandic territorial waters.

(4) Although historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases.[365] The *"Rainbow Warrior"* arbitration involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft. 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".[366] 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.[367]

In fact, the danger to one of the officers, 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, 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 (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations.[368]

(5) The plea of distress is also accepted in many treaties as a circumstance justifying conduct which would otherwise be wrongful. Article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone permits stopping and anchoring by ships during their passage through foreign territorial seas insofar as this conduct is rendered necessary by distress. This provision is repeated in much the same terms in article 18, paragraph 2, of the United Nations Convention on the Law of the Sea.[369] Similar provisions appear in the international conventions on the prevention of pollution at sea.[370]

(6) Article 24 is limited to cases where human life is at stake. The tribunal in the *"Rainbow Warrior"* arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice. The problem with extending article 24 to less than life-threatening situations 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 a wide range of possibilities. 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

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[362] United States of America, *Department of State Bulletin* (see footnote 351 above), reproduced in the study prepared by the Secretariat (see footnote 345 above), para. 144.

[363] Study prepared by the Secretariat (see footnote 345 above), para. 145. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to ICJ in relation to another aerial incident (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 358–359).

[364] *Official Records of the Security Council, Thirtieth Year*, 1866th meeting, 16 December 1975, para. 24; see the study prepared by the Secretariat (footnote 345 above), para. 136.

[365] There have also been cases involving the violation of a land frontier in order to save the life of a person in danger. See, e.g., the case of violation of the Austrian border by Italian soldiers in 1862, study prepared by the Secretariat (footnote 345 above), para. 121.

[366] *"Rainbow Warrior"* (see footnote 46 above), pp. 254–255, para. 78.

[367] *Ibid*., p. 255, para. 79.

[368] *Ibid*., p. 263, para. 99.

[369] See also articles 39, paragraph 1 (*c*), 98 and 109, of the Convention.

[370] See, e.g., the International Convention for the Prevention of Pollution of the Sea by Oil, article IV, paragraph 1 (*a*) of which provides that the prohibition on the discharge of oil into the sea does not apply if the discharge takes place "for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea". See also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, article V, paragraph 1 of which provides that the prohibition on dumping of wastes does not apply when it is "necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea … in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat". See also the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (art. 8, para. 1); and the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention), annex I, regulation 11 (*a*).

not seem necessary to extend the scope of distress beyond threats to life itself. In situations in which a State agent is in distress and has to act to save lives, there should however be a certain degree of flexibility in the assessment of the conditions of distress. The "no other reasonable way" criterion in article 24 seeks to strike a balance between the desire to provide some flexibility regarding the choices of action by the agent in saving lives and the need to confine the scope of the plea having regard to its exceptional character.

(7) Distress may only be invoked as a circumstance precluding wrongfulness in cases where a State agent has acted to save his or her own life or where there exists a special relationship between the State organ or agent and the persons in danger. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.

(8) Article 24 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 the cargo.[371]

(9) As in the case of *force majeure*, a situation which has been caused or induced by the invoking State is not one of distress. In many cases the State invoking distress may well have contributed, even if indirectly, to the situation. Priority should be given to necessary life-saving measures, however, and under *paragraph 2* (a), distress is only excluded if the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it. This is the same formula as that adopted in respect of article 23, paragraph 2 (*a*).[372]

(10) Distress can only preclude wrongfulness where the interests sought to be protected (e.g. the lives of passengers or crew) clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress. For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious breakdown might cause radioactive contamination to a port in which it sought refuge. *Paragraph 2* (b) stipulates that distress does not apply if the act in question is likely to create a comparable or greater peril. This is consistent with paragraph 1, which in asking whether the agent had "no other reasonable way" to save life establishes an objective test. The words "comparable or greater peril" must be assessed in the context of the overall purpose of saving lives.

[371] See *Cashin and Lewis* v. *The King, Canada Law Reports* (1935), p. 103 (even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). See also the *"Rebecca"*, Mexico-United States General Claims Commission, AJIL, vol. 23, No. 4 (October 1929), p. 860 (vessel 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 *"May"* v. *The King, Canada Law Reports* (1931), p. 374; the *"Queen City"* v. *The King, ibid*., p. 387; and *Rex* v. *Flahaut*, *Dominion Law Reports* (1935), p. 685 (test of "real and irresistible distress" applied).

[372] See paragraph (9) of the commentary to article 23.

### *Article 25. 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 the act:**

**(*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and**

**(*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.**

**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 excludes the possibility of invoking necessity; or**

**(*b*) the State has contributed to the situation of necessity.**

*Commentary*

(1) The term "necessity" (*état de nécessité*) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.

(2) The plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.[373]

(3) There is substantial authority in support of the existence of necessity as a circumstance precluding wrongful-

[373] Perhaps the classic case of such an abuse was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of necessity. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs, in J. B. Scott, ed., *Diplomatic Documents relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), part I, pp. 749–750, and the speech in the Reichstag by the German Chancellor von Bethmann-Hollweg, on 4 August 1914, containing the well-known words: *wir sind jetzt in der Notwehr; und Not kennt kein Gebot!* (we are in a state of self-defence and necessity knows no law), *Jahrbuch des Völkerrechts*, vol. III (1916), p. 728.

ness. It has been invoked by States and has been dealt with by a number of international tribunals. In these cases the plea of necessity has been accepted in principle, or at least not rejected.

(4) In an Anglo-Portuguese dispute of 1832, the Portuguese Government argued that the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances had justified its appropriation of property owned by British subjects, notwithstanding a treaty stipulation. The British Government was advised that:

> the Treaties between this Country and Portugal are [not] of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.
>
> The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.[374]

(5) The *"Caroline"* incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has at present. In that case, British armed forces entered United States territory and attacked and destroyed a vessel owned by United States citizens which was carrying recruits and military and other material to Canadian insurgents. In response to the protests by the United States, the British Minister in Washington, Fox, referred to the "necessity of self-defence and self-preservation"; the same point was made by counsel consulted by the British Government, who stated that "the conduct of the British Authorities" was justified because it was "absolutely necessary as a measure of precaution".[375] Secretary of State Webster replied to Minister Fox that "nothing less than a clear and absolute necessity can afford ground of justification" for the commission "of hostile acts within the territory of a Power at Peace", and observed that the British Government must prove that the action of its forces had really been caused by "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[376] In his message to Congress of 7 December 1841, President Tyler reiterated that:

> This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government."[377]

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed that "a strong overpowering necessity may arise when this great principle may and must be suspended". "It must be so", added Lord Ashburton, the British Government's *ad hoc* envoy to Washington, "for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity".[378]

(6) In the *Russian Fur Seals* controversy of 1893, the "essential interest" to be safeguarded against a "grave and imminent peril" was the natural environment in an area not subject to the jurisdiction of any State or to any international regulation. Facing the danger of extermination of a fur seal population by unrestricted hunting, the Russian Government issued a decree prohibiting sealing in an area of the high seas. In a letter to the British Ambassador dated 12 February (24 February) 1893, the Russian Minister for Foreign Affairs explained that the action had been taken because of the "absolute necessity of immediate provisional measures" in view of the imminence of the hunting season. He "emphasize[d] the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances"[379] and declared his willingness to conclude an agreement with the British Government with a view to a longer-term settlement of the question of sealing in the area.

(7) In the *Russian Indemnity* case, the Government of the Ottoman Empire, to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which it described as *"force majeure"* but which was more like a state of necessity. The arbitral tribunal accepted the plea in principle:

> *The exception of force majeure*, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits ... that the obligation for a State to execute treaties may be weakened "if the very existence of the State is endangered, if observation of the international duty is ... *self-destructive*".[380]

It considered, however, that:

> It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation.[381]

In its view, compliance with an international obligation must be "self-destructive" for the wrongfulness of the conduct not in conformity with the obligation to be precluded.[382]

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[374] Lord McNair, ed., *International Law Opinions* (Cambridge University Press, 1956), vol. II, Peace, p. 232.

[375] See respectively W. R. Manning, ed., *Diplomatic Correspondence of the United States: Canadian Relations 1784–1860* (Washington, D.C., Carnegie Endowment for International Peace, 1943), vol. III, p. 422; and Lord McNair, ed., *International Law Opinions* (footnote 374 above), p. 221, at p. 228.

[376] *British and Foreign State Papers, 1840–1841* (London, Ridgway, 1857), vol. 29, p. 1129.

[377] *Ibid.*, 1841–1842, vol. 30, p. 194.

[378] *Ibid.*, p. 195. See Secretary of State Webster's reply on page 201.

[379] *Ibid.*, *1893–1894* (London, HM Stationery Office, 1899), vol. 86, p. 220; and the study prepared by the Secretariat (see footnote 345 above), para. 155.

[380] See footnote 354 above; see also the study prepared by the Secretariat (footnote 345 above), para. 394.

[381] *Ibid.*

[382] A case in which the parties to the dispute agreed that very serious financial difficulties could justify a different mode of discharging the obligation other than that originally provided for arose in connection with the enforcement of the arbitral award in *Forests of Central Rhodopia*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405 (1933); see League of Nations, *Official Journal*, 15th Year, No. 11 (part I) (November 1934), p. 1432.

(8) In *Société commerciale de Belgique*,[383] the Greek Government owed money to a Belgian company under two arbitral awards. Belgium applied to PCIJ for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its international obligations. The Greek Government pleaded the country's serious budgetary and monetary situation.[384] The Court noted that it was not within its mandate to declare whether the Greek Government was justified in not executing the arbitral awards. However, the Court implicitly accepted the basic principle, on which the two parties were in agreement.[385]

(9) In March 1967 the Liberian oil tanker *Torrey Canyon* went aground on submerged rocks off the coast of Cornwall outside British territorial waters, spilling large amounts of oil which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully. The British Government did not advance any legal justification for its conduct, but stressed the existence of a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed.[386] No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution.[387]

(10) In the *"Rainbow Warrior"* arbitration, the arbitral tribunal expressed doubt as to the existence of the excuse of necessity. It noted that the Commission's draft article "allegedly authorizes a State to take unlawful action invoking a state of necessity" and described the Commission's proposal as "controversial".[388]

(11) By contrast, in the *Gabčíkovo-Nagymaros Project* case, ICJ carefully considered an argument based on the Commission's draft article (now article 25), expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the principle itself, the Court noted that the parties had both relied on the Commission's draft article as an appropriate formulation, and continued:

> The Court considers ... 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 ...
>
> 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 ... 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. [389]

(12) The plea of necessity was apparently an issue in the *Fisheries Jurisdiction* case.[390] Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization (NAFO) but had, in Canada's opinion, proved ineffective for various reasons. By the Coastal Fisheries Protection Act 1994, Canada declared that the straddling stocks of the Grand Banks 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". 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 Spanish Government 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".[391] 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".[392] The Court held that it had no jurisdiction over the case.[393]

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[383] *Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 160.

[384] *P.C.I.J., Series C, No. 87*, pp. 141 and 190; study prepared by the Secretariat (footnote 345 above), para. 278. See generally paragraphs 276–287 for the Greek arguments relative to the state of necessity.

[385] See footnote 383 above; and the study prepared by the Secretariat (footnote 345 above), para. 288. See also the *Serbian Loans* case, where the positions of the parties and the Court on the point were very similar (footnote 355 above); the *French Company of Venezuelan Railroads* case (footnote 178 above) p. 353; and the study prepared by the Secretariat (footnote 345 above), paras. 263–268 and 385–386. In his separate opinion in the *Oscar Chinn* case, Judge Anzilotti accepted the principle that "necessity may excuse the non-observance of international obligations", but denied its applicability on the facts (*Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65, at pp. 112–114).

[386] *The "Torrey Canyon"*, Cmnd. 3246 (London, HM Stationery Office, 1967).

[387] International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

[388] *"Rainbow Warrior"* (see footnote 46 above), p. 254. In *Libyan Arab Foreign Investment Company and The Republic of Burundi* (see footnote 358 above), p. 319, 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".

[389] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 40–41, paras. 51–52.

[390] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432.

[391] *Ibid*., p. 443, para. 20. For the European Community protest of 10 March 1995, asserting that the arrest "cannot be justified by any means", see Memorial of Spain (Jurisdiction of the Court), *I.C.J. Pleadings, Fisheries Jurisdiction (Spain* v. *Canada)*, p. 17, at p. 38, para. 15.

[392] *Fisheries Jurisdiction* (see footnote 390 above), p. 443, para. 20. See also the Canadian Counter-Memorial (29 February 1996), *I.C.J. Pleadings* (footnote 391 above), paras. 17–45.

[393] By an Agreed Minute between Canada and the European Community, Canada undertook to repeal the regulations applying the 1994 Act to Spanish and Portuguese vessels in the NAFO area and to 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 Con-

(13) The existence and limits of a plea of necessity have given rise to a long-standing controversy among writers. It was for the most part explicitly accepted by the early writers, subject to strict conditions.[394] In the nineteenth century, abuses of necessity associated with the idea of "fundamental rights of States" led to a reaction against the doctrine. During the twentieth century, the number of writers opposed to the concept of state of necessity in international law increased, but the balance of doctrine has continued to favour the existence of the plea.[395]

(14) On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25. The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin.[396] It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population. But stringent conditions are imposed before any such plea is allowed. This is reflected in article 25. In particular, to emphasize the exceptional nature of necessity and concerns about its possible abuse, article 25 is cast in negative language ("Necessity may not be invoked … unless").[397] In this respect it mirrors the language of article 62 of the 1969 Vienna Convention dealing with fundamental change of circumstances. It also mirrors that language in establishing, in paragraph 1, two conditions without which necessity may not be invoked and excluding, in paragraph 2, two situations entirely from the scope of the excuse of necessity.[398]

servation and Management of Fish Stocks (Brussels, 20 April 1995), ILM, vol. 34, No. 5 (September 1995), p. 1260. 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.

[394] See B. Ayala, *De jure et officiis bellicis et disciplina militari, libri tres* (1582) (Washington, D.C., Carnegie Institution, 1912), vol. II, p. 135; A. Gentili, *De iure belli, libri tres* (1612) (Oxford, Clarendon Press, 1933), vol. II, p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646) (Oxford, Clarendon Press, 1925), vol. II, pp. 193 et seq.; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688) (Oxford, Clarendon Press, 1934), vol. II, pp. 295–296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764) (Oxford, Clarendon Press, 1934), pp. 173–174; and E. de Vattel, *The Law of Nations or the Principles of Natural Law* (1758) (Washington, D.C., Carnegie Institution, 1916), vol. III, p. 149.

[395] For a review of the earlier doctrine, see *Yearbook … 1980*, vol. II (Part Two), pp. 47–49; see also P. A. Pillitu, *Lo stato di necessità nel diritto internazionale* (University of Perugia/Editrice Licosa, 1981); J. Barboza, "Necessity (revisited) in international law", *Essays in International Law in Honour of Judge Manfred Lachs*, J. Makarczyk, ed. (The Hague, Martinus Nijhoff, 1984), p. 27; and R. Boed, "State of necessity as a justification for internationally wrongful conduct", *Yale Human Rights and Development Law Journal*, vol. 3 (2000), p. 1.

[396] Generally on the irrelevance of the source of the obligation breached, see article 12 and commentary.

[397] This negative formulation was referred to by ICJ in the *Gabčíkovo-Nagymaros Project* case (see footnote 27 above), p. 40, para. 51.

[398] A further exclusion, common to all the circumstances precluding wrongfulness, concerns peremptory norms (see article 26 and commentary).

(15) The first condition, set out in *paragraph 1* (a), is that necessity may only be invoked to safeguard an essential interest from a grave and imminent peril. The extent to which a given interest is "essential" depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole. Whatever the interest may be, however, it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave, the peril has to be imminent in the sense of proximate. However, as the Court in the *Gabčíkovo-Nagymaros Project* case said:

> That does not exclude ... 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.[399]

Moreover, the course of action taken must be the "only way" available to safeguard that interest. The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient. Thus, in the *Gabčíkovo-Nagymaros Project* case, the Court was not convinced that the unilateral suspension and abandonment of the Project was the only course open in the circumstances, having regard in particular to the amount of work already done and the money expended on it, and the possibility of remedying any problems by other means.[400] The word "way" in paragraph 1 (*a*) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations (for example, conservation measures for a fishery taken through the competent regional fisheries agency). Moreover, the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered.

(16) It is not sufficient for the purposes of paragraph 1 (*a*) that the peril is merely apprehended or contingent. It is true that in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be issues of scientific uncertainty and different views may be taken by informed 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. By definition, in cases of necessity the peril will not yet have occurred. In the *Gabčíkovo-Nagymaros Project* case the Court noted that the invoking State could not be the sole judge of the necessity,[401] but a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.

(17) The second condition for invoking necessity, set out in *paragraph 1* (b), is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as

[399] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 42, para. 54.

[400] *Ibid*., pp. 42–43, para. 55.

[401] *Ibid*., p. 40, para. 51.

a whole (see paragraph (18) below). In other words, the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.[402]

(18) As a matter of terminology, it is sufficient to use the phrase "international community as a whole" rather than "international community of States as a whole", which is used in the specific context of article 53 of the 1969 Vienna Convention. The insertion of the words "of States" in article 53 of the Convention was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of norms of a peremptory character. On the other hand, ICJ used the phrase "international community as a whole" in the *Barcelona Traction* case,[403] and it is frequently used in treaties and other international instruments in the same sense as in paragraph 1(*b*).[404]

(19) Over and above the conditions in paragraph 1, *paragraph 2* lays down two general limits to any invocation of necessity. This is made clear by the use of the words "in any case". *Paragraph 2* (a) concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus, certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.

(20) According to *paragraph 2* (b), necessity may not be relied on if the responsible State has contributed to the situation of necessity. Thus, in the *Gabčíkovo-Nagymaros Project* case, ICJ considered that because Hungary had "helped, by act or omission to bring about" the situation of alleged necessity, it could not then rely on that situation as a circumstance precluding wrongfulness.[405] For a plea of necessity to be precluded under paragraph 2 (*b*), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral. Paragraph 2 (*b*) is phrased in more categorical terms than articles 23, paragraph 2 (*a*), and 24, paragraph 2 (*a*), because necessity needs to be more narrowly confined.

(21) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of "military necessity". It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention.[406] The question whether 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 is not covered by article 25.[407] The same thing is true of the doctrine of "military necessity" which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law.[408] In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.[409]

### *Article 26. Compliance with peremptory norms*

**Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.**

*Commentary*

(1) In accordance with article 53 of the 1969 Vienna Convention, a treaty which conflicts with a peremptory norm of general international law is void. Under article 64, an earlier treaty which conflicts with a new peremp-

[402] In the *Gabčíkovo-Nagymaros Project* case ICJ affirmed the need to take into account any countervailing interest of the other State concerned (see footnote 27 above), p. 46, para. 58.

[403] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[404] See, e.g., third preambular paragraph of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; fourth preambular paragraph of the International Convention Against the Taking of Hostages; fifth preambular paragraph of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; third preambular paragraph of the Convention on the Safety of United Nations and Associated Personnel; tenth preambular paragraph of the International Convention for the Suppression of Terrorist Bombings; ninth preambular paragraph of the Rome Statute of the International Criminal Court; and ninth preambular paragraph of the International Convention for the Suppression of the Financing of Terrorism.

[405] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 46, para. 57.

[406] For example, in 1960 Belgium invoked necessity to justify its military intervention in the Congo. The matter was discussed in the Security Council but not in terms of the plea of necessity as such. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, paras. 144, 182 and 192; 877th meeting, 20–21 July 1960, paras. 31 et seq. and para. 142; 878th meeting, 21 July 1960, paras. 23 and 65; and 879th meeting, 21–22 July 1960, paras. 80 et seq. and paras. 118 and 151. For the *"Caroline"* incident, see above, paragraph (5).

[407] See also article 26 and commentary for the general exclusion of the scope of circumstances precluding wrongfulness of conduct in breach of a peremptory norm.

[408] See, e.g., article 23 (*g*) of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907), which prohibits the destruction of enemy property "unless such destruction or seizure be imperatively demanded by the necessities of war". Similarly, article 54, paragraph 5, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), appears to permit attacks on objects indispensable to the survival of the civilian population if "imperative military necessity" so requires.

[409] See, e.g., M. Huber, "Die Kriegsrechtlichen Verträge und die Kriegsraison", *Zeitschrift für Völkerrecht*, vol. VII (1913), p. 351; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, p. 207; C. De Visscher, "Les lois de la guerre et la théorie de la nécessité", RGDIP, vol. 24 (1917), p. 74; N. C. H. Dunbar, "Military necessity in war crimes trials", BYBIL, *1952*, vol. 29, p. 442; C. Greenwood, "Historical development and legal basis", *The Handbook of Humanitarian Law in Armed Conflicts*, D. Fleck, ed. (Oxford University Press, 1995), p. 1, at pp. 30–33; and Y. Dinstein, "Military necessity", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 1997), vol. 3, pp. 395–397.

tory norm becomes void and terminates.[410] The question is what implications these provisions may have for the matters dealt with in chapter V.

(2) Sir Gerald Fitzmaurice as Special Rapporteur on the Law of Treaties treated this question on the basis of an implied condition of "continued compatibility with international law", noting that:

> A treaty obligation the observance of which is incompatible 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.[411]

The Commission did not, however, propose with any specific articles on this question, apart from articles 53 and 64 themselves.

(3) Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory, one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred.[412] Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.

(4) It is, however, desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law. For example, a State taking countermeasures may not derogate from such a norm: for example, a genocide cannot justify a counter-genocide.[413] The plea of necessity likewise cannot excuse the breach of a peremptory norm. It would be possible to incorporate this principle expressly in each of the articles of chapter V, but it is both more economical and more in keeping with the overriding character of this class of norms to deal with the basic principle separately. Hence, article 26 provides that nothing in chapter V can preclude the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.[414]

(5) The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.[415] Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[416]

(6) In accordance with article 26, circumstances precluding wrongfulness cannot justify or excuse a breach of a State's obligations under a peremptory rule of general international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V. One State cannot dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, whether by treaty or otherwise.[417] But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility.[418]

### *Article 27. Consequences of invoking a circumstance precluding wrongfulness*

**The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:**

**(*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;**

**(*b*) the question of compensation for any material loss caused by the act in question.**

[410] See also article 44, paragraph 5, which provides that in cases falling under article 53, no separation of the provisions of the treaty is permitted.

[411] Fourth report on the law of treaties, *Yearbook … 1959* (see footnote 307 above), p. 46. See also S. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985), p. 63.

[412] For a possible analogy, 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*, p. 325, at pp. 439–441. ICJ did not address these issues in its order.

[413] As ICJ noted in its decision in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, "in no case could one breach of the Convention serve as an excuse for another" (*Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243, at p. 258, para. 35).

[414] For convenience, this limitation is spelled out again in the context of countermeasures in Part Three, chapter II. See article 50 and commentary, paras. (9) and (10).

[415] See, e.g., the decisions of the International Tribunal for the Former Yugoslavia in case IT-95-17/1-T, *Prosecutor* v. *Furundzija*, judgement of 10 December 1998; ILM, vol. 38, No. 2 (March 1999), p. 317, and of the British House of Lords in *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate and Others*, ex parte *Pinochet Ugarte (No. 3)*, ILR, vol. 119. Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), p. 257, para. 79.

[416] Cf. *East Timor* (footnote 54 above).

[417] See paragraph (4) of the commentary to article 45.

[418] See paragraphs (4) to (7) of the commentary to article 20.

*Commentary*

(1) Article 27 is a without prejudice clause dealing with certain incidents or consequences of invoking circumstances precluding wrongfulness under chapter V. It deals with two issues. First, it makes it clear that circumstances precluding wrongfulness do not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect. Secondly, it refers to the possibility of compensation in certain cases. Article 27 is framed as a without prejudice clause because, as to the first point, it may be that the effect of the facts which disclose a circumstance precluding wrongfulness may also give rise to the termination of the obligation and, as to the second point, because it is not possible to specify in general terms when compensation is payable.

(2) *Subparagraph* (a) of article 27 addresses the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate. It makes 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. The words "and to the extent" are intended to cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation.

(3) This principle was affirmed by the tribunal in the *"Rainbow Warrior"* arbitration,[419] and even more clearly by ICJ in the *Gabčíkovo-Nagymaros Project* case. In considering Hungary's argument that the wrongfulness of its conduct in discontinuing work on the Project was precluded by a state of necessity, the Court remarked that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives".[420] It may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation. Thus, 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 by the injured State. 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 article 27 can resolve, other than by providing that the invocation of circumstances precluding wrongfulness is without prejudice to "compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists". Here "compliance with the obligation in question" includes cessation of the wrongful conduct.

(4) *Subparagraph* (b) of article 27 is a reservation as to questions of possible compensation for damage in cases covered by chapter V. Although the article uses the term "compensation", it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather, it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference to "material loss" is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.

(5) Subparagraph (*b*) is a proper condition, in certain cases, for allowing a State to rely on a circumstance precluding wrongfulness. Without the possibility of such recourse, the State whose conduct would otherwise be unlawful might seek to shift the burden of the defence of its own interests or concerns onto an innocent third State. This principle was accepted by Hungary in invoking the plea of necessity in the *Gabčíkovo-Nagymaros Project* case. 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".[421]

(6) Subparagraph (*b*) does not attempt to specify in what circumstances compensation should be payable. Generally, the range of possible situations covered by chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.

## Part Two

## CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

(1) Whereas Part One of the articles defines the general conditions necessary for State responsibility to arise, Part Two deals with the legal consequences for the responsible State. It is true that a State may face legal consequences of conduct which is internationally wrongful outside the sphere of State responsibility. For example, a material breach of a treaty may give an injured State the right to terminate or suspend the treaty in whole or in part.[422] The focus of Part Two, however, is on the new legal relationship which arises upon the commission by a State of an internationally wrongful act. This constitutes the substance or content of the international responsibility of a State under the articles.

(2) Within the sphere of State responsibility, the consequences which arise by virtue of an internationally wrongful act of a State may be specifically provided for in such terms as to exclude other consequences, in whole or

[419] *"Rainbow Warrior"* (see footnote 46 above), pp. 251–252, para. 75.

[420] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para 101; see also page 38, para. 47.

[421] *Ibid.*, p. 39, para. 48. A separate issue was that of accounting for accrued costs associated with the Project (*ibid*., p. 81, paras. 152–153).

[422] 1969 Vienna Convention, art. 60.

in part.[423] In the absence of any specific provision, however, international law attributes to the responsible State new obligations, and in particular the obligation to make reparation for the harmful consequences flowing from that act. The close link between the breach of an international obligation and its immediate legal consequence in the obligation of reparation was recognized in article 36, paragraph 2, of the PCIJ Statute, which was carried over without change as Article 36, paragraph 2, of the ICJ Statute. In accordance with article 36, paragraph 2, States parties to the Statute may recognize as compulsory the Court's jurisdiction, *inter alia*, in all legal disputes concerning:

(*c*) The existence of any fact which, if established, would constitute a breach of an international obligation;

(*d*) The nature or extent of the reparation to be made for the breach of an international obligation.

Part One of the articles sets out the general legal rules applicable to the question identified in subparagraph (*c*), while Part Two does the same for subparagraph (*d*).

(3) Part Two consists of three chapters. Chapter I sets out certain general principles and specifies more precisely the scope of Part Two. Chapter II focuses on the forms of reparation (restitution, compensation, satisfaction) and the relations between them. Chapter III deals with the special situation which arises in case of a serious breach of an obligation arising under a peremptory norm of general international law, and specifies certain legal consequences of such breaches, both for the responsible State and for other States.

## Chapter I

## GENERAL PRINCIPLES

*Commentary*

(1) Chapter I of Part Two comprises six articles, which define in general terms the legal consequences of an internationally wrongful act of a State. Individual breaches of international law can vary across a wide spectrum from the comparatively trivial or minor up to cases which imperil the survival of communities and peoples, the territorial integrity and political independence of States and the environment of whole regions. This may be true whether the obligations in question are owed to one other State or to some or all States or to the international community as a whole. But over and above the gravity or effects of individual cases, the rules and institutions of State responsibility are significant for the maintenance of respect for international law and for the achievement of the goals which States advance through law-making at the international level.

(2) Within chapter I, article 28 is an introductory article, affirming the principle that legal consequences are entailed whenever there is an internationally wrongful act of a State. Article 29 indicates that these consequences are without prejudice to, and do not supplant, the continued obligation of the responsible State to perform the obligation breached. This point is carried further by article 30, which deals with the obligation of cessation and assurances or guarantees of non-repetition. Article 31 sets out the general obligation of reparation for injury suffered in consequence of a breach of international law by a State. Article 32 makes clear that the responsible State may not rely on its internal law to avoid the obligations of cessation and reparation arising under Part Two. Finally, article 33 specifies the scope of the Part, both in terms of the States to which obligations are owed and also in terms of certain legal consequences which, because they accrue directly to persons or entities other than States, are not covered by Parts Two or Three of the articles.

### *Article 28. Legal consequences of an internationally wrongful act*

**The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.**

*Commentary*

(1) Article 28 serves an introductory function for Part Two and is expository in character. It links the provisions of Part One which define when the international responsibility of a State arises with the provisions of Part Two which set out the legal consequences which responsibility for an internationally wrongful act involves.

(2) The core legal consequences of an internationally wrongful act set out in Part Two are the obligations of the responsible State to cease the wrongful conduct (art. 30) and to make full reparation for the injury caused by the internationally wrongful act (art. 31). Where the internationally wrongful act constitutes a serious breach by the State of an obligation arising under a peremptory norm of general international law, the breach may entail further consequences both for the responsible State and for other States. In particular, all States in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach and not to render aid or assistance to the responsible State in maintaining the situation so created (arts. 40–41).

(3) Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations *of* the State and not only those owed *to* other States. Thus, State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent

[423] On the *lex specialis* principle in relation to State responsibility, see article 55 and commentary.

that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.

### *Article 29. Continued duty of performance*

**The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.**

*Commentary*

(1) Where a State commits a breach of an international obligation, questions as to the restoration and future of the legal relationship thereby affected are central. Apart from the question of reparation, two immediate issues arise, namely, the effect of the responsible State's conduct on the obligation which has been breached, and cessation of the breach if it is continuing. The former question is dealt with by article 29, the latter by article 30.

(2) Article 29 states the general principle that the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached. The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act (see article 14) and the obligation of cessation (see subparagraph (*a*) of article 30).

(3) It is true that in some situations the ultimate effect of a breach of an obligation may be to put an end to the obligation itself. For example, a State injured by a material breach of a bilateral treaty may elect to terminate the treaty.[424] But as the relevant provisions of the 1969 Vienna Convention make clear, the mere fact of a breach and even of a repudiation of a treaty does not terminate the treaty.[425] It is a matter for the injured State to react to the breach to the extent permitted by the Convention. The injured State may have no interest in terminating the treaty as distinct from calling for its continued performance. Where a treaty is duly terminated for breach, the termination does not affect legal relationships which have accrued under the treaty prior to its termination, including the obligation to make reparation for any breach.[426] A breach of an obligation under general international law is even less likely to affect the underlying obligation, and indeed will never do so *as such*. By contrast, the secondary legal relation of State responsibility arises on the occurrence of a breach and without any requirement of invocation by the injured State.

(4) Article 29 does not need to deal with such contingencies. All it provides is that the legal consequences of an internationally wrongful act within the field of State responsibility do not affect any continuing duty to comply with the obligation which has been breached. Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation.

### *Article 30. Cessation and non-repetition*

**The State responsible for the internationally wrongful act is under an obligation:**

**(*a*) to cease that act, if it is continuing;**

**(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.**

*Commentary*

(1) Article 30 deals with two separate but linked issues raised by the breach of an international obligation: the cessation of the wrongful conduct and the offer of assurances and guarantees of non-repetition by the responsible State if circumstances so require. Both are aspects of the restoration and repair of the legal relationship affected by the breach. Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performance. The continuation in force of the underlying obligation is a necessary assumption of both, since if the obligation has ceased following its breach, the question of cessation does not arise and no assurances and guarantees can be relevant.[427]

(2) Subparagraph (*a*) of article 30 deals with the obligation of the State responsible for the internationally wrongful act to cease the wrongful conduct. In accordance with article 2, the word "act" covers both acts and omissions. Cessation is thus relevant to all wrongful acts extending in time "regardless of whether the conduct of a State is

[424] See footnote 422 above.

[425] Indeed, in the *Gabčíkovo-Nagymaros Project* case, ICJ held that continuing material breaches by both parties did not have the effect of terminating the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System (see footnote 27 above), p. 68, para. 114.

[426] See, e.g., *"Rainbow Warrior"* (footnote 46 above), p. 266, citing Lord McNair (dissenting) in *Ambatielos, Preliminary Objection, I.C.J. Reports 1952*, p. 28, at p. 63. On that particular point the Court itself agreed, *ibid*., p. 45. In the *Gabčíkovo-Nagymaros Project* case, Hungary accepted that the legal consequences of its termination of the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System on account of the breach by Czechoslovakia were prospective only, and did not affect the accrued rights of either party (see footnote 27 above), pp. 73–74, paras. 125–127. The Court held that the Treaty was still in force, and therefore did not address the question.

[427] 1969 Vienna Convention, art. 70, para. 1.

an action or an omission … since there may be cessation consisting in abstaining from certain actions".[428]

(3) The tribunal in the *"Rainbow Warrior"* arbitration stressed "two essential conditions intimately linked" for the requirement of cessation of wrongful conduct to arise, "namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".[429] While the obligation to cease wrongful conduct will arise most commonly in the case of a continuing wrongful act,[430] article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions. The phrase "if it is continuing" at the end of subparagraph (*a*) of the article is intended to cover both situations.

(4) Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act. Cessation is often the main focus of the controversy produced by conduct in breach of an international obligation.[431] It is frequently demanded not only by States but also by the organs of international organizations such as the General Assembly and Security Council in the face of serious breaches of international law. By contrast, reparation, important though it is in many cases, may not be the central issue in a dispute between States as to questions of responsibility.[432]

(5) The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.

(6) There are several reasons for treating cessation as more than simply a function of the duty to comply with the primary obligation. First, the question of cessation only arises in the event of a breach. What must then occur depends not only on the interpretation of the primary obligation but also on the secondary rules relating to remedies, and it is appropriate that they are dealt with, at least in general terms, in articles concerning the consequences of an internationally wrongful act. Secondly, continuing wrongful acts are a common feature of cases involving State responsibility and are specifically dealt with in article 14. There is a need to spell out the consequences of such acts in Part Two.

(7) The question of cessation often arises in close connection with that of reparation, and particularly restitution. The result of cessation may be indistinguishable from restitution, for example in cases involving the freeing of hostages or the return of objects or premises seized. Nonetheless, the two must be distinguished. Unlike restitution, cessation is not subject to limitations relating to proportionality.[433] It may give rise to a continuing obligation, even when literal return to the *status quo ante* is excluded or can only be achieved in an approximate way.

(8) The difficulty of distinguishing between cessation and restitution is illustrated by the *"Rainbow Warrior"* arbitration. New Zealand sought the return of the two agents to detention on the island of Hao. According to New Zealand, France was obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was no question of cessation.[434] Evidently, the return of the two agents to the island was of no use to New Zealand if there was no continuing obligation on the part of France to keep them there. Thus, a return to the *status quo ante* may be of little or no value if the obligation breached no longer exists. Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not competent to release it from such performance. The distinction between cessation and restitution may have important consequences in terms of the obligations of the States concerned.

(9) Subparagraph (*b*) of article 30 deals with the obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Assurances and guarantees are concerned with the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases. They are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily. For example, following repeated demonstrations against the United States Embassy in Moscow from 1964 to 1965, President Johnson stated that:

> The U.S. Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between states. Expressions of regret and compensation are no substitute for adequate protection.[435]

[428] *"Rainbow Warrior"* (see footnote 46 above), p. 270, para. 113.

[429] *Ibid*., para. 114.

[430] For the concept of a continuing wrongful act, see paragraphs (3) to (11) of the commentary to article 14.

[431] The focus of the WTO dispute settlement mechanism is on cessation rather than reparation: Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), especially article 3, paragraph 7, which provides for compensation "only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, Australia-Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126/RW and Corr.1), 21 January 2000, para. 6.49.

[432] For cases where ICJ has recognized that this may be so, see, e.g., *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at pp. 201–205, paras. 65–76; and *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 81, para. 153. See also C. D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 77–92.

[433] See article 35 (*b*) and commentary.

[434] UNRIAA, vol. XX, p. 217, at p. 266, para. 105 (1990).

[435] Reprinted in ILM, vol. 4, No. 2 (July 1965), p. 698.

Such demands are not always expressed in terms of assurances or guarantees, but they share the characteristics of being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation and they are included in article 30.

(10) The question whether the obligation to offer assurances or guarantees of non-repetition may be a legal consequence of an internationally wrongful act was debated in the *LaGrand* case. This concerned an admitted failure of consular notification contrary to article 36 of the Vienna Convention on Consular Relations. In its fourth submission, Germany sought both general and specific assurances and guarantees as to the means of future compliance with the Convention. The United States argued that to give such assurances or guarantees went beyond the scope of the obligations in the Convention and that ICJ lacked jurisdiction to require them. In any event, formal assurances and guarantees were unprecedented and should not be required. Germany's entitlement to a remedy did not extend beyond an apology, which the United States had given. Alternatively, no assurances or guarantees were appropriate in the light of the extensive action it had taken to ensure that federal and State officials would in future comply with the Convention. On the question of jurisdiction, the Court held:

> that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation … Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.[436]

On the question of appropriateness, the Court noted that an apology would not be sufficient in any case in which a foreign national had been "subjected to prolonged detention or sentenced to severe penalties" following a failure of consular notification.[437] But in the light of information provided by the United States as to the steps taken to comply in future, the Court held:

> that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (*b*), must be regarded as meeting Germany's request for a general assurance of non-repetition.[438]

As to the specific assurances sought by Germany, the Court limited itself to stating that:

> if the United States, notwithstanding its commitment referred to … should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.[439]

The Court thus upheld its jurisdiction on Germany's fourth submission and responded to it in the operative part. It did not, however, discuss the legal basis for assurances of non-repetition.

(11) Assurances or guarantees of non-repetition may be sought by way of satisfaction (e.g. the repeal of the legislation which allowed the breach to occur) and there is thus some overlap between the two in practice.[440] However, they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past. In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48.

(12) Assurances are normally given verbally, while guarantees of non-repetition involve something more—for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested, international practice is not uniform. The injured State usually demands either safeguards against the repetition of the wrongful act without any specification of the form they are to take[441] or, when the wrongful act affects its nationals, assurances of better protection of persons and property.[442] In the *LaGrand* case, ICJ spelled out with some specificity the obligation that would arise for the United States from a future breach, but added that "[t]his obligation can be carried out in various ways. The choice of means must be left to the United States".[443] It noted further that a State may not be in a position to offer a firm guarantee of non-repetition.[444] Whether it could properly do so would depend on the nature of the obligation in question.

(13) In some cases, the injured State may ask the responsible State to adopt specific measures or to act in a specified way in order to avoid repetition. Sometimes the injured State merely seeks assurances from the responsible State that, in future, it will respect the rights of the injured State.[445] In other cases, the injured State requires specific instructions to be given,[446] or other specific conduct to be

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[436] *LaGrand, Judgment* (see footnote 119 above), p. 485, para. 48, citing *Factory at Chorzów, Jurisdiction* (footnote 34 above).

[437] *LaGrand, Judgment* (see footnote 119 above), p. 512, para. 123.

[438] *Ibid*., p. 513, para. 124; see also the operative part, p. 516, para. 128 (6).

[439] *Ibid*., pp. 513–514, para. 125. See also paragraph 127 and the operative part (para. 128 (7)).

[440] See paragraph (5) of the commentary to article 36.

[441] In the "Dogger Bank" incident in 1904, the United Kingdom sought "security against the recurrence of such intolerable incidents", G. F. de Martens, *Nouveau recueil général de traités*, 2nd series, vol. XXXIII, p. 642. See also the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General in Jakarta, in which the Chinese Deputy Minister for Foreign Affairs sought a guarantee that such incidents would not be repeated in the future, RGDIP, vol. 70 (1966), pp. 1013 et seq.

[442] Such assurances were given in the *Doane* incident (1886), Moore, *Digest*, vol. VI, pp. 345–346.

[443] *LaGrand, Judgment* (see footnote 119 above), p. 513, para. 125.

[444] *Ibid*., para. 124.

[445] See, e.g., the 1901 case in which the Ottoman Empire gave a formal assurance that the British, Austrian and French postal services would henceforth operate freely in its territory, RGDIP, vol. 8 (1901), p. 777, at pp. 788 and 792.

[446] See, e.g., the incidents involving the *"Herzog"* and the *"Bundesrath"*, two German ships seized by the British Navy in December 1899 and January 1900, during the Boer war, in which Germany drew the attention of Great Britain to "the necessity for issuing instructions

taken.[447] But assurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words "if circumstances so require" at the end of subparagraph (*b*). The obligation of the responsible State with respect to assurances and guarantees of non-repetition is formulated in flexible terms in order to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by States in the past.

### *Article 31. Reparation*

**1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.**

**2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.**

*Commentary*

(1) The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.[448]

In this passage, which has been cited and applied on many occasions,[449] the Court was using the term "reparation" in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.

(2) In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[450]

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.[451] In the second sentence, it dealt with that aspect of reparation encompassed by "compensation" for an unlawful act—that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

(3) The obligation placed on the responsible State by article 31 is to make "full reparation" in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed"[452] through the provision of one or more of the forms of reparation set out in chapter II of this part.

(4) The general obligation of reparation is formulated in article 31 as the immediate corollary of a State's responsibility, i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility,[453] the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

(5) The responsible State's obligation to make full reparation relates to the "injury caused by the internationally wrongful act". The notion of "injury", defined in *paragraph 2*, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, "injury" includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individu-

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to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war", Martens, *op. cit.* (footnote 441 above), vol. XXIX, p. 456 at p. 486.

[447] In the *Trail Smelter* case (see footnote 253 above), the arbitral tribunal specified measures to be adopted by the Trail Smelter, including measures designed to "prevent future significant fumigations in the United States" (p. 1934). Requests to modify or repeal legislation are frequently made by international bodies. See, e.g., the decisions of the Human Rights Committee: *Torres Ramirez* v. *Uruguay*, decision of 23 July 1980, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40* (A/35/40), p. 126, para. 19; *Lanza* v. *Uruguay*, decision of 3 April 1980, *ibid*., p. 119, para. 17; and *Dermit Barbato* v. *Uruguay*, decision of 21 October 1982, *ibid*., *Thirty-eighth Session, Supplement No. 40* (A/38/40), p. 133, para. 11.

[448] *Factory at Chorzów, Jurisdiction* (see footnote 34 above).

[449] Cf. the ICJ reference to this decision in *LaGrand, Judgment* (footnote 119 above), p. 485, para. 48.

[450] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

[451] Cf. P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des États", *Collected Courses ... 1984–V* (Dordrecht, Martinus Nijhoff, 1986), vol. 188, p. 9, at p. 94, who uses the term *restauration*.

[452] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

[453] For the States entitled to invoke responsibility, see articles 42 and 48 and commentaries. For the situation where there is a plurality of injured States, see article 46 and commentary.

ally unaffected by the breach.[454] "Material" damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. "Moral" damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.[455]

(6) The question whether damage to a protected interest is a necessary element of an internationally wrongful act has already been discussed.[456] There is in general no such requirement; rather this is a matter which is determined by the relevant primary rule. In some cases, the gist of a wrong is the causing of actual harm to another State. In some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs. In some cases there is an outright commitment to perform a specified act, e.g. to incorporate uniform rules into internal law. In each case the primary obligation will determine what is required. Hence, article 12 defines a breach of an international obligation as a failure to conform with an obligation.

(7) As a corollary there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation. In the *"Rainbow Warrior"* arbitration it was initially argued that "in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation", but the parties subsequently agreed that:

> Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.[457]

The tribunal held that the breach by France had "provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage … of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well".[458]

(8) Where two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed. For the secondary rules of State responsibility to intervene at this stage and to prescribe that there is no responsibility because no identifiable harm or damage has occurred would be unwarranted. If the parties had wished to commit themselves to that formulation of the obligation they could have done so. In many cases, the damage that may follow from a breach (e.g. harm to a fishery from fishing in the closed season, harm to the environment by emissions exceeding the prescribed limit, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless, States may enter into immediate and unconditional commitments in their mutual long-term interest in such fields. Accordingly, article 31 defines "injury" in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case.

(9) Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only "[i]njury … caused by the internationally wrongful act of a State" for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.

(10) The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses "attributable to [the wrongful] act as a proximate cause",[459] or to damage which is "too indirect, remote, and uncertain to be appraised",[460] or to "any direct loss, damage including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of" the wrongful act.[461] Thus, causality in fact is a necessary

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[454] Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. Generally on notions of injury and damage, see B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973); B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", *Collected Courses ... 1984–II* (The Hague, Nijhoff, 1985), vol. 185, p. 95; A. Tanzi, "Is damage a distinct condition for the existence of an internationally wrongful act?", Spinedi and Simma, eds., *op. cit.* (footnote 175 above), p. 1; and Brownlie, *System of the Law of Nations …* (footnote 92 above), pp. 53–88.

[455] See especially article 36 and commentary.

[456] See paragraph (9) of the commentary to article 2.

[457] *"Rainbow Warrior"* (see footnote 46 above), pp. 266–267, paras. 107 and 109.

[458] *Ibid*., p. 267, para. 110.

[459] See United States-German Mixed Claims Commission, *Administrative Decision No. II*, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 23, at p. 30 (1923). See also *Dix* (footnote 178 above), p. 121, and the Canadian statement of claim following the disintegration of the *Cosmos 954* Soviet nuclear-powered satellite over its territory in 1978, ILM, vol. 18 (1979), p. 907, para. 23.

[460] See the *Trail Smelter* arbitration (footnote 253 above), p. 1931. See also A. Hauriou, "Les dommages indirects dans les arbitrages internationaux", RGDIP, vol. 31 (1924), p. 209, citing the *"Alabama"* arbitration as the most striking application of the rule excluding "indirect" damage (footnote 87 above).

[461] Security Council resolution 687 (1991) of 3 April 1991, para. 16. This was a resolution adopted with reference to Chapter VII of the Charter of the United Nations, but it is expressed to reflect Iraq's liability "under international law … as a result of its unlawful invasion and occupation of Kuwait". UNCC and its Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under paragraph 16. See, e.g., Recommendations made by the panel of Commissioners concerning individual claims for serious personal injury or death (category "B" claims), report of 14 April 1994 (S/AC.26/1994/1), approved by the Governing Council in its decision 20 of 26 May 1994 (S/AC.26/Dec.20 (1994)); Report and recommendations made by the panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC claim"), of 15 November 1996 (S/AC.26/1996/5/Annex), paras. 66–86, approved by the Governing

but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used,[462] in others "foreseeability"[463] or "proximity".[464] But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.[465] In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage "is not a part of the law which can be satisfactorily solved by search for a single verbal formula".[466] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.[467] The point was clearly made in this sense by ICJ in the *Gabčíkovo-Nagymaros Project* case:

> Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained".
>
> It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.[468]

(12) Often two separate factors combine to cause damage. In the *United States Diplomatic and Consular Staff in Tehran* case,[469] the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students' own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,[470] the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes,[471] except in cases of contributory fault.[472] In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines even though Albania had not itself laid the mines.[473] Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *United States Diplomatic and Consular Staff in Tehran* case, the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.[474]

(13) It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct. Indeed, in the *Zafiro* claim the tribunal went further and in effect placed the

Council in its decision 40 of 17 December 1996 (S/AC.26/Dec.40 (1996)).

[462] As in Security Council resolution 687 (1991), para. 16.

[463] See, e.g., the *"Naulilaa"* case (footnote 337 above), p. 1031.

[464] For comparative reviews of issues of causation and remoteness, see, e.g., H. L. A. Hart and A. M. Honoré, *Causation in the Law*, 2nd ed. (Oxford, Clarendon Press, 1985); A. M. Honoré, "Causation and remoteness of damage", *International Encyclopedia of Comparative Law*, A. Tunc, ed. (Tübingen, Mohr/The Hague, Martinus Nijhoff, 1983), vol. XI, part I, chap. 7; Zweigert and Kötz, *op. cit*. (footnote 251 above), pp. 601–627, in particular pp. 609 et seq.; and B. S. Markesinis, *The German Law of Obligations: Volume II The Law of Torts: A Comparative Introduction*, 3rd ed. (Oxford, Clarendon Press, 1997), pp. 95–108, with many references to the literature.

[465] See, e.g., the decision of the Iran-United States Claims Tribunal in *The Islamic Republic of Iran* v. *The United States of America*, cases A15 (IV) and A24, Award No. 590–A15 (IV)/A24–FT, 28 December 1998, *World Trade and Arbitration Materials*, vol. 11, No. 2 (1999), p. 45.

[466] P. S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford, Clarendon Press, 1995), p. 466.

[467] In the WBC claim, a UNCC panel noted that "under the general principles of international law relating to mitigation of damages … the Claimant was not only permitted but indeed obligated to take reasonable steps to … mitigate the loss, damage or injury being caused" report of 15 November 1996 (S/AC.26/1996/5/Annex) (see footnote 461 above), para. 54.

[468] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 80.

[469] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 29–32.

[470] *Corfu Channel*, *Merits* (see footnote 35 above), pp. 17–18 and 22–23.

[471] This approach is consistent with the way in which these issues are generally dealt with in national law. "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause … In other words, the liability of a tortfeasor is not affected *vis-à-vis* the victim by the consideration that another is concurrently liable.": T. Weir, "Complex liabilities", A. Tunc, ed., *op. cit*. (footnote 464 above), part 2, chap. 12, p. 43. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident of 27 July 1955* case when it said, referring to Article 38, paragraph 1 (*c*) and (*d*), of the ICJ Statute, that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage" (Memorial of 2 December 1958 (see footnote 363 above), p. 229).

[472] See article 39 and commentary.

[473] See *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 244, at p. 250.

[474] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 31–33.

onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

> We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.
>
> In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.[475]

(14) Concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach. However, the notion of "proportionality" applies differently to the different forms of reparation.[476] It is addressed, as appropriate, in the individual articles in chapter II dealing with the forms of reparation.

### *Article 32. Irrelevance of internal law*

**The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.**

*Commentary*

(1) Article 3 concerns the role of internal law in the characterization of an act as wrongful. Article 32 makes clear the irrelevance of a State's internal law to compliance with the obligations of cessation and reparation. It provides that a State which has committed an internationally wrongful act may not invoke its internal law as a justification for failure to comply with its obligations under this part. Between them, articles 3 and 32 give effect for the purposes of State responsibility to the general principle that a State may not rely on its internal law as a justification for its failure to comply with its international obligations.[477]Although practical difficulties may arise for a State organ confronted with an obstacle to compliance posed by the rules of the internal legal system under which it is bound to operate, the State is not entitled to oppose its internal law or practice as a legal barrier to the fulfilment of an international obligation arising under Part Two.

(2) Article 32 is modelled on article 27 of the 1969 Vienna Convention, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This general principle is equally applicable to the international obligations deriving from the rules of State responsibility set out in Part Two. The principle may be qualified by the relevant primary rule, or by a *lex specialis*, such as article 50 of the European Convention on Human Rights, which provides for just satisfaction in lieu of full reparation "if the internal law of the High Contracting Party concerned allows only partial reparation to be made".[478]

(3) The principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions. For example, the dispute between Japan and the United States in 1906 over California's discriminatory education policies was resolved by the revision of the Californian legislation.[479] In the incident concerning article 61, paragraph 2, of the Weimar Constitution (Constitution of the Reich of 11 August 1919), a constitutional amendment was provided for in order to ensure the discharge of the obligation deriving from article 80 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).[480] In the *Peter Pázmány University* case, PCIJ specified that the property to be returned should be "freed from any measure of transfer, compulsory administration, or sequestration".[481] In short, international law does not recognize that the obligations of a responsible State under Part Two are subject to the State's internal legal system nor does it allow internal law to count as an excuse for non-performance of the obligations of cessation and reparation.

### *Article 33. Scope of international obligations set out in this Part*

**1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.**

**2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.**

*Commentary*

(1) Article 33 concludes the provisions of chapter I of Part Two by clarifying the scope and effect of the international obligations covered by the Part. In particular, *paragraph 1* makes it clear that identifying the State or States towards which the responsible State's obligations in Part Two exist depends both on the primary rule establishing

[475] The *Zafiro* case (see footnote 154 above), pp. 164–165.

[476] See articles 35 (*b*), 37, paragraph 3, and 39 and commentaries.

[477] See paragraphs (2) to (4) of the commentary to article 3.

[478] Article 41 of the Convention, as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Other examples include article 32 of the Revised General Act for the Pacific Settlement of International Disputes and article 30 of the European Convention for the Peaceful Settlement of Disputes.

[479] See R. L. Buell, "The development of the anti-Japanese agitation in the United States", *Political Science Quarterly*, vol. 37 (1922), pp. 620 et seq.

[480] See *British and Foreign State Papers, 1919* (London, HM Stationery Office, 1922), vol. 112, p. 1094.

[481] *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), Judgment, 1933, P.C.I.J., Series A/B, No. 61*, p. 208, at p. 249.

the obligation that was breached and on the circumstances of the breach. For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a single neighbouring State. Evidently, the gravity of the breach may also affect the scope of the obligations of cessation and reparation.

(2) In accordance with paragraph 1, the responsible State's obligations in a given case may exist towards another State, several States or the international community as a whole. The reference to several States includes the case in which a breach affects all the other parties to a treaty or to a legal regime established under customary international law. For instance, when an obligation can be defined as an "integral" obligation, the breach by a State necessarily affects all the other parties to the treaty.[482]

(3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights.[483] The range of possibilities is demonstrated from the ICJ judgment in the *LaGrand* case, where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".[484]

(4) Such possibilities underlie the need for *paragraph 2* of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (art. 55). The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State".

[482] See further article 42 (*b*) (ii) and commentary.

[483] Cf. *Jurisdiction of the Courts of Danzig* (footnote 82 above), pp. 17–21.

[484] *LaGrand, Judgment* (see footnote 119 above), para. 77. In the circumstances the Court did not find it necessary to decide whether the individual rights had "assumed the character of a human right" (para. 78).

## CHAPTER II

## REPARATION FOR INJURY

### *Commentary*

Chapter II deals with the forms of reparation for injury, spelling out in further detail the general principle stated in article 31, and in particular seeking to establish more clearly the relations between the different forms of reparation, viz. restitution, compensation and satisfaction, as well as the role of interest and the question of taking into account any contribution to the injury which may have been made by the victim.

### *Article 34. Forms of reparation*

**Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.**

### *Commentary*

(1) Article 34 introduces chapter II by setting out the forms of reparation which separately or in combination will discharge the obligation to make full reparation for the injury caused by the internationally wrongful act. Since the notion of "injury" and the necessary causal link between the wrongful act and the injury are defined in the statement of the general obligation to make full reparation in article 31,[485] article 34 need do no more than refer to "[f]ull reparation for the injury caused".

(2) In the *Factory at Chorzów* case, the injury was a material one and PCIJ dealt only with two forms of reparation, restitution and compensation.[486] In certain cases, satisfaction may be called for as an additional form of reparation. Thus, full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances. Article 34 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g. injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.

[485] See paragraphs (4) to (14) of the commentary to article 31.

[486] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

(3) The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.[487]

(4) The provision of each of the forms of reparation described in article 34 is subject to the conditions laid down in the articles which follow it in chapter II. This limitation is indicated by the phrase "in accordance with the provisions of this chapter". It may also be affected by any valid election that may be made by the injured State as between different forms of reparation. For example, in most circumstances the injured State is entitled to elect to receive compensation rather than restitution. This element of choice is reflected in article 43.

(5) Concerns have sometimes been expressed that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned. The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character. Thus, restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party.[488] Compensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote.[489] Satisfaction must "not be out of proportion to the injury".[490] Thus, each of the forms of reparation takes such considerations into account.

(6) The forms of reparation dealt with in chapter II represent ways of giving effect to the underlying obligation of reparation set out in article 31. There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction. Some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.[491] To the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others, especially compensation, will be correspondingly more important.

### *Article 35. Restitution*

**A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:**

**(*a*) is not materially impossible;**

**(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.**

*Commentary*

(1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act.

(2) The concept of restitution is not uniformly defined. According to one definition, restitution consists in re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Under another definition, restitution is the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 adopts the narrower definition which has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. Restitution in this narrow sense may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear.

(3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by PCIJ in the *Factory at Chorzów*

[487] Thus, in the judgment in the *LaGrand* case (see footnote 119 above), ICJ indicated that a breach of the notification requirement in article 36 of the Vienna Convention on Consular Relations, leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction "by taking account of the violation of the rights set forth in the Convention" (p. 514, para. 125). This would be a form of restitution which took into account the limited character of the rights in issue.

[488] See article 35 (*b*) and commentary.

[489] See article 31 and commentary.

[490] See article 37, paragraph 3, and commentary.

[491] For example, the *Mélanie Lachenal* case (UNRIAA, vol. XIII (Sales No. 64.V.3), p. 117, at pp. 130–131 (1954)), where compensation was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution would require difficult internal procedures. See also paragraph (4) of the commentary to article 35.

case when it said that the responsible State was under "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible". The Court went on to add that "[t]he impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution".[492] It can be seen in operation in the cases where tribunals have considered compensation only after concluding that, for one reason or another, restitution could not be effected.[493] Despite the difficulties restitution may encounter in practice, States have often insisted upon claiming it in preference to compensation. Indeed, in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation.

(4) On the other hand, there are often situations where restitution is not available or where its value to the injured State is so reduced that other forms of reparation take priority. Questions of election as between different forms of reparation are dealt with in the context of Part Three.[494] But quite apart from valid election by the injured State or other entity, the possibility of restitution may be practically excluded, e.g. because the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason. Indeed, in some cases tribunals have inferred from the terms of the *compromis* or the positions of the parties what amounts to a discretion to award compensation rather than restitution. For example, in the *Walter Fletcher Smith* case, the arbitrator, while maintaining that restitution should be appropriate in principle, interpreted the *compromis* as giving him a discretion to award compensation and did so in "the best interests of the parties, and of the public".[495] In the *Aminoil* arbitration, the parties agreed that restoration of the *status quo ante* following the annulment of the concession by the Kuwaiti decree would be impracticable.[496]

(5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an individual arrested in its territory,[497] the restitution of ships[498] or other types of property,[499] including documents, works of art, share certificates, etc.[500] The term "juridical restitution" is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law,[501] the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner[502] or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.[503] In some cases, both material and juridical restitution may be involved.[504] In others, an international court or tribunal can, by determining the legal position with binding force for the parties, award what amounts to restitution under another form.[505] The term "restitution" in article 35 thus

[492] *Factory at Chorzów, Merits* (see footnote 34 above), p. 48.

[493] See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote 44 above), pp. 621–625 and 651–742; *Religious Property Expropriated by Portugal*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 7 (1920); *Walter Fletcher Smith*, *ibid*., vol. II (Sales No. 1949.V.1), p. 913, at p. 918 (1929); and *Heirs of Lebas de Courmont*, *ibid*., vol. XIII (Sales No. 64.V.3), p. 761, at p. 764 (1957).

[494] See articles 43 and 45 and commentaries.

[495] *Walter Fletcher Smith* (see footnote 493 above). In the *Greek Telephone Company* case, the arbitral tribunal, while ordering restitution, asserted that the responsible State could provide compensation instead for "important State reasons" (see J. G. Wetter and S. M. Schwebel, "Some little known cases on concessions", BYBIL, *1964*, vol. 40, p. 216, at p. 221.

[496] *Government of Kuwait* v. *American Independent Oil Company (Aminoil)* ILR, vol. 66, p. 519, at p. 533 (1982).

[497] Examples of material restitution involving persons include the *"Trent"* (1861) and *"Florida"* (1864) incidents, both involving the arrest of individuals on board ships (Moore, *Digest*, vol. VII, pp. 768 and 1090–1091), and the *United States Diplomatic and Consular Staff in Tehran* case in which ICJ ordered Iran to immediately release every detained United States national (see footnote 59 above), pp. 44–45.

[498] See, e.g., the *"Giaffarieh"* incident (1886) which originated in the capture in the Red Sea by an Egyptian warship of four merchant ships from Massawa under Italian registry, Società Italiana per l'Organizzazione Internazionale–Consiglio Nazionale delle Ricerche, *La prassi italiana di diritto internazionale*, 1st series (Dobbs Ferry, NY., Oceana, 1970), vol. II, pp. 901–902.

[499] For example, *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at pp. 36–37, where ICJ decided in favour of a Cambodian claim which included restitution of certain objects removed from the area and the temple by Thai authorities. See also the *Hôtel Métropole* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 219 (1950); the *Ottoz* case, *ibid*., p. 240 (1950); and the *Hénon* case, *ibid*., p. 248 (1951).

[500] In the *Bužau-Nehoiaşi Railway* case, an arbitral tribunal provided for the restitution to a German company of shares in a Romanian railway company, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1839 (1939).

[501] For cases where the existence of a law itself amounts to a breach of an international obligation, see paragraph (12) of the commentary to article 12.

[502] For example, the *Martini* case, UNRIAA, vol. II (Sales No. 1949. V.1), p. 975 (1930).

[503] In the *Bryan-Chamorro Treaty* case (*Costa Rica* v. *Nicaragua*), the Central American Court of Justice decided that "the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action" (*Anales de la Corte de Justicia Centroamericana* (San José, Costa Rica), vol. VI, Nos. 16–18 (December 1916–May 1917), p. 7); and AJIL, vol. 11, No. 3 (1917), p. 674, at p. 696; see also page 683.

[504] Thus, PCIJ held that Czechoslovakia was "bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question" (*Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (see footnote 481 above)).

[505] In the *Legal Status of Eastern Greenland* case, PCIJ decided that "the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid" (*Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22, at p. 75). In the case of the *Free Zones of Upper Savoy and the District of Gex* (see footnote 79 above), the Court decided that France "must withdraw its customs line in accordance with

(*Continued on next page.*)

has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.

(6) What may be required in terms of restitution will often depend on the content of the primary obligation which has been breached. Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.[506] Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.

(7) The obligation to make restitution is not unlimited. In particular, under article 35 restitution is required "provided and to the extent that" it is neither materially impossible nor wholly disproportionate. The phrase "provided and to the extent that" makes it clear that restitution may be only partially excluded, in which case the responsible State will be obliged to make restitution to the extent that this is neither impossible nor disproportionate.

(8) Under article 35, *subparagraph* (a), restitution is not required if it is "materially impossible". This would apply where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. On the other hand, restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility.

(9) Material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations. In the *Forests of Central Rhodopia* case, the claimant was entitled to only a share in the forestry operations and no claims had been brought by the other participants. The forests were not in the same condition as at the time of their wrongful taking, and detailed inquiries would be necessary to determine their condition. Since the taking, third parties had acquired rights to them. For a combination of these reasons, restitution was denied.[507] The case supports a broad understanding of the impossibility of granting restitution, but it concerned questions of property rights within the legal system of the responsible State.[508] The position may be different where the rights and obligations in issue arise directly on the international plane. In that context restitution plays a particularly important role.

(10) In certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially possible. This was true in the *Forests of Central Rhodopia* case. But whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.

(11) A second exception, dealt with in article 35, *subparagraph* (b), involves those cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the responsible State. Specifically, restitution may not be required if it would "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation". This applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach. It is thus based on considerations of equity and reasonableness,[509] although with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution. The balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability.

### *Article 36. Compensation*

**1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.**

**2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.**

*Commentary*

(1) Article 36 deals with compensation for damage caused by an internationally wrongful act, to the extent that such damage is not made good by restitution. The notion of "damage" is defined inclusively in article 31, paragraph 2, as any damage whether material or moral.[510] Article 36, paragraph 2, develops this definition by specifying that compensation shall cover any financially

(*Footnote 505 continued.*)

the provisions of the said treaties and instruments; and that this régime must continue in force so long as it has not been modified by agreement between the Parties" (p. 172). See also F. A. Mann, "The consequences of an international wrong in international and municipal law", BYBIL, *1976–1977*, vol. 48, p. 1, at pp. 5–8.

[506] See above, paragraph (8) of the commentary to article 30.

[507] *Forests of Central Rhodopia* (see footnote 382 above), p. 1432.

[508] For questions of restitution in the context of State contract arbitration, see *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic* (1977), ILR, vol. 53, p. 389, at pp. 507–508, para. 109; *BP Exploration Company (Libya) Limited* v. *Government of the Libyan Arab Republic*, *ibid*., p. 297, at p. 354 (1974); and *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic ibid*., vol. 62, p. 141, at p. 200 (1977).

[509] See, e.g., J. H. W. Verzijl, *International Law in Historical Perspective* (Leiden, Sijthoff, 1973), part VI, p. 744, and the position taken by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in *Yearbook ... 1969*, vol. II, p. 149.

[510] See paragraphs (5) to (6) and (8) of the commentary to article 31.

assessable damage including loss of profits so far as this is established in the given case. The qualification "financially assessable" is intended to exclude compensation for what is sometimes referred to as "moral damage" to a State, i.e. the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37.

(2) Of the various forms of reparation, compensation is perhaps the most commonly sought in international practice. In the *Gabčíkovo-Nagymaros Project* case, ICJ declared: "It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it."[511] It is equally well established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.[512]

(3) The relationship with restitution is clarified by the final phrase of article 36, paragraph 1 ("insofar as such damage is not made good by restitution"). Restitution, despite its primacy as a matter of legal principle, is frequently unavailable or inadequate. It may be partially or entirely ruled out either on the basis of the exceptions expressed in article 35, or because the injured State prefers compensation or for other reasons. Even where restitution is made, it may be insufficient to ensure full reparation. The role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered.[513] As the Umpire said in the *"Lusitania"* case:

> The fundamental concept of "damages" is ... reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.[514]

Likewise, the role of compensation was articulated by PCIJ in the following terms:

> Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[515]

Entitlement to compensation for such losses is supported by extensive case law, State practice and the writings of jurists.

(4) As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.[516] Thus, compensation generally consists of a monetary payment, though it may sometimes take the form, as agreed, of other forms of value. It is true that monetary payments may be called for by way of satisfaction under article 37, but they perform a function distinct from that of compensation. Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach. Satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly approximate and notional way.[517]

(5) Consistently with other provisions of Part Two, article 36 is expressed as an obligation of the responsible State to provide reparation for the consequences flowing from the commission of an internationally wrongful act.[518] The scope of this obligation is delimited by the phrase "any financially assessable damage", that is, any damage which is capable of being evaluated in financial terms. Financially assessable damage encompasses both damage suffered by the State itself (to its property or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act) as well as damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection.

(6) In addition to ICJ, international tribunals dealing with issues of compensation include the International Tribunal for the Law of the Sea,[519] the Iran-United States Claims Tribunal,[520] human rights courts and other

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[511] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 81, para. 152. See also the statement by PCIJ in *Factory at Chorzów*, *Merits* (footnote 34 above), declaring that "[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity" (p. 27).

[512] *Factory at Chorzów, Jurisdiction* (see footnote 34 above); *Fisheries Jurisdiction* (see footnote 432 above), pp. 203–205, paras. 71–76; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 142.

[513] *Factory at Chorzów, Merits* (see footnote 34 above), pp. 47–48.

[514] UNRIAA, vol. VII (Sales No. 1956.V.5), p. 32, at p. 39 (1923).

[515] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47, cited and applied, *inter alia*, by ITLOS in the case of the *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, *Judgment, ITLOS Reports 1999* , p. 65, para. 170 (1999). See also *Papamichalopoulos and Others* v. *Greece (article 50), Eur. Court H.R., Series A, No. 330–B*, para. 36 (1995); *Velásquez Rodríguez* (footnote 63 above), pp. 26–27 and 30–31; and *Tippetts, Abbett, McCarthy, Stratton* v. *TAMS-AFFA Consulting Engineers of Iran*, Iran-U.S. C.T.R., vol. 6, p. 219, at p. 225 (1984).

[516] In the *Velásquez Rodriguez*, Compensatory Damages case, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989)). See also *Letelier and Moffitt*, ILR, vol. 88, p. 727 (1992), concerning the assassination in Washington, D.C., by Chilean agents of a former Chilean minister; the *compromis* excluded any award of punitive damages, despite their availability under United States law. On punitive damages, see also N. Jørgensen, "A reappraisal of punitive damages in international law", BYBIL, *1997*, vol. 68, pp. 247–266; and S. Wittich, "Awe of the gods and fear of the priests: punitive damages in the law of State responsibility", *Austrian Review of International and European Law*, vol. 3, No. 1 (1998), p. 101.

[517] See paragraph (3) of the commentary to article 37.

[518] For the requirement of a sufficient causal link between the internationally wrongful act and the damage, see paragraphs (11) to (13) of the commentary to article 31.

[519] For example, the *M/V "Saiga"* case (see footnote 515 above), paras. 170–177.

[520] The Iran-United States Claims Tribunal has developed a substantial jurisprudence on questions of assessment of damage and the valuation of expropriated property. For reviews of the tribunal's juris-

(*Continued on next page.*)

bodies,[521] and ICSID tribunals under the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[522] Other compensation claims have been settled by agreement, normally on a without prejudice basis, with the payment of substantial compensation a term of the agreement.[523] The rules and principles developed by these bodies in assessing compensation can be seen as manifestations of the general principle stated in article 36.

(7) As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a concern to reach an equitable and acceptable outcome.[524] The following examples illustrate the types of damage that may be compensable and the methods of quantification that may be employed.

(8) Damage to the State as such might arise out of the shooting down of its aircraft or the sinking of its ships, attacks on its diplomatic premises and personnel, damage caused to other public property, the costs incurred in responding to pollution damage, or incidental damage arising, for example, out of the need to pay pensions and medical expenses for officials injured as the result of a wrongful act. Such a list cannot be comprehensive and the categories of compensable injuries suffered by States are not closed.

(9) In the *Corfu Channel* case, the United Kingdom sought compensation in respect of three heads of damage: replacement of the destroyer *Saumarez*, which became a total loss, the damage sustained by the destroyer *"Volage"*, and the damage resulting from the deaths and injuries of naval personnel. ICJ entrusted the assessment to expert inquiry. In respect of the destroyer *Saumarez*, the Court found that "the true measure of compensation" was "the replacement cost of the [destroyer] at the time of its loss" and held that the amount of compensation claimed by the British Government (£ 700,087) was justified. For the damage to the destroyer *"Volage"*, the experts had reached a slightly lower figure than the £ 93,812 claimed by the United Kingdom, "explained by the necessarily approximate nature of the valuation, especially as regards stores and equipment". In addition to the amounts awarded for the damage to the two destroyers, the Court upheld the United Kingdom's claim for £ 50,048 representing "the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, etc".[525]

(10) In the *M/V "Saiga" (No. 2)* case, Saint Vincent and the Grenadines sought compensation from Guinea following the wrongful arrest and detention of a vessel registered in Saint Vincent and the Grenadines, the *"Saiga"*, and its crew. ITLOS awarded compensation of US$ 2,123,357 with interest. The heads of damage compensated included, *inter alia*, damage to the vessel, including costs of repair, losses suffered with respect to charter hire of the vessel, costs related to the detention of the vessel, and damages for the detention of the captain, members of the crew and others on board the vessel. Saint Vincent and the Grenadines had claimed compensation for the violation of its rights in respect of ships flying its flag occasioned by the arrest and detention of the *"Saiga"*; however, the tribunal considered that its declaration that Guinea acted wrongfully in arresting the vessel in the circumstances, and in using excessive force, constituted adequate reparation.[526] Claims regarding the loss of registration revenue due to the illegal arrest of the vessel and for the expenses resulting from the time lost by officials in dealing with the arrest and detention of the ship and its crew were also unsuccessful. In respect of the former, the tribunal held that Saint Vincent and the Grenadines failed to produce supporting evidence. In respect of the latter, the tribunal considered that such expenses were not recoverable since they were incurred in the exercise of the normal functions of a flag State.[527]

(11) In a number of cases, payments have been directly negotiated between injured and injuring States following wrongful attacks on ships causing damage or sinking of the vessel, and in some cases, loss of life and injury among the crew.[528] Similar payments have been negotiated where damage is caused to aircraft of a State, such as

(*Footnote 520 continued.*)

prudence on these subjects, see, *inter alia*, Aldrich, *op. cit.* (footnote 357 above), chaps. 5–6 and 12; C. N. Brower and J. D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Martinus Nijhoff, 1998), chaps. 14–18; M. Pellonpää, "Compensable claims before the Tribunal: expropriation claims", *The Iran-United States Claims Tribunal*: *Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. MaGraw, eds. (Irvington-on-Hudson, Transnational, 1998), pp. 185–266; and D. P. Stewart, "Compensation and valuation issues", *ibid*., pp. 325–385.

[521] For a review of the practice of such bodies in awarding compensation, see D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999), pp. 214–279.

[522] ICSID tribunals have jurisdiction to award damages or other remedies in cases concerning investments arising between States parties and nationals. Some of these claims involve direct recourse to international law as a basis of claim. See, e.g., *Asian Agricultural Products Limited* v. *Republic of Sri Lanka*, *ICSID Reports* (Cambridge University Press, 1997), vol. 4, p. 245 (1990).

[523] See, e.g., *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote 230 above), and for the Court's order of discontinuance following the settlement, *ibid., Order* (footnote 232 above); *Passage through the Great Belt (Finland* v. *Denmark)*, *Order of 10 September 1992, I.C.J. Reports 1992*, p. 348 (order of discontinuance following settlement); and *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America), Order of 22 February 1996, I.C.J. Reports 1996,* p. 9 (order of discontinuance following settlement).

[524] See Aldrich, *op. cit.* (footnote 357 above), p. 242. See also Graefrath, "Responsibility and damages caused: relationship between responsibility and damages" (footnote 454 above), p. 101; L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938); Gray, *op. cit.* (footnote 432 above), pp. 33–34; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, 1939); and M. Iovane, *La riparazione nella teoria e nella prassi dell'illecito internazionale* (Milan, Giuffrè, 1990).

[525] *Corfu Channel, Assessment of Amount of Compensation* (see footnote 473 above), p. 249.

[526] The *M/V "Saiga"* case (see footnote 515 above), para. 176.

[527] *Ibid*., para. 177.

[528] See the payment by Cuba to the Bahamas for the sinking by Cuban aircraft on the high seas of a Bahamian vessel, with loss of life among the crew (RGDIP, vol. 85 (1981), p. 540), the payment of compensation by Israel for an attack in 1967 on the USS *Liberty*, with loss of life and injury among the crew (*ibid.*, p. 562), and the payment by Iraq of US$ 27 million for the 37 deaths which occurred in May 1987 when Iraqi aircraft severely damaged the USS *Stark* (AJIL, vol. 83, No. 3 (July 1989), p. 561).

the "full and final settlement" agreed between the Islamic Republic of Iran and the United States following a dispute over the destruction of an Iranian aircraft and the killing of its 290 passengers and crew.[529]

(12) Agreements for the payment of compensation are also frequently negotiated by States following attacks on diplomatic premises, whether in relation to damage to the embassy itself[530] or injury to its personnel.[531] Damage caused to other public property, such as roads and infrastructure, has also been the subject of compensation claims.[532] In many cases, these payments have been made on an *ex gratia* or a without prejudice basis, without any admission of responsibility.[533]

(13) Another situation in which States may seek compensation for damage suffered by the State as such is where costs are incurred in responding to pollution damage. Following the crash of the Soviet *Cosmos 954* satellite on Canadian territory in January 1978, Canada's claim for compensation for expenses incurred in locating, recovering, removing and testing radioactive debris and cleaning up affected areas was based "jointly and separately on (a) the relevant international agreements … and (b) general principles of international law".[534] Canada asserted that it was applying "the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty".[535] The claim was eventually settled in April 1981 when the parties agreed on an *ex gratia* payment of Can$ 3 million (about 50 per cent of the amount claimed).[536]

(14) Compensation claims for pollution costs have been dealt with by UNCC in the context of assessing Iraq's liability under international law "for any direct loss, damage—including environmental damage and the depletion of natural resources … as a result of its unlawful invasion and occupation of Kuwait".[537] The UNCC Governing Council decision 7 specifies various heads of damage encompassed by "environmental damage and the depletion of natural resources".[538]

(15) In cases where compensation has been awarded or agreed following an internationally wrongful act that causes or threatens environmental damage, payments have been directed to reimbursing the injured State for expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in the value of polluted property.[539] However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc.—sometimes referred to as "non-use values") is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.

(16) Within the field of diplomatic protection, a good deal of guidance is available as to appropriate compensation standards and methods of valuation, especially as concerns personal injury and takings of, or damage to, tangible property. It is well established that a State may seek compensation in respect of personal injuries suffered by its officials or nationals, over and above any direct injury it may itself have suffered in relation to the same event. Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as "moral damage" in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life. No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the *"Lusitania"* case.[540] The umpire considered that international law provides compensation for mental

[529] *Aerial Incident of 3 July 1988* (see footnote 523 above) (order of discontinuance following settlement). For the settlement agreement itself, see the General Agreement on the Settlement of Certain International Court of Justice and Tribunal Cases (1996), attached to the Joint Request for Arbitral Award on Agreed Terms, Iran-U.S. C.T.R., vol. 32, pp. 213–216 (1996).

[530] See, e.g., the Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia concerning the losses incurred by the Government of the United Kingdom and by British nationals as a result of the disturbances in Indonesia in September 1963 (1 December 1966) for the payment by Indonesia of compensation for, *inter alia*, damage to the British Embassy during mob violence (*Treaty Series No. 34 (1967)*) (London, HM Stationery Office) and the payment by Pakistan to the United States of compensation for the sacking of the United States Embassy in Islamabad in 1979 (RGDIP, vol. 85 (1981), p. 880).

[531] See, e.g., Claim of Consul *Henry R. Myers (United States* v. *Salvador)* (1890), *Papers relating to the Foreign Relations of the United States*, pp. 64–65; (1892), pp. 24–44 and 49–51; (1893), pp. 174–179, 181–182 and 184; and Whiteman, *Damages in International Law* (footnote 347 above), pp. 80–81.

[532] For examples, see Whiteman, *Damages in International Law* (footnote 347 above), p. 81.

[533] See, e.g., the United States-China agreement providing for an *ex gratia* payment of US$ 4.5 million, to be given to the families of those killed and to those injured in the bombing of the Chinese Embassy in Belgrade on 7 May 1999, AJIL, vol. 94, No. 1 (January 2000), p. 127.

[534] The claim of Canada against the Union of Soviet Socialist Republics for damage caused by *Cosmos 954*, 23 January 1979 (see footnote 459 above), pp. 899 and 905.

[535] *Ibid*., p. 907.

[536] Protocol between Canada and the Union of Soviet Socialist Republics in respect of the claim for damages caused by the Satellite "Cosmos 954" (Moscow, 2 April 1981), United Nations, *Treaty Series*, vol. 1470, No. 24934, p. 269. See also ILM, vol. 20, No. 3 (May 1981), p. 689.

[537] Security Council resolution 687 (1991), para. 16 (see footnote 461 above).

[538] Decision 7 of 16 March 1992, Criteria for additional categories of claims (S/AC.26/1991/7/Rev.1), para 35.

[539] See the decision of the arbitral tribunal in the *Trail Smelter* case (footnote 253 above), p. 1911, which provided compensation to the United States for damage to land and property caused by sulphur dioxide emissions from a smelter across the border in Canada. Compensation was assessed on the basis of the reduction in value of the affected land.

[540] See footnote 514 above. International tribunals have frequently granted pecuniary compensation for moral injury to private parties. For example, the *Chevreau* case (see footnote 133 above) (English translation in AJIL, vol. 27, No. 1 (January 1933), p. 153); the *Gage* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 226 (1903); the *Di Caro* case, *ibid*., vol. X (Sales No. 60.V.4), p. 597 (1903); and the *Heirs of Jean Maninat* case, *ibid*., p. 55 (1903).

suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation, such injuries being "very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated …".[541]

(17) International courts and tribunals have undertaken the assessment of compensation for personal injury on numerous occasions. For example, in the *M/V "Saiga"* case, [542] the tribunal held that Saint Vincent and the Grenadines' entitlement to compensation included damages for injury to the crew, their unlawful arrest, detention and other forms of ill-treatment.

(18) Historically, compensation for personal injury suffered by nationals or officials of a State arose mainly in the context of mixed claims commissions dealing with State responsibility for injury to aliens. Claims commissions awarded compensation for personal injury both in cases of wrongful death and deprivation of liberty. Where claims were made in respect of wrongful death, damages were generally based on an evaluation of the losses of the surviving heirs or successors, calculated in accordance with the well-known formula of Umpire Parker in the *"Lusitania"* case:

> Estimate the amounts (*a*) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (*b*) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (*c*) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.[543]

In cases of deprivation of liberty, arbitrators sometimes awarded a set amount for each day spent in detention.[544] Awards were often increased when abusive conditions of confinement accompanied the wrongful arrest and imprisonment, resulting in particularly serious physical or psychological injury.[545]

(19) Compensation for personal injury has also been dealt with by human rights bodies, in particular the European Court of Human Rights and the Inter-American Court of Human Rights. Awards of compensation encompass material losses (loss of earnings, pensions, medical expenses, etc.) and non-material damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment. Hitherto, amounts of compensation or damages awarded or recommended by these bodies have been modest.[546] Nonetheless, the decisions of human rights bodies on compensation draw on principles of reparation under general international law.[547]

(20) In addition to a large number of lump-sum compensation agreements covering multiple claims,[548] property claims of nationals arising out of an internationally wrongful act have been adjudicated by a wide range of *ad hoc* and standing tribunals and commissions, with reported cases spanning two centuries. Given the diversity of adjudicating bodies, the awards exhibit considerable variability.[549] Nevertheless, they provide useful principles to guide the determination of compensation under this head of damage.

(21) The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses.

(22) Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the "fair market value" of the property lost.[550] The method used to

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[541] *"Lusitania"* (see footnote 514 above), p. 40.

[542] See footnote 515 above.

[543] *"Lusitania"* (see footnote 514 above), p. 35.

[544] For example, the *"Topaze"* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 387, at p. 389 (1903); and the *Faulkner* case, *ibid*., vol. IV (Sales No. 1951.V.1), p. 67, at p. 71 (1926).

[545] For example, the *William McNeil* case, *ibid*., vol. V (Sales No. 1952.V.3), p. 164, at p. 168 (1931).

[546] See the review by Shelton, *op. cit.* (footnote 521 above), chaps. 8–9; A. Randelzhofer and C. Tomuschat, eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague, Martinus Nijhoff, 1999); and R. Pisillo Mazzeschi, "La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione europea", *La Comunità internazionale*, vol. 53, No. 2 (1998), p. 215.

[547] See, e.g., the decision of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case (footnote 63 above), pp. 26–27 and 30–31. Cf. *Papamichalopoulos* (footnote 515 above).

[548] See, e.g., R. B. Lillich and B. H. Weston, *International Claims*: *Their Settlement by Lump Sum Agreements* (Charlottesville, University Press of Virginia, 1975); and B. H. Weston, R. B. Lillich and D. J. Bederman, *International Claims*: *Their Settlement by Lump Sum Agreements, 1975–1995* (Ardsley, N.Y., Transnational, 1999).

[549] Controversy has persisted in relation to expropriation cases, particularly over standards of compensation applicable in the light of the distinction between lawful expropriation of property by the State on the one hand, and unlawful takings on the other, a distinction clearly drawn by PCIJ in *Factory at Chorzów, Merits* (footnote 34 above), p. 47. In a number of cases, tribunals have employed the distinction to rule in favour of compensation for lost profits in cases of unlawful takings (see, e.g., the observations of the arbitrator in *Libyan American Oil Company (LIAMCO)* (footnote 508 above), pp. 202–203; and also the *Aminoil* arbitration (footnote 496 above), p. 600, para. 138; and *Amoco International Finance Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 15, p. 189, at p. 246, para. 192 (1987)). Not all cases, however, have drawn a distinction between the applicable compensation principles based on the lawfulness or unlawfulness of the taking. See, e.g., the decision of the Iran-United States Claims Tribunal in *Phillips Petroleum* (footnote 164 above), p. 122, para. 110. See also *Starrett Housing Corporation* v. *Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 16, p. 112 (1987), where the tribunal made no distinction in terms of the lawfulness of the taking and its award included compensation for lost profits.

[550] See *American International Group, Inc*. v. *The Islamic Republic of Iran*, which stated that, under general international law, "the valuation should be made on the basis of the fair market value of the shares", Iran-U.S. C.T.R., vol. 4, p. 96, at p. 106 (1983). In *Starrett Housing Corporation* (see footnote 549 above), the tribunal accepted its expert's concept of fair market value "as the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat" (p. 201). See also the Guidelines on the Treatment of Foreign Direct Investment, which state in paragraph 3 of part IV that compensation "will be deemed 'adequate' if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known", World Bank, *Legal Framework*

assess "fair market value", however, depends on the nature of the asset concerned. Where the property in question or comparable property is freely traded on an open market, value is more readily determined. In such cases, the choice and application of asset-based valuation methods based on market data and the physical properties of the assets is relatively unproblematic, apart from evidentiary difficulties associated with long outstanding claims.[551] Where the property interests in question are unique or unusual, for example, art works or other cultural property,[552] or are not the subject of frequent or recent market transactions, the determination of value is more difficult. This may be true, for example, in respect of certain business entities in the nature of a going concern, especially if shares are not regularly traded.[553]

(23) Decisions of various *ad hoc* tribunals since 1945 have been dominated by claims in respect of nationalized business entities. The preferred approach in these cases has been to examine the assets of the business, making allowance for goodwill and profitability, as appropriate. This method has the advantage of grounding compensation as much as possible in some objective assessment of value linked to the tangible asset backing of the business. The value of goodwill and other indicators of profitability may be uncertain, unless derived from information provided by a recent sale or acceptable arms-length offer. Yet, for profitable business entities where the whole is greater than the sum of the parts, compensation would be incomplete without paying due regard to such factors.[554]

(24) An alternative valuation method for capital loss is the determination of net book value, i.e. the difference between the total assets of the business and total liabilities as shown on its books. Its advantages are that the figures can be determined by reference to market costs, they are normally drawn from a contemporaneous record, and they are based on data generated for some other purpose than supporting the claim. Accordingly, net book value (or some variant of this method) has been employed to assess the value of businesses. The limitations of the method lie in the reliance on historical figures, the use of accounting principles which tend to undervalue assets, especially in periods of inflation, and the fact that the purpose for which the figures were produced does not take account of the compensation context and any rules specific to it. The balance sheet may contain an entry for goodwill, but the reliability of such figures depends upon their proximity to the moment of an actual sale.

(25) In cases where a business is not a going concern,[555] so-called "break-up", "liquidation" or "dissolution" value is generally employed. In such cases, no provision is made for value over and above the market value of the individual assets. Techniques have been developed to construct, in the absence of actual transactions, hypothetical values representing what a willing buyer and willing seller might agree.[556]

(26) Since 1945, valuation techniques have been developed to factor in different elements of risk and probability.[557] The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets. Although developed as a tool for assessing commercial value, it can also be useful in the context of calculating value for compensation purposes.[558] But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a

*for the Treatment of Foreign Investment* (Washington, D.C., 1992), vol. II, p. 41. Likewise, according to article 13, paragraph 1, of the Energy Charter Treaty, compensation for expropriation "shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation".

[551] Particularly in the case of lump-sum settlements, agreements have been concluded decades after the claims arose. See, e.g., the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics concerning the Settlement of Mutual Financial and Property Claims arising before 1939 of 15 July 1986 (*Treaty Series*, No. 65 (1986)) (London, HM Stationery Office) concerning claims dating back to 1917 and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China concerning the Settlement of Mutual Historical Property Claims of 5 June 1987 (*Treaty Series*, No. 37 (1987), *ibid*.) in respect of claims arising in 1949. In such cases, the choice of valuation method was sometimes determined by availability of evidence.

[552] See Report and recommendations made by the panel of Commissioners concerning part two of the first instalment of individual claims for damages above US$ 100 000 (category "D" claims), 12 March 1998 (S/AC.26/1998/3), paras. 48–49, where UNCC considered a compensation claim in relation to the taking of the claimant's Islamic art collection by Iraqi military personnel.

[553] Where share prices provide good evidence of value, they may be utilized, as in *INA Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 8, p. 373 (1985).

[554] Early claims recognized that even where a taking of property was lawful, compensation for a going concern called for something more than the value of the property elements of the business. The American-Mexican Claims Commission, in rejecting a claim for lost profits in the case of a lawful taking, stated that payment for property elements would be "augmented by the existence of those elements which constitute a going concern": *Wells Fargo and Company (Decision No. 22–B)* (1926), American-Mexican Claims Commission (Washington, D.C., United States Government Printing Office, 1948), p. 153 (1926). See also decision No. 9 of the UNCC Governing Council in "Propositions and conclusions on compensation for business losses: types of damages and their valuation" (S/AC.26/1992/9), para. 16.

[555] For an example of a business found not to be a going concern, see *Phelps Dodge Corp.* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 10, p. 121 (1986), where the enterprise had not been established long enough to demonstrate its viability. In *SEDCO, Inc.* v. *National Iranian Oil Co.*, the claimant sought dissolution value only, *ibid*., p. 180 (1986).

[556] The hypothetical nature of the result is discussed in *Amoco International Finance Corporation* (see footnote 549 above), at pp. 256–257, paras. 220–223.

[557] See, for example, the detailed methodology developed by UNCC for assessing Kuwaiti corporate claims (report and recommendations made by the panel of Commissioners concerning the first instalment of "E4" claims, 19 March 1999 (S/AC.26/1999/4), paras. 32–62) and claims filed on behalf of non-Kuwaiti corporations and other business entities, excluding oil sector, construction/engineering and export guarantee claims (report and recommendations made by the panel of Commissioners concerning the third instalment of "E2" claims, 9 December 1999 (S/AC.26/1999/22)).

[558] The use of the discounted cash flow method to assess capital value was analysed in some detail in *Amoco International Finance Corporation* (see footnote 549 above); *Starrett Housing Corporation* (*ibid.*); *Phillips Petroleum Company Iran* (see footnote 164 above); and *Ebrahimi (Shahin Shaine)* v. *Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 30, p. 170 (1994).

cautious approach to the use of the method. Hence, although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.[559] A particular concern is the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits.[560]

(27) *Paragraph 2* of article 36 recognizes that in certain cases compensation for loss of profits may be appropriate. International tribunals have included an award for loss of profits in assessing compensation: for example, the decisions in the *Cape Horn Pigeon* case[561] and *Sapphire International Petroleums Ltd.* v. *National Iranian Oil Company*.[562] Loss of profits played a role in the *Factory at Chorzów* case itself, PCIJ deciding that the injured party should receive the value of property by way of damages not as it stood at the time of expropriation but at the time of indemnification.[563] Awards for loss of profits have also been made in respect of contract-based lost profits in *Libyan American Oil Company (LIAMCO)*[564] and in some ICSID arbitrations.[565] Nevertheless, lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.[566] When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future projections are made. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.[567] This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.[568]

(28) Three categories of loss of profits may be distinguished: first, lost profits from income-producing property during a period when there has been no interference with title as distinct from temporary loss of use; secondly, lost profits from income-producing property between the date of taking of title and adjudication;[569] and thirdly, lost future profits in which profits anticipated after the date of adjudication are awarded.[570]

(29) The first category involves claims for loss of profits due to the temporary loss of use and enjoyment of the income-producing asset.[571] In these cases there is no interference with title and hence in the relevant period the loss compensated is the income to which the claimant was entitled by virtue of undisturbed ownership.

(30) The second category of claims relates to the unlawful taking of income-producing property. In such cases

[559] See, e.g., *Amoco* (footnote 549 above); *Starrett Housing Corporation* (*ibid.*); and *Phillips Petroleum Company Iran* (footnote 164 above). In the context of claims for lost profits, there is a corresponding preference for claims to be based on past performance rather than forecasts. For example, the UNCC guidelines on valuation of business losses in decision 9 (see footnote 554 above) state: "The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future" (para. 19).

[560] See, e.g., *Ebrahimi* (footnote 558 above), p. 227, para. 159.

[561] *Navires* (see footnote 222 above) (*Cape Horn Pigeon* case), p. 63 (1902) (including compensation for lost profits resulting from the seizure of an American whaler). Similar conclusions were reached in the *Delagoa Bay Railway* case, Martens, *op. cit.* (footnote 441 above), vol. XXX, p. 329 (1900); Moore, *History and Digest*, vol. II, p. 1865 (1900); the *William Lee* case (footnote 139 above), pp. 3405–3407; and the *Yuille Shortridge and Co.* case *(Great Britain* v. *Portugal)*, Lapradelle–Politis, *op. cit.* (*ibid*.), vol. II, p. 78 (1861). Contrast the decisions in the *Canada* case *(United States of America* v. *Brazil)*, Moore, *History and Digest*, vol. II, p. 1733 (1870) and the *Lacaze* case (footnote 139 above).

[562] ILR, vol. 35, p. 136, at pp. 187 and 189 (1963).

[563] *Factory at Chorzów, Merits* (see footnote 34 above), pp. 47–48 and 53.

[564] *Libyan American Oil Company (LIAMCO)* (see footnote 508 above), p. 140.

[565] See, e.g., *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, *First Arbitration* (1984); *Annulment* (1986); *Resubmitted case* (1990), *ICSID Reports* (Cambridge, Grotius, 1993), vol. 1, p. 377; and *AGIP SpA* v. *the Government of the People's Republic of the Congo*, *ibid*., p. 306 (1979).

[566] According to the arbitrator in the *Shufeldt* case (see footnote 87 above), "the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative" (p. 1099). See also *Amco Asia Corporation and Others* (footnote 565 above), where it was stated that "non-speculative profits" were recoverable (p. 612, para. 178). UNCC has also stressed the requirement for claimants to provide "clear and convincing evidence of ongoing and expected profitability" (see report and recommendations made by the panel of Commissioners concerning the first instalment of "E3" claims, 17 December 1998 (S/AC.26/1998/13), para. 147). In assessing claims for lost profits on construction contracts, Panels have generally required that the claimant's calculation take into account the risk inherent in the project (*ibid*., para. 157; report and recommendations made by the panel of Commissioners concerning the fourth instalment of "E3" claims, 30 September 1999 (S/AC.26/1999/14), para. 126).

[567] In considering claims for future profits, the UNCC panel dealing with the fourth instalment of "E3" claims expressed the view that in order for such claims to warrant a recommendation, "it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e. profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded" (S/AC.26/1999/14), para. 140 (see footnote 566 above).

[568] According to Whiteman, "in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible" (*Damages in International Law* (Washington, D.C., United States Government Printing Office, 1943), vol. III, p. 1837).

[569] This is most commonly associated with the deprivation of property, as opposed to wrongful termination of a contract or concession. If restitution were awarded, the award of lost profits would be analogous to cases of temporary dispossession. If restitution is not awarded, as in the *Factory at Chorzów, Merits* (see footnote 34 above) and *Norwegian Shipowners' Claims* (footnote 87 above), lost profits may be awarded up to the time when compensation is made available as a substitute for restitution.

[570] Awards of lost future profits have been made in the context of a contractually protected income stream, as in *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, *First Arbitration*; *Annulment; Resubmitted case* (see footnote 565 above), rather than on the basis of the taking of income-producing property. In the UNCC report and recommendations on the second instalment of "E2" claims, dealing with reduced profits, the panel found that losses arising from a decline in business were compensable even though tangible property was not affected and the businesses continued to operate throughout the relevant period (S/AC.26/1999/6, para. 76).

[571] Many of the early cases concern vessels seized and detained. In the *"Montijo"*, an American vessel seized in Panama, the Umpire allowed a sum of money per day for loss of the use of the vessel (see footnote 117 above). In the *"Betsey"*, compensation was awarded not only for the value of the cargo seized and detained, but also for demurrage for the period representing loss of use: Moore, *International Adjudications* (New York, Oxford University Press, 1933) vol. V, p. 47, at p. 113.

lost profits have been awarded for the period up to the time of adjudication. In the *Factory at Chorzów* case,[572] this took the form of re-invested income, representing profits from the time of taking to the time of adjudication. In the *Norwegian Shipowners' Claims* case,[573] lost profits were similarly not awarded for any period beyond the date of adjudication. Once the capital value of income-producing property has been restored through the mechanism of compensation, funds paid by way of compensation can once again be invested to re-establish an income stream. Although the rationale for the award of lost profits in these cases is less clearly articulated, it may be attributed to a recognition of the claimant's continuing beneficial interest in the property up to the moment when potential restitution is converted to a compensation payment.[574]

(31) The third category of claims for loss of profits arises in the context of concessions and other contractually protected interests. Again, in such cases, lost future income has sometimes been awarded.[575] In the case of contracts, it is the future income stream which is compensated, up to the time when the legal recognition of entitlement ends. In some contracts this is immediate, e.g. where the contract is determinable at the instance of the State,[576] or where some other basis for contractual termination exists. Or it may arise from some future date dictated by the terms of the contract itself.

(32) In other cases, lost profits have been excluded on the basis that they were not sufficiently established as a legally protected interest. In the *Oscar Chinn* case[577] a monopoly was not accorded the status of an acquired right. In the *Asian Agricultural Products* case,[578] a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings. Claims for lost profits are also subject to the usual range of limitations on the recovery of damages, such as causation, remoteness, evidentiary requirements and accounting principles, which seek to discount speculative elements from projected figures.

(33) If loss of profits are to be awarded, it is inappropriate to award interest under article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation.

(34) It is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach.[579] Such expenses may be associated, for example, with the displacement of staff or the need to store or sell undelivered products at a loss.

### *Article 37. Satisfaction*

**1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.**

**2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.**

**3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.**

*Commentary*

(1) Satisfaction is the third form of reparation which the responsible State may have to provide in discharge of its obligation to make full reparation for the injury caused by an internationally wrongful act. It is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation. The rather exceptional character of the remedy of satisfaction, and its relationship to the principle of full reparation, are emphasized by the phrase "insofar as [the injury] cannot be made good by restitution or compensation". It is only in those cases where those two forms have not provided full reparation that satisfaction may be required.

(2) Article 37 is divided into three paragraphs, each dealing with a separate aspect of satisfaction. Paragraph 1 addresses the legal character of satisfaction and the types of injury for which it may be granted. Paragraph 2 describes, in a non-exhaustive fashion, some modalities of satisfaction. Paragraph 3 places limitations on the obliga-

[572] *Factory at Chorzów, Merits* (see footnote 34 above).

[573] *Norwegian Shipowners' Claims* (see footnote 87 above).

[574] For the approach of UNCC in dealing with loss of profits claims associated with the destruction of businesses following the Iraqi invasion of Kuwait, see S/AC.26/1999/4 (footnote 557 above), paras. 184–187.

[575] In some cases, lost profits were not awarded beyond the date of adjudication, though for reasons unrelated to the nature of the income-producing property. See, e.g., *Robert H. May (United States* v. *Guatemala)*, 1900 For. Rel. 648; and Whiteman, *Damages in International Law*, vol. III (footnote 568 above), pp. 1704 and 1860, where the concession had expired. In other cases, circumstances giving rise to *force majeure* had the effect of suspending contractual obligations: see, e.g., *Gould Marketing, Inc.* v. *Ministry of Defence of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 6, p. 272 (1984); and *Sylvania Technical Systems, Inc.* v. *The Government of the Islamic Republic of Iran, ibid*., vol. 8, p. 298 (1985). In the *Delagoa Bay Railway* case (footnote 561 above), and in *Shufeldt* (see footnote 87 above), lost profits were awarded in respect of a concession which had been terminated. In *Sapphire International Petroleums Ltd.* (see footnote 562 above), p. 136; *Libyan American Oil Company (LIAMCO)* (see footnote 508 above), p. 140; and *Amco Asia Corporation and Others* v. *The Republic of Indonesia, First Arbitration; Annulment; Resubmitted case* (see footnote 565 above), awards of lost profits were also sustained on the basis of contractual relationships.

[576] As in *Sylvania Technical Systems, Inc.* (see the footnote above).

[577] See footnote 385 above.

[578] See footnote 522 above.

[579] Compensation for incidental expenses has been awarded by UNCC (report and recommendations on the first instalment of "E2" claims (S/AC.26/1998/7) where compensation was awarded for evacuation and relief costs (paras. 133, 153 and 249), repatriation (para. 228), termination costs (para. 214), renovation costs (para. 225) and expenses in mitigation (para. 183)), and by the Iran-United States Claims Tribunal (see *General Electric Company* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 26, p. 148, at pp. 165–169, paras. 56–60 and 67–69 (1991), awarding compensation for items resold at a loss and for storage costs).

tion to give satisfaction, having regard to former practices in cases where unreasonable forms of satisfaction were sometimes demanded.

(3) In accordance with paragraph 2 of article 31, the injury for which a responsible State is obliged to make full reparation embraces "any damage, whether material or moral, caused by the internationally wrongful act of a State". Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.

(4) The availability of the remedy of satisfaction for injury of this kind, sometimes described as "non-material injury",[580] is well established in international law. The point was made, for example, by the tribunal in the *"Rainbow Warrior"* arbitration:

> There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities.[581]

State practice also provides many instances of claims for satisfaction in circumstances where the internationally wrongful act of a State causes non-material injury to another State. Examples include situations of insults to the symbols of the State, such as the national flag,[582] violations of sovereignty or territorial integrity,[583] attacks on ships or aircraft,[584] ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons[585] and violations of the premises of embassies or consulates or of the residences of members of the mission.[586]

(5) *Paragraph 2* of article 37 provides that satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. The forms of satisfaction listed in the article are no more than examples. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.[587] Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or injury,[588] a trust fund to manage compensation payments in the interests of the beneficiaries, disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act[589] or the award of symbolic damages for non-pecuniary injury.[590] Assurances or guarantees of non-repetition, which are dealt with in the articles in the context of cessation, may also amount to a form of satisfaction.[591] Paragraph 2 does not attempt to list all the possibilities, but neither is it intended to exclude them. Moreover, the order of the modalities of satisfaction in paragraph 2 is not intended to reflect any hierarchy or preference. Paragraph 2 simply gives examples which are not listed in order of appropriateness or seriousness. The appropriate mode, if any, will be determined having regard to the circumstances of each case.

(6) One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal. The utility of declaratory relief as a form of satisfaction in the case of non-material injury to a State was affirmed by ICJ in the *Corfu Channel* case, where the Court, after finding unlawful a minesweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:

> [T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.

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[580] See C. Dominicé, "De la réparation constructive du préjudice immatériel souffert par un État", *L'ordre juridique international entre tradition et innovation: recueil d'études* (Paris, Presses Universitaires de France, 1997), p. 349, at p. 354.

[581] *"Rainbow Warrior"* (see footnote 46 above), pp. 272–273, para. 122.

[582] Examples are the *Magee* case (Whiteman, *Damages in International Law*, vol. I (see footnote 347 above), p. 64 (1874)), the *Petit Vaisseau* case (*La prassi italiana di diritto internazionale*, 2nd series (see footnote 498 above), vol. III, No. 2564 (1863)) and the case that arose from the insult to the French flag in Berlin in 1920 (C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), pp. 186–187).

[583] As occurred in the *"Rainbow Warrior"* arbitration (see footnote 46 above).

[584] Examples include the attack carried out in 1961 against a Soviet aircraft transporting President Brezhnev by French fighter planes over the international waters of the Mediterranean (RGDIP, vol. 65 (1961), p. 603); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (*ibid*., vol. 84 (1980), pp. 1078–1079).

[585] See F. Przetacznik, "La responsabilité internationale de l'État à raison des préjudices de caractère moral et politique causés à un autre État", RGDIP, vol. 78 (1974), p. 919, at p. 951.

[586] Examples include the attack by demonstrators in 1851 on the Spanish Consulate in New Orleans (Moore, *Digest*, vol. VI, p. 811, at p. 812), and the failed attempt of two Egyptian policemen, in 1888, to intrude upon the premises of the Italian Consulate at Alexandria (*La prassi italiana di diritto internazionale*, 2nd series (see footnote 498 above), vol. III, No. 2558). Also see cases of apologies and expressions of regret following demonstrations in front of the French Embassy in Belgrade in 1961 (RGDIP, vol. 65 (1961), p. 610), and the fires in the libraries of the United States Information Services in Cairo in 1964 (*ibid*., vol. 69 (1965), pp. 130–131) and in Karachi in 1965 (*ibid*., vol. 70 (1966), pp. 165–166).

[587] In the *"Rainbow Warrior"* arbitration the tribunal, while rejecting New Zealand's claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation "to assist [the parties] in putting an end to the present unhappy affair". Specifically, it recommended that France contribute US$ 2 million to a fund to be established "to promote close and friendly relations between the citizens of the two countries" (see footnote 46 above), p. 274, paras. 126–127. See also L. Migliorino, "Sur la déclaration d'illicéité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du Rainbow Warrior", RGDIP, vol. 96 (1992), p. 61.

[588] For example, the United States naval inquiry into the causes of the collision between an American submarine and the Japanese fishing vessel, the *Ehime Maru*, in waters off Honolulu, *The New York Times*, 8 February 2001, sect. 1, p. 1.

[589] Action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest of International Law*, vol. 8, pp. 742–743) and in the case of the killing of two United States officers in Tehran (RGDIP, vol. 80 (1976, p. 257).

[590] See, e.g., the cases *"I'm Alone"*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1609 (1935); and "*Rainbow Warrior"* (footnote 46 above).

[591] See paragraph (11) of the commentary to article 30.

This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.[592]

This has been followed in many subsequent cases.[593] However, while the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought. What the Court did in the *Corfu Channel* case was to use a declaration as a form of satisfaction in a case where Albania had sought no other form. Moreover, such a declaration has further advantages: it should be clear and self-contained and will by definition not exceed the scope or limits of satisfaction referred to in paragraph 3 of article 37. A judicial declaration is not listed in paragraph 2 only because it must emanate from a competent third party with jurisdiction over a dispute, and the articles are not concerned to specify such a party or to deal with issues of judicial jurisdiction. Instead, article 37 specifies the acknowledgement of the breach by the responsible State as a modality of satisfaction.

(7) Another common form of satisfaction is an apology, which may be given verbally or in writing by an appropriate official or even the Head of State. Expressions of regret or apologies were required in the *"I'm Alone"*,[594] *Kellett*[595] and *"Rainbow Warrior"*[596] cases, and were offered by the responsible State in the *Consular Relations*[597] and *LaGrand*[598] cases. Requests for, or offers of, an apology are a quite frequent feature of diplomatic practice and the tender of a timely apology, where the circumstances justify it, can do much to resolve a dispute. In other circumstances an apology may not be called for, e.g. where a case is settled on an *ex gratia* basis, or it may be insufficient. In the *LaGrand* case the Court considered that "an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties".[599]

(8) Excessive demands made under the guise of "satisfaction" in the past[600] suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of States.[601] In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. *Paragraph 3* of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; and secondly, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term "humiliating" is imprecise, but there are certainly historical examples of demands of this kind.

### *Article 38. Interest*

**1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.**

**2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.**

*Commentary*

(1) Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case. For this reason the term "principal sum" is used in article 38 rather than "compensation". Nevertheless, an award of interest may be required in some cases in order to provide full reparation for the injury caused by an internationally wrongful act, and it is normally the subject of separate treatment in claims for reparation and in the awards of tribunals.

(2) As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgement or award concerning, the claim and to the extent that it is necessary to ensure full reparation.[602] Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence.[603] In the *S.S. "Wimbledon"*, PCIJ awarded simple interest at 6 per cent as from the date of judgment, on the basis that interest was only payable "from the moment when the amount of the sum due

[592] *Corfu Channel, Merits* (see footnote 35 above), p. 35, repeated in the operative part (p. 36).

[593] For example, *"Rainbow Warrior"* (see footnote 46 above), p. 273, para. 123.

[594] See footnote 590 above.

[595] Moore, *Digest*, vol. V, p. 44 (1897).

[596] See footnote 46 above.

[597] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248. For the text of the United States' apology, see United States Department of State, Text of Statement Released in Asunción, Paraguay; Press statement by James P. Rubin, Spokesman, 4 November 1998. For the order discontinuing proceedings of 10 November 1998, see *I.C.J. Reports 1998*, p. 426.

[598] See footnote 119 above.

[599] *LaGrand*, *Merits* (*ibid.*), para. 123.

[600] For example, the joint note presented to the Chinese Government in 1900 following the Boxer uprising and the demand by the Conference of Ambassadors against Greece in the *Tellini* affair in 1923: see C. Eagleton, *op. cit.* (footnote 582 above), pp. 187–188.

[601] The need to prevent the abuse of satisfaction was stressed by early writers such as J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt*, 3rd ed. (Nördlingen, Beck, 1878); French translation by M. C. Lardy, *Le droit international codifié*, 5th rev. ed. (Paris, Félix Alcan, 1895), pp. 268–269.

[602] Thus, interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses* arbitration (footnote 182 above), pp. 252–253.

[603] See, e.g., the awards of interest made in the *Illinois Central Railroad Co. (U.S.A.)* v. *United Mexican States* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 134 (1926); and the *Lucas* case, ILR, vol. 30, p. 220 (1966); see also administrative decision No. III of the United States-Germany Mixed Claims Commission, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 66 (1923).

has been fixed and the obligation to pay has been established".[604]

(3) Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and where the injury was to the State itself.[605] The experience of the Iran-United States Claims Tribunal is worth noting. In *The Islamic Republic of Iran* v. *The United States of America (Case A–19)*, the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related "to the exercise … of the discretion accorded to them in deciding each particular case".[606] On the issue of principle the tribunal said:

> Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by [a]rticle V of the Claims Settlement Declaration to decide claims "on the basis of respect for law". In doing so, it has regularly treated interest, where sought, as forming an integral part of the "claim" which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as "compensation for damages suffered due to delay in payment". … Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*. Given that the power to award interest is inherent in the Tribunal's authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered.[607]

The tribunal has awarded interest at a different and slightly lower rate in respect of intergovernmental claims.[608] It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.[609]

(4) Decision 16 of the Governing Council of the United Nations Compensation Commission deals with the question of interest. It provides:

> 1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.
>
> 2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.
>
> 3. Interest will be paid after the principal amount of awards.[610]

This provision combines a decision in principle in favour of interest where necessary to compensate a claimant with flexibility in terms of the application of that principle. At the same time, interest, while a form of compensation, is regarded as a secondary element, subordinated to the principal amount of the claim.

(5) Awards of interest have also been envisaged by human rights courts and tribunals, even though the compensation practice of these bodies is relatively cautious and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time.[611]

(6) In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.[612] Some national court decisions have also dealt with issues of interest under international law,[613] although more often questions of interest are dealt with as part of the law of the forum.

(7) Although the trend of international decisions and practice is towards greater availability of interest as an aspect of full reparation, an injured State has no automatic entitlement to the payment of interest. The awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation. This approach is compatible with the tradition of various legal systems as well as the practice of international tribunals.

(8) An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example, the Iran-United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In *R.J. Reynolds Tobacco Co.* v. *The Government of the Islamic Republic of Iran*, the tribunal failed to find:

> any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, "[t]here are few rules within the scope of the

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[604] See footnote 34 above. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to "the present financial situation of the world and … the conditions prevailing for public loans".

[605] In the *M/V "Saiga"* case (see footnote 515 above), ITLOS awarded interest at different rates in respect of different categories of loss (para. 173).

[606] *The Islamic Republic of Iran* v. *The United States of America*, Iran-U.S. C.T.R., vol. 16, p. 285, at p. 290 (1987). Aldrich, *op. cit.* (see footnote 357 above), pp. 475–476, points out that the practice of the three Chambers has not been entirely uniform.

[607] *The Islamic Republic of Iran* v. *The United States of America* (see footnote 606 above), pp. 289–290.

[608] See C. N. Brower and J. D. Brueschke, *op. cit*. (footnote 520 above), pp. 626–627, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

[609] See the detailed analysis of Chamber Three in *McCollough and Company, Inc.* v. *Ministry of Post, Telegraph and Telephone*, Iran-U.S. C.T.R., vol. 11, p. 3, at pp. 26–31 (1986).

[610] Awards of interest, decision of 18 December 1992 (S/AC.26/1992/16).

[611] See, e.g., the *Velásquez Rodríguez*, Compensatory Damages case (footnote 516 above), para. 57. See also *Papamichalopoulos* (footnote 515 above), para. 39, where interest was payable only in respect of the pecuniary damage awarded. See further D. Shelton, *op. cit.* (footnote 521 above), pp. 270–272.

[612] See, e.g., the Foreign Compensation (People's Republic of China), Order, Statutory Instrument No. 2201 (1987) (London, HM Stationery Office), para. 10, giving effect to the settlement Agreement between the United Kingdom and China (footnote 551 above).

[613] See, e.g., *McKesson Corporation* v. *The Islamic Republic of Iran*, United States District Court for the District of Columbia, 116 F, Supp. 2d 13 (2000).

subject of damages in international law that are better settled than the one that compound interest is not allowable" … Even though the term "all sums" could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest. [614]

Consistent with this approach, the tribunal has gone behind contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit "wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts due at its disposal".[615] The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the *British Claims in the Spanish Zone of Morocco* case:

the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other … is unanimous … in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest.[616]

The same is true for compound interest in respect of State-to-State claims.

(9) Nonetheless, several authors have argued for a reconsideration of this principle, on the ground that "compound interest reasonably incurred by the injured party should be recoverable as an item of damage".[617] This view has also been supported by arbitral tribunals in some cases.[618] But given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.

(10) The actual calculation of interest on any principal sum payable by way of reparation raises a complex of issues concerning the starting date (date of breach,[619] date on which payment should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). There is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable.[620] In practice, the circumstances of each case and the conduct of the parties strongly affect the outcome. There is wisdom in the Iran-United States Claims Tribunal's observation that such matters, if the parties cannot resolve them, must be left "to the exercise … of the discretion accorded to [individual tribunals] in deciding each particular case".[621] On the other hand, the present unsettled state of practice makes a general provision on the calculation of interest useful. Accordingly, article 38 indicates that the date from which interest is to be calculated is the date when the principal sum should have been paid. Interest runs from that date until the date the obligation to pay is fulfilled. The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.

(11) Where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery. A capital sum cannot be earning interest *and* notionally employed in earning profits at one and the same time. However, interest may be due on the profits which would have been earned but which have been withheld from the original owner.

(12) Article 38 does not deal with post-judgement or moratory interest. It is only concerned with interest that goes to make up the amount that a court or tribunal should award, i.e. compensatory interest. The power of a court or tribunal to award post-judgement interest is a matter of its procedure.

### *Article 39. Contribution to the injury*

**In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought**.

#### *Commentary*

(1) Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially

[614] Iran-U.S. C.T.R., vol. 7, p. 181, at pp. 191–192 (1984), citing Whiteman, *Damages in International Law*, vol. III (see footnote 568 above), p. 1997.

[615] *Anaconda-Iran, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 13, p. 199, at p. 235 (1986). See also Aldrich, *op. cit.* (footnote 357 above), pp. 477–478.

[616] *British Claims in the Spanish Zone of Morocco* (see footnote 44 above), p. 650. Cf. the *Aminoil* arbitration (footnote 496 above), where the interest awarded was compounded for a period without any reason being given. This accounted for more than half of the total final award (p. 613, para. 178 (5)).

[617] F. A. Mann, "Compound interest as an item of damage in international law", *Further Studies in International Law* (Oxford, Clarendon Press, 1990), p. 377, at p. 383.

[618] See, e.g., *Compañía del Desarrollo de Santa Elena, S.A.* v. *Republic of Costa Rica*, case No. ARB/96/1, *ICSID Reports* (Cambridge, Grotius, 2002), vol. 5, final award (17 February 2000), paras. 103–105.

[619] Using the date of the breach as the starting date for calculation of the interest term is problematic as there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run. The date of formal demand was taken as the relevant date in the *Russian Indemnity* case (see footnote 354 above), p. 442, by analogy from the general position in European legal systems. In any event, failure to make a timely claim for payment is relevant in deciding whether to allow interest.

[620] See, e.g., J. Y. Gotanda, *Supplemental Damages in Private International Law* (The Hague, Kluwer, 1998), p. 13. It should be noted that a number of Islamic countries, influenced by the sharia, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example, payment of interest is prohibited by the Iranian Constitution, articles 43 and 49, but the Guardian Council has held that this injunction does not apply to "foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited" (*ibid*., pp. 38–40, with references).

[621] *The Islamic Republic of Iran* v. *The United States of America (Case No. A-19)* (see footnote 606 above).

contributed to the damage by some wilful or negligent act or omission. Its focus is on situations which in national law systems are referred to as "contributory negligence", "comparative fault", "faute de la victime", etc.[622]

(2) Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury—but nothing more—arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach.

(3) In the *LaGrand* case, ICJ recognized that the conduct of the claimant State could be relevant in determining the form and amount of reparation. There, Germany had delayed in asserting that there had been a breach and in instituting proceedings. The Court noted that "Germany may be criticized for the manner in which these proceedings were filed and for their timing", and stated that it would have taken this factor, among others, into account "had Germany's submission included a claim for indemnification".[623]

(4) The relevance of the injured State's contribution to the damage in determining the appropriate reparation is widely recognized in the literature[624] and in State practice.[625] While questions of an injured State's contribution to the damage arise most frequently in the context of compensation, the principle may also be relevant to other forms of reparation. For example, if a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition.

(5) Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights.[626] While the notion of a negligent action or omission is not qualified, e.g. by a requirement that the negligence should have reached the level of being "serious" or "gross", the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case.[627] The phrase "account shall be taken" indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.

(6) The wilful or negligent action or omission which contributes to the damage may be that of the injured State or "any person or entity in relation to whom reparation is sought". This phrase is intended to cover not only the situation where a State claims on behalf of one of its nationals in the field of diplomatic protection, but also any other situation in which one State invokes the responsibility of another State in relation to conduct primarily affecting some third party. Under articles 42 and 48, a number of different situations can arise where this may be so. The underlying idea is that the position of the State seeking reparation should not be more favourable, so far as reparation in the interests of another is concerned, than it would be if the person or entity in relation to whom reparation is sought were to bring a claim individually.

## CHAPTER III

## SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

### *Commentary*

(1) Chapter III of Part Two is entitled "Serious breaches of obligations under peremptory norms of general international law". It sets out certain consequences of specific types of breaches of international law, identified by reference to two criteria: first, they involve breaches of obligations under peremptory norms of general international law; and secondly, the breaches concerned are in themselves serious, having regard to their scale or character. Chapter III contains two articles, the first defining its scope of application (art. 40), the second spelling out the legal consequences entailed by the breaches coming within the scope of the chapter (art. 41).

(2) Whether a qualitative distinction should be recognized between different breaches of international law has been the subject of a major debate.[628] The issue was underscored by ICJ in the *Barcelona Traction* case, when it said that:

[622] See C. von Bar, *op. cit*. (footnote 315 above), pp. 544–569.

[623] *LaGrand, Judgment* (see footnote 119 above), at p. 487, para. 57, and p. 508, para. 116. For the relevance of delay in terms of loss of the right to invoke responsibility, see article 45, subparagraph (*b*), and commentary.

[624] See, e.g., B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages" (footnote 454 above) and B. Bollecker-Stern, *op. cit.* (footnote 454 above), pp. 265–300.

[625] In the *Delagoa Bay Railway* case (see footnote 561 above), the arbitrators noted that: "[a]ll the circumstances that can be adduced against the concessionaire company and for the Portuguese Government mitigate the latter's liability and warrant ... a reduction in reparation." In *S.S. "Wimbledon"* (see footnote 34 above), p. 31, a question arose as to whether there had been any contribution to the injury suffered as a result of the ship harbouring at Kiel for some time, following refusal of passage through the Kiel Canal, before taking an alternative course. PCIJ implicitly acknowledged that the captain's conduct could affect the amount of compensation payable, although it held that the captain had acted reasonably in the circumstances. For other examples, see Gray, *op. cit.* (footnote 432 above), p. 23.

[626] This terminology is drawn from article VI, paragraph 1, of the Convention on International Liability for Damage Caused by Space Objects.

[627] It is possible to envisage situations where the injury in question is entirely attributable to the conduct of the victim and not at all to that of the "responsible" State. Such situations are covered by the general requirement of proximate cause referred to in article 31, rather than by article 39. On questions of mitigation of damage, see paragraph (11) of the commentary to article 31.

[628] For full bibliographies, see M. Spinedi, "Crimes of State: bibliography", *International Crimes of State*, J. H. H. Weiler, A. Cassese and M. Spinedi, eds. (Berlin, De Gruyter, 1989), pp. 339–353; and N. H. B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford University Press, 2000) pp. 299–314.

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.[629]

The Court was there concerned to contrast the position of an injured State in the context of diplomatic protection with the position of all States in respect of the breach of an obligation towards the international community as a whole. Although no such obligation was at stake in that case, the Court's statement clearly indicates that for the purposes of State responsibility certain obligations are owed to the international community as a whole, and that by reason of "the importance of the rights involved" all States have a legal interest in their protection.

(3) On a number of subsequent occasions the Court has taken the opportunity to affirm the notion of obligations to the international community as a whole, although it has been cautious in applying it. In the *East Timor* case, the Court said that "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable".[630] At the preliminary objections stage of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, it stated that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*":[631] this finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound by the Convention.

(4) A closely related development is the recognition of the concept of peremptory norms of international law in articles 53 and 64 of the 1969 Vienna Convention. These provisions recognize the existence of substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty.[632]

(5) From the first it was recognized that these developments had implications for the secondary rules of State responsibility which would need to be reflected in some way in the articles. Initially, it was thought this could be done by reference to a category of "international crimes of State", which would be contrasted with all other cases of internationally wrongful acts ("international delicts").[633] There has been, however, no development of penal consequences for States of breaches of these fundamental norms. For example, the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms. In accordance with article 34, the function of damages is essentially compensatory.[634] Overall, it remains the case, as the International Military Tribunal said in 1946, that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[635]

(6) In line with this approach, despite the trial and conviction by the Nuremberg and Tokyo Military Tribunals of individual government officials for criminal acts committed in their official capacity, neither Germany nor Japan were treated as "criminal" by the instruments creating these tribunals.[636] As to more recent international practice, a similar approach underlies the establishment of the *ad hoc* tribunals for Yugoslavia and Rwanda by the Security Council. Both tribunals are concerned only with the prosecution of individuals.[637] In its decision relating to a *subpoena duces tecum* in the *Blaskić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia stated that "[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems".[638] The Rome Statute of the International Criminal Court likewise establishes jurisdiction over the "most serious crimes of concern to the international community as a whole" (preamble), but limits this jurisdiction to "natural persons" (art. 25, para. 1). The same article specifies that no provision of the Statute "relating to individual criminal responsibility shall affect the responsibility of States under international law" (para. 4).[639]

(7) Accordingly, the present articles do not recognize the existence of any distinction between State "crimes" and "delicts" for the purposes of Part One. On the other hand, it is necessary for the articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which ICJ has given of

[629] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33. See M. Ragazzi, *The Concept of International Obligations* Erga Omnes (Oxford, Clarendon Press, 1997).

[630] See footnote 54 above.

[631] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (see footnote 54 above), p. 616, para. 31.

[632] See article 26 and commentary.

[633] See *Yearbook … 1976*, vol. II (Part Two), pp. 95–122, especially paras. (6)–(34). See also paragraph (5) of the commentary to article 12.

[634] See paragraph (4) of the commentary to article 36.

[635] International Military Tribunal (Nuremberg), judgement of 1 October 1946, reprinted in AJIL (see footnote 321 above), p. 221.

[636] This despite the fact that the London Charter of 1945 specifically provided for the condemnation of a "group or organization" as "criminal"; see Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, annex, United Nations, Treaty Series, vol. 82, No. 251, p. 279, arts. 9 and 10.

[637] See, respectively, articles 1 and 6 of the statute of the International Tribunal for the Former Yugoslavia; and articles 1 and 7 of the statute of the International Tribunal for Rwanda (footnote 257 above).

[638] *Prosecutor* v. *Blaskić*, International Tribunal for the Former Yugoslavia, Case IT-95-14-AR 108 *bis*, ILR, vol. 110, p. 688, at p. 698, para. 25 (1997). Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (footnote 54 above), in which neither of the parties treated the proceedings as being criminal in character. See also paragraph (6) of the commentary to article 12.

[639] See also article 10: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

obligations towards the international community as a whole[640] all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the 1969 Vienna Convention[641] involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance—i.e. in terms of the present articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole. The first of these propositions is the concern of the present chapter; the second is dealt with in article 48.

### *Article 40. Application of this chapter*

**1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.**

**2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.**

#### *Commentary*

(1) Article 40 serves to define the scope of the breaches covered by the chapter. It establishes two criteria in order to distinguish "serious breaches of obligations under peremptory norms of general international law" from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfil both criteria.

(2) The first criterion relates to the character of the obligation breached. In order to give rise to the application of this chapter, a breach must concern an obligation arising under a peremptory norm of general international law. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is:

> 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.

The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.[642]

(3) It is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the 1969 Vienna Convention. The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.

(4) Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory. This is supported, for example, by the Commission's commentary to what was to become article 53,[643] uncontradicted statements by Governments in the course of the Vienna Conference on the Law of Treaties,[644] the submissions of both parties in the *Military and Paramilitary Activities in and against Nicaragua* case and the Court's own position in that case.[645] There also seems to be widespread agreement with other examples listed in the Commission's commentary to article 53: viz. the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among Governments as to the peremptory character of these prohibitions at the Vienna Conference. As to the peremptory character of the prohibition against

[640] According to ICJ, obligations *erga omnes* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination": *Barcelona Traction* (see footnote 25 above), at p. 32, para. 34. See also *East Timor* (footnote 54 above); *Legality of the Threat or Use of Nuclear Weapons* (*ibid.*); and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (*ibid.*).

[641] The Commission gave the following examples of treaties which would violate the article due to conflict with a peremptory norm of general international law, or a rule of *jus cogens*: "(*a*) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (*b*) a treaty contemplating the performance of any other act criminal under international law, and (*c*) a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate … treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples", *Yearbook … 1966*, vol. II, p. 248.

[642] For further discussion of the requirements for identification of a norm as peremptory, see paragraph (5) of the commentary to article 26, with selected references to the case law and literature.

[643] *Yearbook … 1966*, vol. II, pp. 247–249.

[644] In the course of the conference, a number of Governments characterized as peremptory the prohibitions against aggression and the illegal use of force: see *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March to 24 May 1968, summary records of the plenary meeting and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 52nd meeting, paras. 3, 31 and 43; 53rd meeting, paras. 4, 9, 15, 16, 35, 48, 59 and 69; 54th meeting, paras. 9, 41, 46 and 55; 55th meeting, paras. 31 and 42; and 56th meeting, paras. 6, 20, 29 and 51.

[645] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), pp. 100–101, para. 190; see also the separate opinion of magistrate Nagendra Singh (president), p. 153.

genocide, this is supported by a number of decisions by national and international courts.[646]

(5) Although not specifically listed in the Commission's commentary to article 53 of the 1969 Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The peremptory character of this prohibition has been confirmed by decisions of international and national bodies.[647] In the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory.[648] Finally, the obligation to respect the right of self-determination deserves to be mentioned. As the Court noted in the *East Timor* case, "[t]he principle of self-determination ... is one of the essential principles of contemporary international law", which gives rise to an obligation to the international community as a whole to permit and respect its exercise.[649]

(6) It should be stressed that the examples given above may not be exhaustive. In addition, article 64 of the 1969 Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole, as referred to in article 53. The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53.

(7) Apart from its limited scope in terms of the comparatively small number of norms which qualify as peremptory, article 40 applies a further limitation for the purposes of the chapter, viz. that the breach should itself have been "serious". A "serious" breach is defined in paragraph 2 as one which involves "a gross or systematic failure by the responsible State to fulfil the obligation" in question. The word "serious" signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach and it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable. But relatively less serious cases of breach of peremptory norms can be envisaged, and it is necessary to limit the scope of this chapter to the more serious or systematic breaches. Some such limitation is supported by State practice. For example, when reacting against breaches of international law, States have often stressed their systematic, gross or egregious nature. Similarly, international complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, e.g. in terms of the non-applicability of the rule of exhaustion of local remedies.[650]

(8) To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.[651]

(9) Article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the articles to establish new institutional procedures for dealing with individual cases, whether they arise under chapter III of Part Two or otherwise. Moreover, the serious breaches dealt with in this chapter are likely to be addressed by the competent international organizations, including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter of the United Nations.

### *Article 41. Particular consequences of a serious breach of an obligation under this chapter*

**1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.**

[646] See, for example, ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures* (footnote 412 above), pp. 439–440; *Counter-Claims* (footnote 413 above), p. 243; and the District Court of Jerusalem in the *Attorney-General of the Government of Israel* v. *Adolf Eichmann* case, ILR, vol. 36, p. 5 (1961).

[647] Cf. the United States Court of Appeals, Ninth Circuit, in *Siderman de Blake and Others* v. *The Republic of Argentina and Others*, ILR, vol. 103, p. 455, at p. 471 (1992); the United Kingdom Court of Appeal in *Al Adsani* v. *Government of Kuwait and Others*, ILR, vol. 107, p. 536, at pp. 540–541 (1996); and the United Kingdom House of Lords in *Pinochet* (footnote 415 above), pp. 841 and 881. Cf. the United States Court of Appeals, Second Circuit, in *Filartiga* v. *Pena-Irala*, ILR, vol. 77, p. 169, at pp. 177–179 (1980).

[648] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79.

[649] *East Timor* (*ibid.*). See Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex, fifth principle.

[650] See the *Ireland* v. *the United Kingdom* case (footnote 236 above), para. 159; cf., e.g., the procedure established under Economic and Social Council resolution 1503 (XLVIII), which requires a "consistent pattern of gross and reliably attested violations of human rights".

[651] At its twenty-second session, the Commission proposed the following examples as cases denominated as "international crimes":

"(*a*) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

"(*b*) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

"(*c*) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

"(*d*) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."

*Yearbook … 1976*, vol. II (Part Two), pp. 95–96.

**2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.**

**3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.**

*Commentary*

(1) Article 41 sets out the particular consequences of breaches of the kind and gravity referred to in article 40. It consists of three paragraphs. The first two prescribe special legal obligations of States faced with the commission of "serious breaches" in the sense of article 40, the third takes the form of a saving clause.

(2) Pursuant to *paragraph 1* of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.

(3) Neither does paragraph 1 prescribe what measures States should take in order to bring to an end serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation. It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40.

(4) Pursuant to *paragraph 2* of article 41, States are under a duty of abstention, which comprises two obligations, first, not to recognize as lawful situations created by serious breaches in the sense of article 40 and, secondly, not to render aid or assistance in maintaining that situation.

(5) The first of these two obligations refers to the obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches in the sense of article 40.[652] The obligation applies to "situations" created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.

(6) The existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in decisions of ICJ. The principle that territorial acquisitions brought about by the use of force are not valid and must not be recognized found a clear expression during the Manchurian crisis of 1931–1932, when the Secretary of State, Henry Stimson, declared that the United States of America—joined by a large majority of members of the League of Nations—would not:

> admit the legality of any situation de facto nor ... recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the ... sovereignty, the independence or the territorial and administrative integrity of the Republic of China, ... [nor] recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928.[653]

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations affirms this principle by stating unequivocally that States shall not recognize as legal any acquisition of territory brought about by the use of force.[654] As ICJ held in *Military and Paramilitary Activities in and against Nicaragua*, the unanimous consent of States to this declaration "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves".[655]

(7) An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990. Following the Iraqi declaration of a "comprehensive and eternal merger" with Kuwait, the Security Council, in resolution 662 (1990) of 9 August 1990, decided that the annexation had "no legal validity, and is considered null and void", and called upon all States, international organizations and specialized agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as a recognition of it, whether direct or indirect. In fact, no State recognized the

[652] This has been described as "an essential legal weapon in the fight against grave breaches of the basic rules of international law" (C. Tomuschat, "International crimes by States: an endangered species?", *International Law: Theory and Practice — Essays in Honour of Eric Suy*, K. Wellens, ed. (The Hague, Martinus Nijhoff, 1998), p. 253, at p. 259.

[653] Secretary of State's note to the Chinese and Japanese Governments, in Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1940), vol. I, p. 334; endorsed by Assembly resolutions of 11 March 1932, *League of Nations Official Journal*, March 1932, Special Supplement No. 101, p. 87. For a review of earlier practice relating to collective non-recognition, see J. Dugard, *Recognition and the United Nations* (Cambridge, Grotius, 1987), pp. 24–27.

[654] General Assembly resolution 2625 (XXV), annex, first principle.

[655] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 100, para. 188.

legality of the purported annexation, the effects of which were subsequently reversed.

(8) As regards the denial by a State of the right of self-determination of peoples, the advisory opinion of ICJ in the *Namibia* case is similarly clear in calling for a non-recognition of the situation.[656] The same obligations are reflected in the resolutions of the Security Council and General Assembly concerning the situation in Rhodesia[657] and the Bantustans in South Africa.[658] These examples reflect the principle that where a serious breach in the sense of article 40 has resulted in a situation that might otherwise call for recognition, this has nonetheless to be withheld. Collective non-recognition would seem to be a prerequisite for any concerted community response against such breaches and marks the minimum necessary response by States to the serious breaches referred to in article 40.

(9) Under article 41, paragraph 2, no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State. There have been cases where the responsible State has sought to consolidate the situation it has created by its own "recognition". Evidently, the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement. These conclusions are consistent with article 30 on cessation and are reinforced by the peremptory character of the norms in question.[659]

(10) The consequences of the obligation of non-recognition are, however, not unqualified. In the *Namibia* advisory opinion the Court, despite holding that the illegality of the situation was opposable *erga omnes* and could not be recognized as lawful even by States not members of the United Nations, said that:

> the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[660]

Both the principle of non-recognition and this qualification to it have been applied, for example, by the European Court of Human Rights.[661]

(11) The second obligation contained in paragraph 2 prohibits States from rendering aid or assistance in maintaining the situation created by a serious breach in the sense of article 40. This goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act, which are covered by article 16. It deals with conduct "after the fact" which assists the responsible State in maintaining a situation "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law".[662] It extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one. As to the elements of "aid or assistance", article 41 is to be read in connection with article 16. In particular, the concept of aid or assistance in article 16 presupposes that the State has "knowledge of the circumstances of the internationally wrongful act". There is no need to mention such a requirement in article 41, paragraph 2, as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.

(12) In some respects, the prohibition contained in paragraph 2 may be seen as a logical extension of the duty of non-recognition. However, it has a separate scope of application insofar as actions are concerned which would not imply recognition of the situation created by serious breaches in the sense of article 40. This separate existence is confirmed, for example, in the resolutions of the Security Council prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa or Portuguese colonial rule.[663] Just as in the case of the duty of non-recognition, these resolutions would seem to express a general idea applicable to all situations created by serious breaches in the sense of article 40.

(13) Pursuant to *paragraph 3*, article 41 is without prejudice to the other consequences elaborated in Part Two and to possible further consequences that a serious breach in the sense of article 40 may entail. The purpose of this paragraph is twofold. First, it makes it clear that a serious breach in the sense of article 40 entails the legal consequences stipulated for all breaches in chapters I and II of Part Two. Consequently, a serious breach in the sense of article 40 gives rise to an obligation, on behalf of the responsible State, to cease the wrongful act, to continue performance and, if appropriate, to give guarantees and assurances of non-repetition. By the same token, it entails a duty to make reparation in conformity with the rules set out in chapter II of this Part. The incidence of these obligations will no doubt be affected by the gravity of the breach in question, but this is allowed for in the actual language of the relevant articles.

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[656] *Namibia* case (see footnote 176 above), where the Court held that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law" (p. 56, para. 126).

[657] Cf. Security Council resolution 216 (1965) of 12 November 1965.

[658] See, e.g., General Assembly resolution 31/6 A of 26 October 1976, endorsed by the Security Council in its resolution 402 (1976) of 22 December 1976; Assembly resolutions 32/105 N of 14 December 1977 and 34/93 G of 12 December 1979; see also the statements of 21 September 1979 and 15 December 1981 issued by the respective presidents of the Security Council in reaction to the "creation" of Venda and Ciskei (S/13549 and S/14794).

[659] See also paragraph (7) of the commentary to article 20 and paragraph (4) of the commentary to article 45.

[660] *Namibia* case (see footnote 176 above), p. 56, para. 125.

[661] *Loizidou, Merits* (see footnote 160 above), p. 2216; *Cyprus* v. *Turkey* (see footnote 247 above), paras. 89–98.

[662] *Namibia* case (see footnote 176 above), p. 56, para. 126.

[663] See, e.g., Security Council resolutions 218 (1965) of 23 November 1965 on the Portuguese colonies, and 418 (1977) of 4 November 1977 and 569 (1985) of 26 July 1985 on South Africa.

(14) Secondly, paragraph 3 allows for such further consequences of a serious breach as may be provided for by international law. This may be done by the individual primary rule, as in the case of the prohibition of aggression. Paragraph 3 accordingly allows that international law may recognize additional legal consequences flowing from the commission of a serious breach in the sense of article 40. The fact that such further consequences are not expressly referred to in chapter III does not prejudice their recognition in present-day international law, or their further development. In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.

## Part Three

## THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Part Three deals with the implementation of State responsibility, i.e. with giving effect to the obligations of cessation and reparation which arise for a responsible State under Part Two by virtue of its commission of an internationally wrongful act. Although State responsibility arises under international law independently of its invocation by another State, it is still necessary to specify what other States faced with a breach of an international obligation may do, what action they may take in order to secure the performance of the obligations of cessation and reparation on the part of the responsible State. This, sometimes referred to as the *mise-en-oeuvre* of State responsibility, is the subject matter of Part Three. Part Three consists of two chapters. Chapter I deals with the invocation of State responsibility by other States and with certain associated questions. Chapter II deals with countermeasures taken in order to induce the responsible State to cease the conduct in question and to provide reparation.

## Chapter I

## INVOCATION OF THE RESPONSIBILITY OF A STATE

### *Commentary*

(1) Part One of the articles identifies the internationally wrongful act of a State generally in terms of the breach of any international obligation of that State. Part Two defines the consequences of internationally wrongful acts in the field of responsibility as obligations of the responsible State, not as rights of any other State, person or entity. Part Three is concerned with the implementation of State responsibility, i.e. with the entitlement of other States to invoke the international responsibility of the responsible State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33, paragraph 2.

(2) Central to the invocation of responsibility is the concept of the injured State. This is the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act. This concept is introduced in article 42 and various consequences are drawn from it in other articles of this chapter. In keeping with the broad range of international obligations covered by the articles, it is necessary to recognize that a broader range of States may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question. Indeed, in certain situations, all States may have such an interest, even though none of them is individually or specially affected by the breach.[664] This possibility is recognized in article 48. Articles 42 and 48 are couched in terms of the entitlement of States to invoke the responsibility of another State. They seek to avoid problems arising from the use of possibly misleading terms such as "direct" versus "indirect" injury or "objective" versus "subjective" rights.

(3) Although article 42 is drafted in the singular ("an injured State"), more than one State may be injured by an internationally wrongful act and be entitled to invoke responsibility as an injured State. This is made clear by article 46. Nor are articles 42 and 48 mutually exclusive. Situations may well arise in which one State is "injured" in the sense of article 42, and other States are entitled to invoke responsibility under article 48.

(4) Chapter I also deals with a number of related questions: the requirement of notice if a State wishes to invoke the responsibility of another (art. 43), certain aspects of the admissibility of claims (art. 44), loss of the right to invoke responsibility (art. 45), and cases where the responsibility of more than one State may be invoked in relation to the same internationally wrongful act (art. 47).

(5) Reference must also be made to article 55, which makes clear the residual character of the articles. In addition to giving rise to international obligations for States, special rules may also determine which other State or States are entitled to invoke the international responsibility arising from their breach, and what remedies they may seek. This was true, for example, of article 396 of the Treaty of Versailles, which was the subject of the decision in the *S.S. "Wimbledon"* case.[665] It is also true of article 33 of the European Convention on Human Rights. It will be a matter of interpretation in each case whether such provisions are intended to be exclusive, i.e. to apply as a *lex specialis*.

[664] Cf. the statement by ICJ that "all States can be held to have a legal interest" as concerns breaches of obligations *erga omnes*, *Barcelona Traction* (footnote 25 above), p. 32, para. 33, cited in paragraph (2) of the commentary to chapter III of Part Two.

[665] Four States there invoked the responsibility of Germany, at least one of which, Japan, had no specific interest in the voyage of the *S.S. "Wimbledon"* (see footnote 34 above).

### *Article 42. Invocation of responsibility by an injured State*

**A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:**

**(*a*) that State individually; or**

**(*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:**

**(i) specially affects that State; or**

**(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.**

*Commentary*

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the "injured State". It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal,[666] or even the taking of countermeasures. In order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred by a treaty,[667] or it must be considered an injured State. The purpose of article 42 is to define this latter category.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also—as is clear from the opening phrase of article 49—resort to countermeasures in accordance with the rules laid down in chapter II of this Part. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, e.g. under article 48 which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, "A State is entitled as an injured State to invoke the responsibility".

(4) The definition in article 42 is closely modelled on article 60 of the 1969 Vienna Convention, although the scope and purpose of the two provisions are different. Article 42 is concerned with any breach of an international obligation of whatever character, whereas article 60 is concerned with breach of treaties. Moreover, article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty.[668] This is why article 60 is restricted to "material" breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the analogy with article 60 is justified. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty, the right can only be that of the other State party, but in the case of a multilateral treaty article 60, paragraph 2, does not allow every other State to terminate or suspend the treaty for material breach. The other State must be specially affected by the breach, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the 1969 Vienna Convention, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has *vis-à-vis* the other State party (subparagraph (*a*)). Secondly, a State may be specially affected by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (subparagraph (*b*) (i)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by all the other States (subparagraph (*b*) (ii)); this is the so-called "integral" or "inter-

[666] An analogous distinction is drawn by article 27, paragraph 2, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which distinguishes between the bringing of an international claim in the field of diplomatic protection and "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute".

[667] In relation to article 42, such a treaty right could be considered a *lex specialis*: see article 55 and commentary.

[668] Cf. the 1969 Vienna Convention, art. 73.

dependent" obligation.[669] In each of these cases, the possible suspension or termination of the obligation or of its performance by the injured State may be of little value to it as a remedy. Its primary interest may be in the restoration of the legal relationship by cessation and reparation.

(6) Pursuant to *subparagraph* (a) of article 42, a State is "injured" if the obligation breached was owed to it individually. The expression "individually" indicates that in the circumstances, performance of the obligation was owed to that State. This will necessarily be true of an obligation arising under a bilateral treaty between the two States parties to it, but it will also be true in other cases, e.g. of a unilateral commitment made by one State to another. It may be the case under a rule of general international law: thus, for example, rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian State and another. Or it may be true under a multilateral treaty where particular performance is incumbent under the treaty as between one State party and another. For example, the obligation of the receiving State under article 22 of the Vienna Convention on Diplomatic Relations to protect the premises of a mission is owed to the sending State. Such cases are to be contrasted with situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized. It will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of subparagraph (*a*) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an "injured State" in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation *vis-à-vis* another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.[670] If it is established that the beneficiaries of the promise or the stipulation in favour of a third State were intended to acquire actual rights to performance of the obligation in question, they will be injured by its breach. Another example is a binding judgement of an international court or tribunal imposing obligations on one State party to the litigation for the benefit of the other party.[671]

(8) In addition, subparagraph (*a*) is intended to cover cases where the performance of an obligation under a multilateral treaty or customary international law is owed to one particular State. The scope of subparagraph (*a*) in this respect is different from that of article 60, paragraph 1, of the 1969 Vienna Convention, which relies on the formal criterion of bilateral as compared with multilateral treaties. But although a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to " 'bundles' of bilateral relations".[672]

(9) The identification of one particular State as injured by a breach of an obligation under the Vienna Convention on Diplomatic Relations does not exclude that all States parties may have an interest of a general character in compliance with international law and in the continuation of international institutions and arrangements which have been built up over the years. In the *United States Diplomatic and Consular Staff in Tehran* case, after referring to the "fundamentally unlawful character" of the Islamic Republic of Iran's conduct in participating in the detention of the diplomatic and consular personnel, the Court drew:

> the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.[673]

(10) Although discussion of multilateral obligations has generally focused on those arising under multilateral treaties, similar considerations apply to obligations under rules of customary international law. For example, the rules of general international law governing the diplomatic or consular relations between States establish bilateral relations between particular receiving and sending States, and violations of these obligations by a particular receiving State injure the sending State to which performance was owed in the specific case.

(11) *Subparagraph* (b) deals with injury arising from violations of collective obligations, i.e. obligations that apply between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole. The violation of these obligations only injures any particular State if additional requirements are met. In using the expression "group of States", article 42, subparagraph (*b*), does not imply that the group has any separate existence or that it has separate legal personality. Rather, the term is intended to refer to a group of States, consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be

[669] The notion of "integral" obligations was developed by Fitzmaurice as Special Rapporteur on the Law of Treaties: see *Yearbook … 1957*, vol. II, p. 54. The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an "all or nothing" basis. The term "interdependent obligations" may be more appropriate.

[670] Cf. the 1969 Vienna Convention, art. 36.

[671] See, e.g., Article 59 of the Statute of ICJ.

[672] See, e.g., K. Sachariew, "State responsibility for multilateral treaty violations: identifying the 'injured State' and its legal status", *Netherlands International Law Review*, vol. 35, No. 3 (1988), p. 273, at pp. 277–278; B. Simma, "Bilateralism and community interest in the law of State responsibility", *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Y. Dinstein, ed. (Dordrecht, Martinus Nijhoff, 1989), p. 821, at p. 823; C. Annacker, "The legal régime of *erga omnes* obligations in international law", *Austrian Journal of Public and International Law*, vol. 46, No. 2 (1994), p. 131, at p. 136; and D. N. Hutchinson, "Solidarity and breaches of multilateral treaties", BYBIL, *1988*, vol. 59, p. 151, at pp. 154–155.

[673] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 41–43, paras. 89 and 92.

considered for that purpose as making up a community of States of a functional character.

(12) *Subparagraph* (b) (i) stipulates that a State is injured if it is "specially affected" by the violation of a collective obligation. The term "specially affected" is taken from article 60, paragraph (2) (*b*), of the 1969 Vienna Convention. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach. Like article 60, paragraph (2) (*b*), of the 1969 Vienna Convention, subparagraph (*b*) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered "injured". This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, *subparagraph* (b) (ii) deals with a special category of obligations, the breach of which must be considered as affecting *per se* every other State to which the obligation is owed. Article 60, paragraph 2 (*c*), of the 1969 Vienna Convention recognizes an analogous category of treaties, viz. those "of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations". Examples include a disarmament treaty,[674] a nuclear-free zone treaty, or any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others. Under article 60, paragraph 2 (*c*), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially, the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in the termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Antarctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

(15) The articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice, interdependent obligations covered by subparagraph (*b*) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this subparagraph be narrow in its scope. Accordingly, a State is only considered injured under subparagraph (*b*) (ii) if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

### *Article 43. Notice of claim by an injured State*

**1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.**

**2. The injured State may specify in particular:**

**(*a*) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;**

**(*b*) what form reparation should take in accordance with the provisions of Part Two.**

*Commentary*

(1) Article 43 concerns the modalities to be observed by an injured State in invoking the responsibility of another State. The article applies to the injured State as defined in article 42, but States invoking responsibility under article 48 must also comply with its requirements.[675]

(2) Although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, etc. Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence: this is dealt with in article 45.

(3) Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State. It is analogous to article 65 of the 1969 Vienna Convention. Notice under article 43 need not

[674] The example given in the commentary of the Commission to what became article 60: *Yearbook … 1966*, vol. II, p. 255, document A/6309/Rev.1, para. (8).

[675] See article 48, paragraph (3), and commentary.

be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless, an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the articles to specify in detail the form which an invocation of responsibility should take. In practice, claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In the *Certain Phosphate Lands in Nauru* case, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".[676] The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However, the Court also noted that:

> It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position". [677]

The Court summarized the communications between the parties as follows:

> The Court … takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time. [678]

In the circumstances, it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus, *paragraph 2* (a) provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would satisfy the injured State; this may facilitate the resolution of the dispute.

(6) *Paragraph 2* (b) deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,[679] or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.[680] Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, insofar as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In the light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead, it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

### *Article 44. Admissibility of claims*

**The responsibility of a State may not be invoked if:**

**(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;**

**(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.**

*Commentary*

(1) The present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather, they define the conditions for establishing the international responsibility of a State and for the invocation of

[676] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 253, para. 31.

[677] *Ibid*., p. 254, para. 35.

[678] *Ibid*., pp. 254–255, para. 36.

[679] As PCIJ noted in the *Factory at Chorzów, Jurisdiction* (see footnote 34 above), by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents (p. 17).

[680] In the *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 12, ICJ did not accept Denmark's argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark's international obligations. For the terms of the eventual settlement, see M. Koskenniemi, "L'affaire du passage par le Grand-Belt", *Annuaire français de droit international*, vol. 38 (1992), p. 905, at p. 940.

that responsibility by another State or States. Thus, it is not the function of the articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispendence or election as they may affect the jurisdiction of one international tribunal *vis-à-vis* another.[681] By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.

(2) *Subparagraph* (a) provides that the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims. As PCIJ said in the *Mavrommatis Palestine Concessions* case:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.[682]

Subparagraph (*a*) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.[683]

(3) *Subparagraph* (b) provides that when the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.

(4) The local remedies rule was described by a Chamber of the Court in the *ELSI* case as "an important principle of customary international law".[684] In the context of a claim brought on behalf of a corporation of the claimant State, the Chamber defined the rule succinctly in the following terms:

> for 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.[685]

The Chamber thus treated the exhaustion of local remedies as being distinct, in principle, from "the merits of the case".[686]

(5) Only those local remedies which are "available and effective" have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular, there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal. Beyond this, article 44, subparagraph (*b*), does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international law.[687]

### *Article 45. Loss of the right to invoke responsibility*

**The responsibility of a State may not be invoked if:**

**(*a*) the injured State has validly waived the claim;**

**(*b*) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.**

*Commentary*

(1) Article 45 is analogous to article 45 of the 1969 Vienna Convention concerning loss of the right to invoke a ground for invalidating or terminating a treaty. The article deals with two situations in which the right of an injured State or other States concerned to invoke the responsibility of a wrongdoing State may be lost: waiver and acquiescence in the lapse of the claim. In this regard, the position of an injured State as referred to in article 42 and other States concerned with a breach needs to be distinguished. A valid waiver or settlement of the responsibility dispute

[681] For discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), vol. 2, pp. 427–575; and S. Rosenne, *The Law and Practice of the International Court, 1920–1996*, 3rd ed. (The Hague, Martinus Nijhoff, 1997), vol. II, *Jurisdiction*.

[682] *Mavrommatis* (see footnote 236 above), p. 12.

[683] Questions of nationality of claims will be dealt with in detail in the work of the Commission on diplomatic protection. See first report of the Special Rapporteur for the topic "Diplomatic protection" in *Yearbook … 2000*, vol. II (Part One), document A/CN.4/506 and Add.1.

[684] *ELSI* (see footnote 85 above), p. 42, para. 50. See also *Interhandel, Preliminary Objections, I.C.J. Reports 1959*, p. 6, at p. 27. On the exhaustion of local remedies rule generally, see, e.g., C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990); J. Chappez, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doehring, "Local remedies, exhaustion of", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (footnote 409 above), vol. 3, pp. 238–242; and G. Perrin, "La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la Commission du droit international", *Festschrift für Rudolf Bindschedler* (Bern, Stämpfli, 1980), p. 271. On the exhaustion of local remedies rule in relation to violations of human rights obligations, see, e.g., A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press, 1983); and E. Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65–89.

[685] *ELSI* (see footnote 85 above), p. 46, para. 59.

[686] *Ibid*., p. 48, para. 63.

[687] The topic will be dealt with in detail in the work of the Commission on diplomatic protection. See second report of the Special Rapporteur on diplomatic protection in *Yearbook … 2001*, vol. II (Part One), document A/CN.4/514.

between the responsible State and the injured State, or, if there is more than one, all the injured States, may preclude any claim for reparation. Positions taken by individual States referred to in article 48 will not have such an effect.

(2) *Subparagraph* (a) deals with the case where an injured State has waived either the breach itself, or its consequences in terms of responsibility. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State.

(3) In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum corresponding to the capital amount of a loan, without any reference to interest or damages for delay. Turkey having paid the sum demanded, the tribunal held that this conduct amounted to the abandonment of any other claim arising from the loan.[688]

(4) A waiver is only effective if it is validly given. As with other manifestations of State consent, questions of validity can arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter, arising perhaps from a misrepresentation of those facts by the responsible State. The use of the term "valid waiver" is intended to leave to the general law the question of what amounts to a valid waiver in the circumstances.[689] Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.

(5) Although it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal. In the *Certain Phosphate Lands in Nauru* case, it was argued that the Nauruan authorities before independence had waived the rehabilitation claim by concluding an agreement relating to the future of the phosphate industry as well as by statements made at the time of independence. As to the former, the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements were unclear and equivocal. The Court held there had been no waiver, since the conduct in question "did not at any time effect a clear and unequivocal waiver of their claims".[690] In particular, the statements relied on "[n]otwithstanding some ambiguity in the wording … did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations".[691]

(6) Just as it may explicitly waive the right to invoke responsibility, so an injured State may acquiesce in the loss of that right. *Subparagraph* (b) deals with the case where an injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim. The article emphasizes *conduct* of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.

(7) The principle that a State may by acquiescence lose its right to invoke responsibility was endorsed by ICJ in the *Certain Phosphate Lands in Nauru* case, in the following passage:

> The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.[692]

In the *LaGrand* case, the Court held the German application admissible even though Germany had taken legal action some years after the breach had become known to it.[693]

(8) One concern of the rules relating to delay is that additional difficulties may be caused to the respondent State due to the lapse of time, e.g. as concerns the collection and presentation of evidence. Thus, in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness to the respondent State were advanced.[694] In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not establish the existence of any prejudice on its part, as where it has always had notice of the claim and was in a position to collect and preserve evidence relating to it.[695]

(9) Moreover, contrary to what may be suggested by the expression "delay", international courts have not engaged simply in measuring the lapse of time and applying clear-cut time limits. No generally accepted time limit,

[688] *Russian Indemnity* (see footnote 354 above), p. 446.

[689] Cf. the position with respect to valid consent under article 20: see paragraphs (4) to (8) of the commentary to article 20.

[690] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 247, para. 13.

[691] *Ibid*., p. 250, para. 20.

[692] *Ibid*., pp. 253–254, para. 32. The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru's application was not inadmissible on this ground (para. 36). It reserved for the merits any question of prejudice to the respondent State by reason of the delay. See further paragraph (8) of the commentary to article 13.

[693] *LaGrand*, *Provisional Measures* (see footnote 91 above) and *LaGrand, Judgment* (see footnote 119 above), at pp. 486–487, paras. 53–57.

[694] See *Stevenson*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 385 (1903); and *Gentini, ibid.*, vol. X (Sales No. 60.V.4), p. 551 (1903).

[695] See, e.g., *Tagliaferro*, UNRIAA, vol. X (Sales No. 60.V.4), p. 592, at p. 593 (1903); see also the actual decision in *Stevenson* (footnote 694 above), pp. 386–387.

expressed in terms of years, has been laid down.[696] The Swiss Federal Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.[697] Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.[698] None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.[699] It would be very difficult to establish any single limit, given the variety of situations, obligations and conduct that may be involved.

(10) Once a claim has been notified to the respondent State, delay in its prosecution (e.g. before an international tribunal) will not usually be regarded as rendering it inadmissible.[700] Thus, in the *Certain Phosphate Lands in Nauru* case, ICJ held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.[701] In the *Tagliaferro* case, Umpire Ralston likewise held that, despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred.[702]

(11) To summarize, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged. International courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.[703]

[696] In some cases time limits are laid down for specific categories of claims arising under specific treaties (e.g. the six-month time limit for individual applications under article 35, paragraph 1, of the European Convention on Human Rights) notably in the area of private law (e.g. in the field of commercial transactions and international transport). See the Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol to the Convention. By contrast, it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limits.

[697] Communiqué of 29 December 1970, in *Annuaire suisse de droit international*, vol. 32 (1976), p. 153.

[698] C.-A. Fleischhauer, "Prescription", *Encyclopedia of Public International Law* (see footnote 409 above), vol. 3, p. 1105, at p. 1107.

[699] A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather, the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides *Certain Phosphate Lands in Nauru* (footnotes 230 and 232 above), see, e.g. *Gentini* (footnote 694 above), p. 561; and the *Ambatielos* arbitration, ILR, vol. 23, p. 306, at pp. 314–317 (1956).

[700] For statements of the distinction between notice of claim and commencement of proceedings, see, e.g. R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed. (Harlow, Longman, 1992), vol. I, *Peace*, p. 527; and C. Rousseau, *Droit international public* (Paris, Sirey, 1983), vol. V, p. 182.

[701] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 250, para. 20.

[702] *Tagliaferro* (see footnote 695 above), p. 593.

[703] See article 39 and commentary.

### *Article 46. Plurality of injured States*

**Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.**

*Commentary*

(1) Article 46 deals with the situation of a plurality of injured States, in the sense defined in article 42. It states the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account.

(2) Several States may qualify as "injured" States under article 42. For example, all the States to which an interdependent obligation is owed within the meaning of article 42, subparagraph (*b*) (ii), are injured by its breach. In a situation of a plurality of injured States, each may seek cessation of the wrongful act if it is continuing, and claim reparation in respect of the injury to itself. This conclusion has never been doubted, and is implicit in the terms of article 42 itself.

(3) It is by no means unusual for claims arising from the same internationally wrongful act to be brought by several States. For example, in the *S.S. "Wimbledon"* case, four States brought proceedings before PCIJ under article 386, paragraph 1, of the Treaty of Versailles, which allowed "any interested Power" to apply in the event of a violation of the provisions of the Treaty concerning transit through the Kiel Canal. The Court noted that "each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags". It held they were each covered by article 386, paragraph 1, "even though they may be unable to adduce a prejudice to any pecuniary interest".[704] In fact, only France, representing the operator of the vessel, claimed and was awarded compensation. In the cases concerning the *Aerial Incident of 27 July 1955*, proceedings were commenced by the United States, the United Kingdom and Israel against Bulgaria concerning the destruction of an Israeli civil aircraft and the loss of lives involved.[705] In the *Nuclear Tests* cases, Australia and New Zealand each claimed to be injured in various ways by the French conduct of atmospheric nuclear tests at Mururoa Atoll.[706]

(4) Where the States concerned do not claim compensation on their own account as distinct from a declaration

[704] *S.S.* "*Wimbledon"* (see footnote 34 above), p. 20.

[705] ICJ held that it lacked jurisdiction over the Israeli claim: *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, p. 131, after which the United Kingdom and United States claims were withdrawn. In its Memorial, Israel noted that there had been active coordination of the claims between the various claimant Governments, and added: "One of the primary reasons for establishing coordination of this character from the earliest stages was to prevent, so far as was possible, the Bulgarian Government being faced with double claims leading to the possibility of double damages" (see footnote 363 above), p. 106.

[706] See *Nuclear Tests (Australia* v. *France)* and *(New Zealand* v. *France)* (footnote 196 above), pp. 256 and 460, respectively.

of the legal situation, it may not be clear whether they are claiming as injured States or as States invoking responsibility in the common or general interest under article 48. Indeed, in such cases it may not be necessary to decide into which category they fall, provided it is clear that they fall into one or the other. Where there is more than one injured State claiming compensation on its own account or on account of its nationals, evidently each State will be limited to the damage actually suffered. Circumstances might also arise in which several States injured by the same act made incompatible claims. For example, one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.[707] In any event, two injured States each claiming in respect of the same wrongful act would be expected to coordinate their claims so as to avoid double recovery. As ICJ pointed out in its advisory opinion on *Reparation for Injuries*, "International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case".[708]

### *Article 47. Plurality of responsible States*

**1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.**

**2. Paragraph 1:**

**(*a*) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;**

**(*b*) is without prejudice to any right of recourse against the other responsible States.**

*Commentary*

(1) Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.

(2) Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example, two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. In that case the injured State can hold each responsible State to account for the wrongful conduct as a whole. Or two States may act through a common organ which carries out the conduct in question, e.g. a joint authority responsible for the management of a boundary river. Or one State may direct and control another State in the commission of the same internationally wrongful act by the latter, such that both are responsible for the act.[709]

(3) It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as "joint", "joint and several" and "solidary" responsibility derive from different legal traditions[710] and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.[711] In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed.

(4) In the *Certain Phosphate Lands in Nauru* case,[712] Australia, the sole respondent, had administered Nauru as a trust territory under the Trusteeship Agreement on behalf of the three States concerned. Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. Australia argued that the two States were necessary parties to the case and that in accordance with the principle formulated in *Monetary Gold*,[713] the claim against Australia alone was inadmissible. It also argued that the responsibility of the three States making up the Administering Authority was "solidary" and that a claim could not be made against only one of them. The Court rejected both arguments. On the question of "solidary" responsibility it said:

> Australia has raised the question whether the liability of the three States would be "joint and several" (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This … is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.[714]

The Court was careful to add that its decision on jurisdiction "does not settle the question whether reparation

[707] Cf. *Forests of Central Rhodopia*, where the arbitrator declined to award restitution, *inter alia*, on the ground that not all the persons or entities interested in restitution had claimed (see footnote 382 above), p. 1432.

[708] *Reparation for Injuries* (see footnote 38 above), p. 186.

[709] See article 17 and commentary.

[710] For a comparative survey of internal laws on solidary or joint liability, see T. Weir, *loc. cit.* (footnote 471 above), vol. XI, especially pp. 43–44, sects. 79–81.

[711] See paragraphs (1) to (5) of the introductory commentary to chapter IV of Part One.

[712] See footnote 230 above.

[713] See footnote 286 above. See also paragraph (11) of the commentary to article 16.

[714] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), pp. 258–259, para. 48.

would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems … and, in particular, the special role played by Australia in the administration of the Territory".[715]

(5) The extent of responsibility for conduct carried on by a number of States is sometimes addressed in treaties.[716] A well-known example is the Convention on International Liability for Damage Caused by Space Objects. Article IV, paragraph 1, provides expressly for "joint and several liability" where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Article IV, paragraph 2, provides:

> In all cases of joint and several liability referred to in paragraph 1 … the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.[717]

This is clearly a *lex specialis*, and it concerns liability for lawful conduct rather than responsibility in the sense of the present articles.[718] At the same time, it indicates what a regime of "joint and several" liability might amount to so far as an injured State is concerned.

(6) According to *paragraph 1* of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.

(7) Under paragraph 1 of article 47, where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State in the sense of article 42. The consequences that flow from the wrongful act, for example in terms of reparation, will be those which flow from the provisions of Part Two in relation to that State.

(8) Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. In the *Corfu Channel* incident, it appears that Yugoslavia actually laid the mines and would have been responsible for the damage they caused. ICJ held that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.[719] Yet, it was not suggested that Albania's responsibility for failure to warn was reduced, let alone precluded, by reason of the concurrent responsibility of a third State. In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

(9) The general principle set out in paragraph 1 of article 47 is subject to the two provisos set out in *paragraph 2*. *Subparagraph* (a) addresses the question of double recovery by the injured State. It provides that the injured State may not recover, by way of compensation, more than the damage suffered.[720] This provision is designed to protect the responsible States, whose obligation to compensate is limited by the damage suffered. The principle is only concerned to ensure against the actual recovery of more than the amount of the damage. It would not exclude simultaneous awards against two or more responsible States, but the award would be satisfied so far as the injured State is concerned by payment in full made by any one of them.

(10) The second proviso, in *subparagraph* (b), recognizes that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. This is specifically envisaged, for example, in articles IV, paragraph 2, and V, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects. On the other hand, there may be cases where recourse by one responsible State against another should not be allowed. Subparagraph (*b*) does not address the question of contribution among several States which are responsible for the same wrongful act; it merely provides that the general principle stated in paragraph 1 is without prejudice to any right of recourse which one responsible State may have against any other responsible State.

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[715] *Ibid*., p. 262, para. 56. The case was subsequently withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru's claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement. See *Certain Phosphate Lands in Nauru, Order* (footnote 232 above) and the settlement agreement (*ibid.*).

[716] A special case is the responsibility of the European Union and its member States under "mixed agreements", where the Union and all or some members are parties in their own name. See, e.g., annex IX to the United Nations Convention on the Law of the Sea. Generally on mixed agreements, see, e.g., A. Rosas, "Mixed Union mixed agreements", *International Law Aspects of the European Union*, M. Koskenniemi, ed. (The Hague, Kluwer, 1998), p. 125.

[717] See also article V, paragraph 2, which provides for indemnification between States which are jointly and severally liable.

[718] See paragraph 4 of the general commentary for the distinction between international responsibility for wrongful acts and international liability arising from lawful conduct.

[719] *Corfu Channel, Merits* (see footnote 35 above), pp. 22–23.

[720] Such a principle was affirmed, for example, by PCIJ in the *Factory at Chorzów, Merits* case (see footnote 34 above), when it held that a remedy sought by Germany could not be granted "or the same compensation would be awarded twice over" (p. 59); see also pp. 45 and 49.

### *Article 48. Invocation of responsibility by a State other than an injured State*

**1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:**

**(*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or**

**(*b*) the obligation breached is owed to the international community as a whole.**

**2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:**

**(*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and**

**(*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.**

**3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.**

*Commentary*

(1) Article 48 complements the rule contained in article 42. It deals with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole. The distinction is underlined by the phrase "[a]ny State other than an injured State" in paragraph 1 of article 48.

(2) Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42. Indeed, in respect of obligations to the international community as a whole, ICJ specifically said as much in its judgment in the *Barcelona Traction* case.[721] Although the Court noted that "all States can be held to have a legal interest in" the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as "interested States". The term "legal interest" would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.

(3) As to the structure of article 48, paragraph 1 defines the categories of obligations which give rise to the wider right to invoke responsibility. Paragraph 2 stipulates which forms of responsibility States other than injured States may claim. Paragraph 3 applies the requirements of invocation contained in articles 43, 44 and 45 to cases where responsibility is invoked under article 48, paragraph 1.

(4) *Paragraph 1* refers to "[a]ny State other than an injured State". In the nature of things, all or many States will be entitled to invoke responsibility under article 48, and the term "[a]ny State" is intended to avoid any implication that these States have to act together or in unison. Moreover, their entitlement will coincide with that of any injured State in relation to the same internationally wrongful act in those cases where a State suffers individual injury from a breach of an obligation to which article 48 applies.

(5) Paragraph 1 defines the categories of obligations, the breach of which may entitle States other than the injured State to invoke State responsibility. A distinction is drawn between obligations owed to a group of States and established to protect a collective interest of the group (paragraph 1 (*a*)), and obligations owed to the international community as a whole (paragraph 1 (*b*)).[722]

(6) Under *paragraph 1* (a), States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and secondly, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as "obligations *erga omnes partes*".

(7) Obligations coming within the scope of paragraph 1 (*a*) have to be "collective obligations", i.e. they must apply between a group of States and have been established in some collective interest.[723] They might concern, for example, the environment or security of a region (e.g. a regional nuclear-free-zone treaty or a regional system for the protection of human rights). They are not limited to arrangements established only in the interest of the member States but would extend to agreements established by a group of States in some wider common interest.[724] But in any event the arrangement must transcend the sphere of bilateral relations of the States parties. As to the requirement that the obligation in question protect a collective interest, it is not the function of the articles to provide an enumeration of such interests. If they fall within paragraph 1 (*a*), their principal purpose will be to foster a common interest, over and above any interests of the States concerned individually. This would include situations in

[721] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[722] For the extent of responsibility for serious breaches of obligations to the international community as a whole, see Part Two, chap. III and commentary.

[723] See also paragraph (11) of the commentary to article 42.

[724] In the *S.S. "Wimbledon"* (see footnote 34 above), the Court noted "[t]he intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind" (p. 23).

which States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities.[725]

(8) Under *paragraph 1* (b), States other than the injured State may invoke responsibility if the obligation in question was owed "to the international community as a whole".[726] The provision intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew "an essential distinction" between obligations owed to particular States and those owed "towards the international community as a whole".[727] With regard to the latter, the Court went on to state that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".

(9) While taking up the essence of this statement, the articles avoid use of the term "obligations *erga omnes*", which conveys less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to "the outlawing of acts of aggression, and of genocide" and to "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[728] In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.[729]

(10) Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. Whereas the category of collective obligations covered by paragraph 1 (*a*) needs to be further qualified by the insertion of additional criteria, no such qualifications are necessary in the case of paragraph 1 (*b*). All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such. Of course, such obligations may at the same time protect the individual interests of States, as the prohibition of acts of aggression protects the survival of each State and the security of its people. Similarly, individual States may be specially affected by the breach of such an obligation, for example a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(11) *Paragraph 2* specifies the categories of claim which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and invocation of responsibility under article 48 gives rise to a more limited range of rights as compared to those of injured States under article 42. In particular, the focus of action by a State under article 48—such State not being injured in its own right and therefore not claiming compensation on its own account—is likely to be on the very question whether a State is in breach and on cessation if the breach is a continuing one. For example, in the *S.S. "Wimbledon"* case, Japan, which had no economic interest in the particular voyage, sought only a declaration, whereas France, whose national had to bear the loss, sought and was awarded damages.[730] In the *South West Africa* cases, Ethiopia and Liberia sought only declarations of the legal position.[731] In that case, as the Court itself pointed out in 1971, "the injured entity" was a people, viz. the people of South West Africa.[732]

(12) Under *paragraph 2* (a), any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require, assurances and guarantees of non-repetition under article 30. In addition, *paragraph 2* (b) allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with paragraph 2 (*b*), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48, paragraph 2, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party. In those cases where they have been resorted to, a clear distinction has been drawn between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation.[733] Thus, a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its Government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present articles

[725] Article 22 of the Covenant of the League of Nations, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it. Cf., however, the much-criticized decision of ICJ in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, from which article 48 is a deliberate departure.

[726] For the terminology "international community as a whole", see paragraph (18) of the commentary to article 25.

[727] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33, and see paragraphs (2) to (6) of the commentary to chapter III of Part Two.

[728] *Barcelona Traction* (*ibid.*), p. 32, para. 34.

[729] See footnote 54 above.

[730] *S.S. "Wimbledon"* (see footnote 34 above), p. 30.

[731] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319; *South West Africa, Second Phase, Judgment* (see footnote 725 above).

[732] *Namibia* case (see footnote 176 above), p. 56, para. 127.

[733] See, e.g., the observations of the European Court of Human Rights in *Denmark* v. *Turkey* (friendly settlement), judgment of 5 April 2000, Reports of Judgments and Decisions 2000-IV, pp. 7, 10 and 11, paras. 20 and 23.

cannot solve.[734] Paragraph 2 (*b*) can do no more than set out the general principle.

(13) Paragraph 2 (*b*) refers to the State claiming "[p]erformance of the obligation of reparation in accordance with the preceding articles". This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example, a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) *Paragraph 3* subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

## Chapter II

## COUNTERMEASURES

### *Commentary*

(1) This chapter deals with the conditions for and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures that would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.[735] This is reflected in article 22 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an operational system, taking into account the exceptional character of countermeasures as a response to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term "reprisals" was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.[736] More recently, the term "reprisals" has been limited to action taken in time of international armed conflict; i.e. it has been taken as equivalent to belligerent reprisals. The term "countermeasures" covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.[737] Countermeasures are to be contrasted with retorsion, i.e. "unfriendly" conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present articles. The term "sanction" is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the Charter of the United Nations refers only to "measures", even though these can encompass a very wide range of acts, including the use of armed force (Articles 39, 41 and 42). Questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand, the articles are concerned with countermeasures as referred to in article 22. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the 1969 Vienna Convention. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.[738] Countermeasures involve conduct taken in derogation from a subsisting treaty

[734] See also paragraphs (3) to (4) of the commentary to article 33.

[735] For the substantial literature, see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational, 1984), pp. 179–189; O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 227–241; L.-A. Sicilianos, *Les réactions décentralisées à l'illicite: Des contre-mesures à la légitime défense* (Paris, Librairie générale de droit et de jurisprudence, 1990), pp. 501–525; and D. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures en droit international public* (Paris, Pedone, 1994).

[736] See, e.g., E. de Vattel, *The Law of Nations, or the Principles of Natural Law* (footnote 394 above), vol. II, chap. XVIII, p. 342.

[737] *Air Service Agreement* (see footnote 28 above), p. 443, para. 80; *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 106, para. 201; and *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 82.

[738] On the respective scope of the codified law of treaties and the law of State responsibility, see paragraphs (3) to (7) of the introductory commentary to chapter V of Part One.

obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.

(5) This chapter does not draw any distinction between what are sometimes called "reciprocal countermeasures" and other measures. That term refers to countermeasures which involve suspension of performance of obligations towards the responsible State "if such obligations correspond to, or are directly connected with, the obligation breached".[739] There is no requirement that States taking countermeasures should be limited to suspension of performance of the same or a closely related obligation.[740] A number of considerations support this conclusion. First, for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have a non-reciprocal character and are not only due to other States but to the individuals themselves.[741] Secondly, a limitation to reciprocal countermeasures assumes that the injured State will be in a position to impose the same or related measures as the responsible State, which may not be so. The obligation may be a unilateral one or the injured State may already have performed its side of the bargain. Above all, considerations of good order and humanity preclude many measures of a reciprocal nature. This conclusion does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as in the *Air Service Agreement* arbitration.[742]

(6) This conclusion reinforces the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse. Chapter II seeks to do this in a variety of ways. First, as already noted, it concerns only non-forcible countermeasures (art. 50, para. 1 (*a*)). Secondly, countermeasures are limited by the requirement that they be directed at the responsible State and not at third parties (art. 49, paras. 1 and 2). Thirdly, since countermeasures are intended as instrumental—in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment—they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (arts. 49, paras. 2 and 3, and 53). Fourthly, countermeasures must be proportionate (art. 51). Fifthly, they must not involve any departure from certain basic obligations (art. 50, para. 1), in particular those under peremptory norms of general international law.

(7) This chapter also deals to some extent with the conditions of the implementation of countermeasures. In particular, countermeasures cannot affect any dispute settlement procedure which is in force between the two States and applicable to the dispute (art. 50, para. 2 (*a*)). Nor can they be taken in such a way as to impair diplomatic or consular inviolability (art. 50, para. 2 (*b*)). Countermeasures must be preceded by a demand by the injured State that the responsible State comply with its obligations under Part Two, must be accompanied by an offer to negotiate, and must be suspended if the internationally wrongful act has ceased and the dispute is submitted in good faith to a court or tribunal with the authority to make decisions binding on the parties (art. 52, para. 3).

(8) The focus of the chapter is on countermeasures taken by injured States as defined in article 42. Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic. This chapter does not purport to regulate the taking of countermeasures by States other than the injured State. It is, however, without prejudice to the right of any State identified in article 48, paragraph 1, to take lawful measures against a responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached (art. 54).

(9) In common with other chapters of these articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus, a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. Likewise, a regime for dispute resolution to which States must resort in the event of a dispute, especially if (as with the WTO dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.[743]

### *Article 49. Object and limits of countermeasures*

**1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.**

**2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.**

**3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.**

[739] See the sixth report of the Special Rapporteur on State responsibility, William Riphagen, article 8 of Part Two of the draft articles, *Yearbook … 1985*, vol. II (Part One), p. 10, document A/CN.4/389.

[740] Contrast the exception of non-performance in the law of treaties, which is so limited: see paragraph (9) of the introductory commentary to chapter V of Part One.

[741] Cf. *Ireland* v. *the United Kingdom* (footnote 236 above).

[742] See footnote 28 above.

[743] See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 1, 3, para. 7, and 22.

*Commentary*

(1) Article 49 describes the permissible object of countermeasures taken by an injured State against the responsible State and places certain limits on their scope. Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two, namely, to cease the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured State.[744] Countermeasures are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible State under Part Two. The limited object and exceptional nature of countermeasures are indicated by the use of the word "only" in paragraph 1 of article 49.

(2) A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure. This point was clearly made by ICJ in the *Gabčíkovo Nagymaros Project* case, in the following passage:

> 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.[745]

(3) *Paragraph 1* of article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.[746] In this respect, there is no difference between countermeasures and other circumstances precluding wrongfulness.[747]

(4) A second essential element of countermeasures is that they "must be directed against"[748] a State which has committed an internationally wrongful act, and which has not complied with its obligations of cessation and reparation under Part Two of the present articles.[749] The word "only" in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State.[750]

(5) This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.

(6) In taking countermeasures, the injured State effectively withholds performance for the time being of one or more international obligations owed by it to the responsible State, and *paragraph 2* of article 49 reflects this element. Although countermeasures will normally take the form of the non-performance of a single obligation, it is possible that a particular measure may affect the performance of several obligations simultaneously. For this reason, paragraph 2 refers to "obligations" in the plural. For example, freezing of the assets of a State might involve what would otherwise be the breach of several obligations to that State under different agreements or arrangements. Different and coexisting obligations might be affected by the same act. The test is always that of proportionality, and a State which has committed an internationally wrongful act does not thereby make itself the target for any form or combination of countermeasures, irrespective of their severity or consequences.[751]

(7) The phrase "for the time being" in paragraph 2 indicates the temporary or provisional character of countermeasures. Their aim is the restoration of a condition of legality as between the injured State and the responsible

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[744] For these obligations, see articles 30 and 31 and commentaries.

[745] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83. See also *"Naulilaa"* (footnote 337 above), p. 1027; *"Cysne"* (footnote 338 above), p. 1057. At the 1930 Hague Conference, all States which responded on this point took the view that a prior wrongful act was an indispensable prerequisite for the adoption of reprisals; see League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote 88 above), p. 128.

[746] The tribunal's remark in the *Air Service Agreement* case (see footnote 28 above), to the effect that "each State establishes for itself its legal situation vis-à-vis other States" (p. 443, para. 81) should not be interpreted in the sense that the United States would have been justified in taking countermeasures whether or not France was in breach of the Agreement. In that case the tribunal went on to hold that the United States was actually responding to a breach of the Agreement by France, and that its response met the requirements for countermeasures under international law, in particular in terms of purpose and proportionality. The tribunal did not decide that an unjustified belief by the United States as to the existence of a breach would have been sufficient.

[747] See paragraph (8) of the introductory commentary to chapter V of Part One.

[748] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 55–56, para. 83.

[749] In the *Gabčíkovo-Nagymaros Project* case ICJ held that the requirement had been satisfied, in that Hungary was in continuing breach of its obligations under a bilateral treaty, and Czechoslovakia's response was directed against it on that ground.

[750] On the specific question of human rights obligations, see article 50, paragraph (1) (*b*), and commentary.

[751] See article 51 and commentary. In addition, the performance of certain obligations may not be withheld by way of countermeasures in any circumstances: see article 50 and commentary.

State, and not the creation of new situations which cannot be rectified whatever the response of the latter State to the claims against it.[752] Countermeasures are taken as a form of inducement, not punishment: if they are effective in inducing the responsible State to comply with its obligations of cessation and reparation, they should be discontinued and performance of the obligation resumed.

(8) Paragraph 1 of article 49 refers to the obligations of the responsible State "under Part Two". It is to ensuring the performance of these obligations that countermeasures are directed. In many cases the main focus of countermeasures will be to ensure cessation of a continuing wrongful act, but they may also be taken to ensure reparation, provided the other conditions laid down in chapter II are satisfied. Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased, irrespective of the seriousness of the breach or its consequences, or of the State's refusal to make reparation for it. In this context an issue arises whether countermeasures should be available where there is a failure to provide satisfaction as demanded by the injured State, given the subsidiary role this remedy plays in the spectrum of reparation.[753] In normal situations, satisfaction will be symbolic or supplementary and it would be highly unlikely that a State which had ceased the wrongful act and tendered compensation to the injured State could properly be made the target of countermeasures for failing to provide satisfaction as well. This concern may be adequately addressed by the application of the notion of proportionality set out in article 51.[754]

(9) *Paragraph 3* of article 49 is inspired by article 72, paragraph 2, of the 1969 Vienna Convention, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible. In the *Gabčíkovo-Nagymaros Project* case, the existence of this condition was recognized by the Court, although it found that it was not necessary to pronounce on the matter. After concluding that "the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate", the Court said:

> 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 obligations under international law, and that the measure must therefore be reversible.[755]

However, the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. For example, a requirement of notification of some activity is of no value after the activity has been undertaken. By contrast, inflicting irreparable damage on the responsible State could amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the articles. The phrase "as far as possible" in paragraph 3 indicates that if the injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.

### *Article 50. Obligations not affected by countermeasures*

**1. Countermeasures shall not affect:**

**(*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;**

**(*b*) obligations for the protection of fundamental human rights;**

**(*c*) obligations of a humanitarian character prohibiting reprisals;**

**(*d*) other obligations under peremptory norms of general international law.**

**2. A State taking countermeasures is not relieved from fulfilling its obligations:**

**(*a*) under any dispute settlement procedure applicable between it and the responsible State;**

**(*b*) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.**

*Commentary*

(1) Article 50 specifies certain obligations the performance of which may not be impaired by countermeasures. An injured State is required to continue to respect these obligations in its relations with the responsible State, and may not rely on a breach by the responsible State of its obligations under Part Two to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.

(2) The obligations dealt with in article 50 fall into two basic categories. Paragraph 1 deals with certain obligations which, by reason of their character, must not be the subject of countermeasures at all. Paragraph 2 deals with certain obligations relating in particular to the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes.

(3) *Paragraph 1* of article 50 identifies four categories of fundamental substantive obligations which may not be affected by countermeasures: (*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (*b*) obligations for the protection of fundamental human rights; (*c*) obligations of a humanitarian character prohibiting reprisals; and (*d*) other obligations under peremptory norms of general international law.

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[752] This notion is further emphasized by articles 49, paragraph 3, and 53 (termination of countermeasures).

[753] See paragraph (1) of the commentary to article 37.

[754] Similar considerations apply to assurances and guarantees of non-repetition. See article 30, subparagraph (*b*), and commentary.

[755] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 56–57, para. 87.

(4) *Paragraph 1* (a) deals with the prohibition of the threat or use of force as embodied in the Charter of the United Nations, including the express prohibition of the use of force in Article 2, paragraph 4. It excludes forcible measures from the ambit of permissible countermeasures under chapter II.

(5) The prohibition of forcible countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly proclaimed that "States have a duty to refrain from acts of reprisal involving the use of force".[756] The prohibition is also consistent with the prevailing doctrine as well as a number of authoritative pronouncements of international judicial[757] and other bodies.[758]

(6) *Paragraph 1* (b) provides that countermeasures may not affect obligations for the protection of fundamental human rights. In the *"Naulilaa"* arbitration, the tribunal stated that a lawful countermeasure must be "limited by the requirements of humanity and the rules of good faith applicable in relations between States".[759] The Institut de droit international in its 1934 resolution stated that in taking countermeasures a State must "abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience".[760] This has been taken further as a result of the development since 1945 of international human rights. In particular, the relevant human rights treaties identify certain human rights which may not be derogated from even in time of war or other public emergency.[761]

(7) In its general comment No. 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present articles,[762] as well as with countermeasures imposed by individual States or groups of States. It stressed that "whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights",[763] and went on to state that:

> it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.[764]

Analogies can be drawn from other elements of general international law. For example, paragraph 1 of article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) stipulates unconditionally that "[s]tarvation of civilians as a method of warfare is prohibited".[765] Likewise, the final sentence of paragraph 2 of article 1 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights states that "In no case may a people be deprived of its own means of subsistence".

(8) *Paragraph 1* (c) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60, paragraph 5, of the 1969 Vienna Convention.[766] The paragraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the Geneva Convention relative to the Treatment of Prisoners of War of 1929, the Geneva Conventions of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.[767]

(9) *Paragraph 1* (d) prohibits countermeasures affecting obligations under peremptory norms of general international law. Evidently, a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Subparagraph (*d*) reiterates for the purposes of the present chapter the recognition in article 26 that the circumstances precluding wrongfulness elaborated in chapter V of Part One do not affect the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. The reference to "other" obligations under

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[756] General Assembly resolution 2625 (XXV), annex, first principle. The Final Act of the Conference on Security and Co-operation in Europe also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration on Principles Guiding Relations between Participating States embodied in the first "Basket" of that Final Act reads: "Likewise [the participating States] will also refrain in their mutual relations from any act of reprisal by force."

[757] See especially *Corfu Channel*, *Merits* (footnote 35 above), p. 35; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 127, para. 249.

[758] See, e.g., Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962, 188 (1964) of 9 April 1964, 316 (1972) of 26 June 1972, 332 (1973) of 21 April 1973, 573 (1985) of 4 October 1985 and 1322 (2000) of 7 October 2000. See also General Assembly resolution 41/38 of 20 November 1986.

[759] *"Naulilaa"* (see footnote 337 above), p. 1026.

[760] *Annuaire de l'Institut de droit international*, vol. 38 (1934), p. 710.

[761] See article 4 of the International Covenant on Civil and Political Rights; article 15 of the European Convention on Human Rights; and article 27 of the American Convention on Human Rights.

[762] See below, article 59 and commentary.

[763] E/C.12/1997/8, para. 1.

[764] *Ibid*., para. 4.

[765] See also paragraph 2 of article 54 ("objects indispensable to the survival of the civilian population") and article 75. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II).

[766] Paragraph 5 of article 60 of the 1969 Vienna Convention precludes a State from suspending or terminating for material breach any treaty provision "relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties". This paragraph was added at the Vienna Conference on the Law of Treaties on a vote of 88 votes in favour, none against and 7 abstentions.

[767] See K. J. Partsch, "Reprisals", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 2000), vol. 4, p. 200, at pp. 203–204; and S. Oeter, "Methods and means of combat", D. Fleck, ed., *op. cit.* (footnote 409 above) p. 105, at pp. 204–207, paras. 476–479, with references to relevant provisions.

peremptory norms makes it clear that subparagraph (*d*) does not qualify the preceding subparagraphs, some of which also encompass norms of a peremptory character. In particular, subparagraphs (*b*) and (*c*) stand on their own. Subparagraph (*d*) allows for the recognition of further peremptory norms creating obligations which may not be the subject of countermeasures by an injured State.[768]

(10) States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50, paragraph 1 (*d*). In particular, a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.[769] Under the dispute settlement system of WTO, the prior authorization of the Dispute Settlement Body is required before a member can suspend concessions or other obligations under the WTO agreements in response to a failure of another member to comply with recommendations and rulings of a WTO panel or the Appellate Body.[770] Pursuant to article 23 of the WTO Dispute Settlement Understanding (DSU), members seeking "the redress of a violation of obligations or other nullification or impairment of benefits" under the WTO agreements, "shall have recourse to, and abide by" the DSU rules and procedures. This has been construed both as an "exclusive dispute resolution clause" and as a clause "preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations".[771] To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are "intransgressible",[772] they may entail the exclusion of countermeasures.

(11) In addition to the substantive limitations on the taking of countermeasures in paragraph 1 of article 50, *paragraph 2* provides that countermeasures may not be taken with respect to two categories of obligations, viz. certain obligations under dispute settlement procedures applicable between it and the responsible State, and obligations with respect to diplomatic and consular inviolability. The justification in each case concerns not so much the substantive character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.

(12) The first of these, contained in *paragraph 2* (a), applies to "any dispute settlement procedure applicable" between the injured State and the responsible State. This phrase refers only to dispute settlement procedures that are related to the dispute in question and not to other unrelated issues between the States concerned. For this purpose the dispute should be considered as encompassing both the initial dispute over the internationally wrongful act and the question of the legitimacy of the countermeasure(s) taken in response.

(13) It is a well-established principle that dispute settlement provisions must be upheld notwithstanding that they are contained in a treaty which is at the heart of the dispute and the continued validity or effect of which is challenged. As ICJ said in *Appeal Relating to the Jurisdiction of the ICAO Council:*

> Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.[773]

Similar reasoning underlies the principle that dispute settlement provisions between the injured and the responsible State and applicable to their dispute may not be suspended by way of countermeasures. Otherwise, unilateral action would replace an agreed provision capable of resolving the dispute giving rise to the countermeasures. The point was affirmed by the Court in the *United States Diplomatic and Consular Staff in Tehran* case:

> In any event, any alleged violation of the Treaty [of Amity] by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.[774]

(14) The second exception in *paragraph 2* (b) limits the extent to which an injured State may resort, by way of countermeasures, to conduct inconsistent with its obligations in the field of diplomatic or consular relations. An injured State could envisage action at a number of levels. To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors in situations provided for in the Vienna Convention on Diplomatic Relations—such acts do not amount to countermeasures in the sense of this chapter. At a second level, measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met. On the other hand, the scope of prohibited countermeasures under article 50, paragraph 2 (*b*), is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in

[768] See paragraphs (4) to (6) of the commentary to article 40.

[769] On the exclusion of unilateral countermeasures in European Union law, see, for example, joined cases 90 and 91-63 (*Commission of the European Economic Community* v. *Grand Duchy of Luxembourg and Kingdom of Belgium*), *Reports of cases before the Court*, p. 625, at p. 631 (1964); case 52/75 (*Commission of the European Communities* v. *Italian Republic*), *ibid*., p. 277, at p. 284 (1976); case 232/78 (*Commission of the European Economic Communities* v. *French Republic*), *ibid*., p. 2729 (1979); and case C-5/94 (*The Queen.* v. *Ministry of Agriculture, Fisheries and Food,* ex parte *Hedley Lomas (Ireland) Ltd.*), *Reports of cases before the Court of Justice and the Court of First Instance*, p. I–2553 (1996).

[770] See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 3, para. 7 and 22.

[771] See WTO, Report of the Panel, United States–Sections 301–310 of the Trade Act of 1974 (footnote 73 above), paras. 7.35–7.46.

[772] To use the synonym adopted by ICJ in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79.

[773] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 46, at p. 53. See also S. M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), pp. 13–59.

[774] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 28, para. 53.

all circumstances, including armed conflict.[775] The same applies, *mutatis mutandis*, to consular officials.

(15) In the *United States Diplomatic and Consular Staff in Tehran* case, ICJ stressed that "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions",[776] and it concluded that violations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State. As the Court said:

> The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.[777]

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds. It does not affect the various avenues for redress available to the receiving State under the terms of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.[778] On the other hand, no reference need be made in article 50, paragraph 2 (*b*), to multilateral diplomacy. The representatives of States to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations themselves, no retaliatory step taken by a host State to their detriment could qualify as a countermeasure since it would involve non-compliance not with an obligation owed to the responsible State but with an obligation owed to a third party, i.e. the international organization concerned.

### *Article 51. Proportionality*

**Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.**

*Commentary*

(1) Article 51 establishes an essential limit on the taking of countermeasures by an injured State in any given case, based on considerations of proportionality. It is relevant in determining what countermeasures may be applied and their degree of intensity. Proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.

(2) Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence. According to the award in the *"Naulilaa"* case:

> even if one were to admit that the law of nations does not require that the reprisal should be approximately in keeping with the offence, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them.[779]

(3) In the *Air Service Agreement* arbitration,[780] the issue of proportionality was examined in some detail. In that case there was no exact equivalence between France's refusal to allow a change of gauge in London on flights from the west coast of the United States and the United States' countermeasure which suspended Air France flights to Los Angeles altogether. The tribunal nonetheless held the United States measures to be in conformity with the principle of proportionality because they "do not appear to be clearly disproportionate when compared to those taken by France". In particular, the majority said:

> It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule … It has been observed, generally, that judging the "proportionality" of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation. [781]

In that case the countermeasures taken were in the same field as the initial measures and concerned the same routes, even if they were rather more severe in terms of their economic effect on the French carriers than the initial French action.

(4) The question of proportionality was again central to the appreciation of the legality of possible countermeasures taken by Czechoslovakia in the *Gabčíkovo-Nagymaros Project* case.[782] ICJ, having accepted that

[775] See, e.g., Vienna Convention on Diplomatic Relations, arts. 22, 24, 29, 44 and 45.

[776] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 38, para. 83.

[777] *Ibid*., p. 40, para. 86. Cf. article 45, subparagraph (*a*), of the Vienna Convention on Diplomatic Relations; article 27, paragraph 1 (*a*), of the Vienna Convention on Consular Relations (premises, property and archives to be protected "even in case of armed conflict").

[778] See articles 9, 11, 26, 36, paragraph 2, 43 (*b*) and 47, paragraph 2 (*a*), of the Vienna Convention on Diplomatic Relations; and articles 10, paragraph 2, 12, 23, 25 (*b*) and (*c*) and article 35, paragraph (3), of the Vienna Convention on Consular Relations.

[779] *"Naulilaa"* (see footnote 337 above), p. 1028.

[780] *Air Service Agreement* (see footnote 28 above), para. 83.

[781] *Ibid*.; Reuter, dissenting, accepted the tribunal's legal analysis of proportionality but suggested that there were "serious doubts on the proportionality of the counter-measures taken by the United States, which the tribunal has been unable to assess definitely" (p. 448).

[782] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 56, paras. 85 and 87, citing *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27.

Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 1977, went on to say:

> 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.
>
> In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:
>
> "[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user [sic] of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others"...
>
> Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well ...
>
> 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.

Thus, the Court took into account the quality or character of the rights in question as a matter of principle and (like the tribunal in the *Air Service Agreement* case) did not assess the question of proportionality only in quantitative terms.

(5) In other areas of the law where proportionality is relevant (e.g. self-defence), it is normal to express the requirement in positive terms, even though, in those areas as well, what is proportionate is not a matter which can be determined precisely.[783] The positive formulation of the proportionality requirement is adopted in article 51. A negative formulation might allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.

(6) Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely "quantitative" element of the injury suffered, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but "taking into account" two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to "the rights in question" has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration.

(7) Proportionality is concerned with the relationship between the internationally wrongful act and the countermeasure. In some respects proportionality is linked to the requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49. Proportionality is, however, a limitation even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.

[783] E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Milan, Giuffrè, 2000).

### *Article 52. Conditions relating to resort to countermeasures*

**1. Before taking countermeasures, an injured State shall:**

**(*a*) call upon the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;**

**(*b*) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.**

**2. Notwithstanding paragraph 1 (*b*), the injured State may take such urgent countermeasures as are necessary to preserve its rights.**

**3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:**

**(*a*) the internationally wrongful act has ceased; and**

**(*b*) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.**

**4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.**

*Commentary*

(1) Article 52 lays down certain procedural conditions relating to the resort to countermeasures by the injured State. Before taking countermeasures an injured State is required to call on the responsible State in accordance with article 43 to comply with its obligations under Part Two. The injured State is also required to notify the responsible State that it intends to take countermeasures and to offer to negotiate with that State. Notwithstanding this second requirement, the injured State may take certain urgent countermeasures to preserve its rights. If the responsible State has ceased the internationally wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken; if already taken, they must be suspended. However, this requirement does not apply if the responsible State fails to implement dispute settlement procedures in good faith. In such a case countermeasures do not have to be suspended and may be resumed.

(2) Overall, article 52 seeks to establish reasonable procedural conditions for the taking of countermeasures in a context where compulsory third party settlement of disputes may not be available, immediately or at all.[784] At the same time, it needs to take into account the possibility that there may be an international court or tribunal with authority to make decisions binding on the parties in relation to the dispute. Countermeasures are a form of self-help, which responds to the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that the responsible State is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives.

(3) The system of article 52 builds upon the observations of the tribunal in the *Air Service Agreement* arbitration.[785] The first requirement, set out in *paragraph 1* (a), is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. This requirement (sometimes referred to as "*sommation*") was stressed both by the tribunal in the *Air Service Agreement* arbitration[786] and by ICJ in the *Gabčíkovo-Nagymaros Project* case.[787] It also appears to reflect a general practice.[788]

(4) The principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the other State is given notice of a claim and some opportunity to present a response. In practice, however, there are usually quite extensive and detailed negotiations over a dispute before the point is reached where some countermeasures are contemplated. In such cases the injured State will already have notified the responsible State of its claim in accordance with article 43, and it will not have to do it again in order to comply with paragraph 1 (*a*).

(5) *Paragraph 1* (b) requires that the injured State which decides to take countermeasures should notify the responsible State of that decision to take countermeasures and offer to negotiate with that State. Countermeasures can have serious consequences for the target State, which should have the opportunity to reconsider its position faced with the proposed countermeasures. The temporal relationship between the operation of subparagraphs (*a*) and (*b*) of paragraph 1 is not strict. Notifications could be made close to each other or even at the same time.

(6) Under *paragraph 2*, however, the injured State may take "such urgent countermeasures as are necessary to preserve its rights" even before any notification of the intention to do so. Under modern conditions of communications, a State which is responsible for an internationally wrongful act and which refuses to cease that act or provide any redress therefore may also seek to immunize itself from countermeasures, for example by withdrawing assets from banks in the injured State. Such steps can be taken within a very short time, so that the notification required by paragraph 1 (*b*) might frustrate its own purpose. Hence, paragraph 2 allows for urgent countermeasures which are necessary to preserve the rights of the injured State: this phrase includes both its rights in the subject matter of the dispute and its right to take countermeasures. Temporary stay orders, the temporary freezing of assets and similar measures could fall within paragraph 2, depending on the circumstances.

(7) *Paragraph 3* deals with the case in which the wrongful act has ceased and the dispute is submitted to a court or tribunal which has the authority to decide it with binding effect for the parties. In such a case, and for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified. Once the conditions in paragraph 3 are met, the injured State may not take countermeasures; if already taken, they must be suspended "without undue delay". The phrase "without undue delay" allows a limited tolerance for the arrangements required to suspend the measures in question.

(8) A dispute is not "pending before a court or tribunal" for the purposes of paragraph 3 (*b*) unless the court or tribunal exists and is in a position to deal with the case. For these purposes a dispute is not pending before an *ad hoc* tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which will take some time even if both parties are cooperating in the appointment of the members of the tribunal.[789] Paragraph 3 is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international courts and tribunals.[790] The rationale behind paragraph 3 is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will

[784] See above, paragraph (7) of the commentary to the present chapter.

[785] *Air Service Agreement* (see footnote 28 above), pp. 445–446, paras. 91 and 94–96.

[786] *Ibid*., p. 444, paras. 85–87.

[787] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 56, para. 84.

[788] A. Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (Milan, Giuffrè, 1997).

[789] Hence, paragraph 5 of article 290 of the United Nations Convention on the Law of the Sea provides for ITLOS to deal with provisional measures requests "[p]ending the constitution of an arbitral tribunal to which the dispute is being submitted".

[790] The binding effect of provisional measures orders under Part XI of the United Nations Convention on the Law of the Sea is assured by paragraph 6 of article 290. For the binding effect of provisional measures orders under Article 41 of the Statute of ICJ, see the decision in *LaGrand, Judgment* (footnote 119 above), pp. 501–504, paras. 99–104.

make countermeasures unnecessary pending the decision of the tribunal. The reference to a "court or tribunal" is intended to refer to any third party dispute settlement procedure, whatever its designation. It does not, however, refer to political organs such as the Security Council. Nor does it refer to a tribunal with jurisdiction between a private party and the responsible State, even if the dispute between them has given rise to the controversy between the injured State and the responsible State. In such cases, however, the fact that the underlying dispute has been submitted to arbitration will be relevant for the purposes of articles 49 and 51, and only in exceptional cases will countermeasures be justified.[791]

(9) *Paragraph 4* of article 52 provides a further condition for the suspension of countermeasures under paragraph 3. It comprehends various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order, whether or not it is formally binding, through to refusal to accept the final decision of the court or tribunal. This paragraph also applies to situations where a State party fails to cooperate in the establishment of the relevant tribunal or fails to appear before the tribunal once it is established. Under the circumstances of paragraph 4, the limitations to the taking of countermeasures under paragraph 3 do not apply.

### *Article 53. Termination of countermeasures*

**Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.**

*Commentary*

(1) Article 53 deals with the situation where the responsible State has complied with its obligations of cessation and reparation under Part Two in response to countermeasures taken by the injured State. Once the responsible State has complied with its obligations under Part Two, no ground is left for maintaining countermeasures, and they must be terminated forthwith.

(2) The notion that countermeasures must be terminated as soon as the conditions which justified them have ceased is implicit in the other articles in this chapter. In view of its importance, however, article 53 makes this clear. It underlines the specific character of countermeasures under article 49.

[791] Under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, the State of nationality may not bring an international claim on behalf of a claimant individual or company "in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute" (art. 27, para. 1); see C. H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) pp. 397–414. This excludes all forms of invocation of responsibility by the State of nationality, including the taking of countermeasures. See paragraph (2) of the commentary to article 42.

### *Article 54. Measures taken by States other than an injured State*

**This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.**

*Commentary*

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. However, "injured" States, as defined in article 42, are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group. By virtue of article 48, paragraph 2, such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus, with respect to the obligations referred to in article 48, such States are recognized as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches.[792]

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organizations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the Charter of the United Nations, is not covered by the articles.[793] More generally, the articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.[794]

(3) Practice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (e.g. breaking off air links or other contacts). Examples include the following:

[792] See, e.g., M. Akehurst, "Reprisals by third States", BYBIL, *1970*, vol. 44, p. 1; J. I. Charney, "Third State remedies in international law", *Michigan Journal of International Law*, vol. 10, No. 1 (1989), p. 57; Hutchinson, *loc. cit*. (footnote 672 above); Sicilianos, *op. cit.* (footnote 735 above), pp. 110–175; B. Simma, "From bilateralism to community interest in international law", *Collected Courses ..., 1994–VI* (The Hague, Martinus Nijhoff, 1997), vol. 250, p. 217; and J. A. Frowein, "Reactions by not directly affected States to breaches of public international law", *Collected Courses ..., 1994–IV* (Dordrecht, Martinus Nijhoff, 1995), vol. 248, p. 345.

[793] See article 59 and commentary.

[794] See article 57 and commentary.

• *United States-Uganda (1978).* In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.[795] The legislation recited that "[t]he Government of Uganda … has committed genocide against Ugandans" and that the "United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide".[796]

• *Certain Western countries-Poland and the Soviet Union (1981).* On 13 December 1981, the Polish Government imposed martial law and subsequently suppressed demonstrations and detained many dissidents.[797] The United States and other Western countries took action against both Poland and the Soviet Union. The measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, Great Britain, France, the Netherlands, Switzerland and Austria.[798] The suspension procedures provided for in the respective treaties were disregarded.[799]

• *Collective measures against Argentina (1982).* In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.[800] Following a request by the United Kingdom, European Community members, Australia, Canada and New Zealand adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to article XI:1 and possibly article III of the General Agreement on Tariffs and Trade. It was disputed whether the measures could be justified under the national security exception provided for in article XXI (*b*) (iii) of the Agreement.[801] The embargo adopted by the European countries also constituted a suspension of Argentina's rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,[802] for which security exceptions of the Agreement did not apply.

• *United States-South Africa (1986).* When in 1985, the Government of South Africa declared a state of emergency in large parts of the country, the Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.[803] Subsequently, some countries introduced measures which went beyond those recommended by the Security Council. The United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended landing rights of South African Airlines on United States territory.[804] This immediate suspension was contrary to the terms of the 1947 United States of America and Union of South Africa Agreement relating to air services between their respective territories[805] and was justified as a measure which should encourage the Government of South Africa "to adopt reforms leading to the establishment of a non-racial democracy".[806]

• *Collective measures against Iraq (1990).* On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion. European Community member States and the United States adopted trade embargoes and decided to freeze Iraqi assets.[807] This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait.

• C*ollective measures against the Federal Republic of Yugoslavia (1998).* In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.[808] For a number of countries, such as France, Germany and the United Kingdom, the latter measure implied the non-performance of bilateral aviation agreements.[809] Because of doubts about the legitimacy of the action, the British Government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that "President Milosevic's ... worsening record on human rights means that, on moral and political grounds, he has forfeited the right of his Government to insist upon the 12 months notice which would normally ap-

[795] Uganda Embargo Act, Public Law 95-435 of 10 October 1978, *United States Statutes at Large 1978*, vol. 92, part 1 (Washington, D.C., United States Government Printing Office, 1980), pp. 1051–1053.

[796] *Ibid*., sects. 5(*a*) and (*b*).

[797] RGDIP, vol. 86 (1982), pp. 603–604.

[798] *Ibid*., p. 606.

[799] See, e.g., article 15 of the Air Transport Agreement between the Government of the United States of America and the Government of the Polish People's Republic of 1972 (*United States Treaties and Other International Agreements*, vol. 23, part 4 (1972), p. 4269); and article 17 of the United States-Union of Soviet Socialist Republics Civil Air Transport Agreement of 1966, ILM, vol. 6, No. 1 (January 1967), p. 82 and vol. 7, No. 3 (May 1968), p. 571.

[800] Security Council resolution 502 (1982) of 3 April 1982.

[801] Western States' reliance on this provision was disputed by other GATT members; cf. communiqué of Western countries, GATT document L. 5319/Rev.1 and the statements by Spain and Brazil, GATT document C/M/157, pp. 5–6. For an analysis, see M. J. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Unilateral Suspension of GATT Obligations as Reprisal (English summary)) (Berlin, Springer, 1996), pp. 328–334.

[802] The treaties are reproduced in *Official Journal of the European Communities*, No. L 298 of 26 November 1979, p. 2; and No. L 275 of 18 October 1980, p. 14.

[803] Security Council resolution 569 (1985) of 26 July 1985. For further references, see Sicilianos, *op. cit.* (footnote 735 above), p. 165.

[804] For the text of this provision, see ILM, vol. 26, No. 1 (January 1987), p. 79 (sect. 306).

[805] United Nations, *Treaty Series*, vol. 66, p. 239 (art. VI).

[806] For the implementation order, see ILM (footnote 804 above), p. 105.

[807] See, e.g., President Bush's Executive Orders of 2 August 1990, reproduced in AJIL, vol. 84, No. 4 (October 1990), pp. 903–905.

[808] Common positions of 7 May and 29 June 1998, *Official Journal of the European Communities*, No. L 143 of 14 May 1998, p. 1 and No. L 190 of 4 July 1998, p. 3; implemented through Council Regulations 1295/98, *ibid*., No. L 178 of 23 June 1998, p. 33 and 1901/98, *ibid.*, No. L 248 of 8 September 1998, p. 1.

[809] See, e.g., United Kingdom, *Treaty Series* No. 10 (1960) (London, HM Stationery Office, 1960); and *Recueil des Traités et Accords de la France*, 1967, No. 69.

ply".[810] The Federal Republic of Yugoslavia protested these measures as "unlawful, unilateral and an example of the policy of discrimination".[811]

(4) In some other cases, certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures, but asserted a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

• *Netherlands-Suriname (1982).* In 1980, a military Government seized power in Suriname. In response to a crackdown by the new Government on opposition movements in December 1982, the Dutch Government suspended a bilateral treaty on development assistance under which Suriname was entitled to financial subsidies.[812] While the treaty itself did not contain any suspension or termination clauses, the Dutch Government stated that the human rights violations in Suriname constituted a fundamental change of circumstances which gave rise to a right of suspension.[813]

• *European Community member States-the Federal Republic of Yugoslavia (1991).* In the autumn of 1991, in response to resumption of fighting within the Federal Republic of Yugoslavia, European Community members suspended and later denounced the 1983 Cooperation Agreement with Yugoslavia.[814] This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in resolution 713 (1991) of 25 September 1991. The reaction was incompatible with the terms of the Cooperation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice. Justifying the suspension, European Community member States explicitly mentioned the threat to peace and security in the region. But as in the case of Suriname, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.[815]

(5) In some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those States could not be considered "injured States" in the sense of article 42. It should be noted that in those cases where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State.[816]

(6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently, it is not appropriate to include in the present articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead, chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.

(7) Article 54 accordingly provides that the chapter on countermeasures does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached. The article speaks of "lawful measures" rather than "countermeasures" so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.

## Part Four

## GENERAL PROVISIONS

This Part contains a number of general provisions applicable to the articles as a whole, specifying either their scope or certain matters not dealt with. First, article 55 makes it clear by reference to the *lex specialis* principle that the articles have a residual character. Where some matter otherwise dealt with in the articles is governed by a special rule of international law, the latter will prevail to the extent of any inconsistency. Correlatively, article 56 makes it clear that the articles are not exhaustive, and that they do not affect other applicable rules of international law on matters not dealt with. There follow three saving clauses. Article 57 excludes from the scope of the articles questions concerning the responsibility of international organizations and of States for the acts of international organizations. The articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State, and this is made clear by article 58. Finally, article 59 reserves the effects of the Charter of the United Nations itself.

[810] BYBIL, *1998*, vol. 69, p. 581; see also BYBIL, *1999*, vol. 70, pp. 555–556.

[811] Statement of the Government of the Federal Republic of Yugoslavia on the suspension of flights of Yugoslav Airlines of 10 October 1998. See M. Weller, *The Crisis in Kosovo 1989-1999* (Cambridge, Documents & Analysis Publishing, 1999), p. 227.

[812] *Tractatenblad van het Koninkrijk der Nederlanden*, No. 140 (1975). See H.-H. Lindemann, "The repercussions resulting from the violation of human rights in Surinam on the contractual relations between the Netherlands and Surinam", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 44 (1984), p. 64, at pp. 68–69.

[813] R. C. R. Siekmann, "Netherlands State practice for the parliamentary year 1982–1983", NYIL, 1984, vol. 15, p. 321.

[814] *Official Journal of the European Communities*, No. L 41 of 14 February 1983, p. 1; No. L 315 of 15 November 1991, p. 1, for the suspension; and No. L 325 of 27 November 1991, p. 23, for the denunciation.

[815] See also the decision of the European Court of Justice in *A. Racke GmbH and Co.* v. *Hauptzollamt Mainz*, case C-162/96, *Reports of cases before the Court of Justice and the Court of First Instance*, 1998-6, p. I–3655, at pp. 3706–3708, paras. 53–59.

[816] Cf. *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above) where ICJ noted that action by way of collective self-defence could not be taken by a third State except at the request of the State subjected to the armed attack (p. 105, para. 199).

### *Article 55.* Lex specialis

**These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.**

*Commentary*

(1) When defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach. The question then is whether those provisions are exclusive, i.e. whether the consequences which would otherwise apply under general international law, or the rules that might otherwise have applied for determining a breach, are thereby excluded. A treaty may expressly provide for its relationship with other rules. Often, however, it will not do so and the question will then arise whether the specific provision is to coexist with or exclude the general rule that would otherwise apply.

(2) Article 55 provides that the articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. It reflects the maxim *lex specialis derogat legi generali*. Although it may provide an important indication, this is only one of a number of possible approaches towards determining which of several rules potentially applicable is to prevail or whether the rules simply coexist. Another gives priority, as between the parties, to the rule which is later in time.[817] In certain cases the consequences that follow from a breach of some overriding rule may themselves have a peremptory character. For example, States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law. Thus, the assumption of article 55 is that the special rules in question have at least the same legal rank as those expressed in the articles. On that basis, article 55 makes it clear that the present articles operate in a residual way.

(3) It will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases, it will be clear from the language of a treaty or other text that only the consequences specified are to flow. Where that is so, the consequence will be "determined" by the special rule and the principle embodied in article 55 will apply. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example of the former is the WTO Understanding on Rules and Procedures governing the Settlement of Disputes as it relates to certain remedies.[818] An example of the latter is article 41 of Protocol No. 11 to the European Convention on Human Rights.[819] Both concern matters dealt with in Part Two of the articles. The same considerations apply to Part One. Thus, a particular treaty might impose obligations on a State but define the "State" for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II.[820] Or a treaty might exclude a State from relying on *force majeure* or necessity.

(4) For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus, the question is essentially one of interpretation. For example, in the *Neumeister* case, the European Court of Human Rights held that the specific obligation in article 5, paragraph 5, of the European Convention on Human Rights for compensation for unlawful arrest or detention did not prevail over the more general provision for compensation in article 50. In the Court's view, to have applied the *lex specialis* principle to article 5, paragraph 5, would have led to "consequences incompatible with the aim and object of the Convention".[821] It was sufficient, in applying article 50, to take account of the specific provision.[822]

(5) Article 55 is designed to cover both "strong" forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as "weaker" forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution. PCIJ referred to the notion of a self-contained regime in the *S.S. "Wimbledon"* case with respect to the transit provisions concerning the Kiel Canal in the Treaty of Versailles,[823]

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[817] See paragraph 3 of article 30 of the 1969 Vienna Convention.

[818] See Marrakesh Agreement establishing the World Trade Organization, annex 2, especially art. 3, para. 7, which provides for compensation "only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". For WTO purposes, "compensation" refers to the future conduct, not past conduct, and involves a form of countermeasure. See article 22 of the Understanding. On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, Australia–Subsidies Provided to Producers and Exporters of Automotive Leather (footnote 431 above).

[819] See paragraph (2) of the commentary to article 32.

[820] Thus, article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment only applies to torture committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". This is probably narrower than the bases for attribution of conduct to the State in Part One, chapter II. Cf. "federal" clauses, allowing certain component units of the State to be excluded from the scope of a treaty or limiting obligations of the federal State with respect to such units (e.g. article 34 of the Convention for the Protection of the World Cultural and Natural Heritage).

[821] *Neumeister* v. *Austria, Eur. Court H.R., Series A, No. 17* (1974), paras. 28–31, especially para. 30.

[822] See also *Mavrommatis* (footnote 236 above), pp. 29–33; *Marcu Colleanu* v. *German State*, *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (Paris, Sirey, 1930), vol. IX, p. 216 (1929); WTO, Report of the Panel, Turkey–Restrictions on Imports of Textile and Clothing Products (footnote 130 above), paras. 9.87–9.95; *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI (Sales No. E/F. 95.V.2), p. 53, at p. 100, para. 39 (1977). See further C. W. Jenks, "The conflict of law-making treaties", BYBIL, *1953*, vol. 30, p. 401; M. McDougal, H. D. Lasswell and J. C. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven Press, 1994), pp. 200–206; and P. Reuter, *Introduction to the Law of Treaties* (footnote 300 above), para. 201.

[823] *S.S.* "*Wimbledon"* (see footnote 34 above), pp. 23–24.

as did ICJ in the *United States Diplomatic and Consular Staff in Tehran* case with respect to remedies for abuse of diplomatic and consular privileges.[824]

(6) The principle stated in article 55 applies to the articles as a whole. This point is made clear by the use of language ("the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State") which reflects the content of each of Parts One, Two and Three.

### *Article 56. Questions of State responsibility not regulated by these articles*

**The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.**

*Commentary*

(1) The present articles set out by way of codification and progressive development the general secondary rules of State responsibility. In that context, article 56 has two functions. First, it preserves the application of the rules of customary international law concerning State responsibility on matters not covered by the articles. Secondly, it preserves other rules concerning the effects of a breach of an international obligation which do not involve issues of State responsibility but stem from the law of treaties or other areas of international law. It complements the *lex specialis* principle stated in article 55. Like article 55, it is not limited to the legal consequences of wrongful acts but applies to the whole regime of State responsibility set out in the articles.

(2) As to the first of these functions, the articles do not purport to state all the consequences of an internationally wrongful act even under existing international law and there is no intention of precluding the further development of the law on State responsibility. For example, the principle of law expressed in the maxim *ex injuria jus non oritur* may generate new legal consequences in the field of responsibility.[825] In this respect, article 56 mirrors the preambular paragraph of the 1969 Vienna Convention which affirms that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". However, matters of State responsibility are not only regulated by customary international law but also by some treaties; hence article 56 refers to the "applicable rules of international law".

(3) A second function served by article 56 is to make it clear that the present articles are not concerned with any legal effects of a breach of an international obligation which do not flow from the rules of State responsibility, but stem from the law of treaties or other areas of law. Examples include the invalidity of a treaty procured by an unlawful use of force,[826] the exclusion of reliance on a fundamental change of circumstances where the change in question results from a breach of an international obligation of the invoking State to any other State party,[827] or the termination of the international obligation violated in the case of a material breach of a bilateral treaty.[828]

### *Article 57. Responsibility of an international organization*

**These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.**

*Commentary*

(1) Article 57 is a saving clause which reserves two related issues from the scope of the articles. These concern, first, any question involving the responsibility of international organizations, and secondly, any question concerning the responsibility of any State for the conduct of an international organization.

(2) In accordance with the articles prepared by the Commission on other topics, the expression "international organization" means an "intergovernmental organization".[829] Such an organization possesses separate legal personality under international law,[830] and is responsible for its own acts, i.e. for acts which are carried out by the organization through its own organs or officials.[831] By contrast, where a number of States act together through their own organs as distinct from those of an international organization, the conduct in question is that of the States concerned, in accordance with the principles set out in chapter II of Part One. In such cases, as article 47 confirms, each State remains responsible for its own conduct.

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[824] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), at p. 40, para. 86. See paragraph (15) of the commentary to article 50 and also B. Simma, "Self-contained regimes", NYIL, 1985, vol. 16, p. 111.

[825] Another possible example, related to the determination whether there has been a breach of an international obligation, is the so-called principle of "approximate application", formulated by Sir Hersch Lauterpacht in *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23, at p. 46. In the *Gabčíkovo-Nagymaros Project* case (see footnote 27 above), the Court said that "even if such a principle existed, it could by definition only be employed within the limits of the treaty in question" (p. 53, para. 76). See also S. Rosenne, *Breach of Treaty* (footnote 411 above), pp. 96–101.

[826] 1969 Vienna Convention, art. 52.

[827] *Ibid*., art. 62, para. 2 (*b*).

[828] *Ibid*., art. 60, para 1.

[829] See article 2, paragraph 1 (*i*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "the 1986 Vienna Convention").

[830] A firm foundation for the international personality of the United Nations is laid in the advisory opinion of the Court in *Reparation for Injuries* (see footnote 38 above), at p. 179.

[831] As the Court has observed, "the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts", *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 56 above).

(3) Just as a State may second officials to another State, putting them at its disposal so that they act for the purposes of and under the control of the latter, so the same could occur as between an international organization and a State. The former situation is covered by article 6. As to the latter situation, if a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributable to the organization, not the sending State, and will fall outside the scope of the articles. As to the converse situation, in practice there do not seem to be convincing examples of organs of international organizations which have been "placed at the disposal of" a State in the sense of article 6,[832] and there is no need to provide expressly for the possibility.

(4) Article 57 also excludes from the scope of the articles issues of the responsibility of a State for the acts of an international organization, i.e. those cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization. Formally, such issues could fall within the scope of the present articles since they concern questions of State responsibility akin to those dealt with in chapter IV of Part One. But they raise controversial substantive questions as to the functioning of international organizations and the relations between their members, questions which are better dealt with in the context of the law of international organizations.[833]

(5) On the other hand article 57 does not exclude from the scope of the articles any question of the responsibility of a State for its own conduct, i.e. for conduct attributable to it under chapter II of Part One, not being conduct performed by an organ of an international organization. In this respect the scope of article 57 is narrow. It covers only what is sometimes referred to as the derivative or secondary liability of member States for the acts or debts of an international organization.[834]

### *Article 58. Individual responsibility*

**These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.**

*Commentary*

(1) Article 58 makes clear that the articles as a whole do not address any question of the individual responsibility under international law of any person acting on behalf of a State. It clarifies a matter which could be inferred in any case from the fact that the articles only address issues relating to the responsibility of States.

(2) The principle that individuals, including State officials, may be responsible under international law was established in the aftermath of the Second World War. It was included in the London Charter of 1945 which established the Nuremberg Tribunal[835] and was subsequently endorsed by the General Assembly.[836] It underpins more recent developments in the field of international criminal law, including the two *ad hoc* tribunals and the Rome Statute of the International Criminal Court.[837] So far this principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility.[838] As a saving clause, article 58 is not intended to exclude that possibility; hence the use of the general term "individual responsibility".

(3) Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility.[839] The

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[832] Cf. *Yearbook ... 1974*, vol. II (Part One), pp. 286–290. The High Commissioner for the Free City of Danzig was appointed by the League of Nations Council and was responsible to it; see *Treatment of Polish Nationals* (footnote 75 above). Although the High Commissioner exercised powers in relation to Danzig, it is doubtful that he was placed at the disposal of Danzig within the meaning of article 6. The position of the High Representative, appointed pursuant to annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina of 14 December 1995, is also unclear. The Constitutional Court of Bosnia and Herzegovina has held that the High Representative has a dual role, both as an international agent and as an official in certain circumstances acting in and for Bosnia and Herzegovina; in the latter respect, the High Representative's acts are subject to constitutional control. See *Case U 9/00 on the Law on the State Border Service*, Official Journal of Bosnia and Herzegovina, No. 1/01 of 19 January 2001.

[833] This area of international law has acquired significance following controversies, *inter alia*, over the International Tin Council: *J. H. Rayner (Mincing Lane) Ltd.* v. *Department of Trade and Industry*, case 2 A.C. 418 (1990) (England, House of Lords); *Maclaine Watson and Co., Ltd.* v. *Council and Commission of the European Communities*, case C-241/87, *Reports of cases before the Court of Justice and the Court of First Instance*, 1990-5, p. I–1797; and the Arab Organization for Industrialization (*Westland Helicopters Ltd.* v. *Arab Organization for Industrialization*, ILR, vol. 80, p. 595 (1985) (International Chamber of Commerce Award); *Arab Organization for Industrialization* v. *Westland Helicopters Ltd., ibid*., p. 622 (1987) (Switzerland, Federal Supreme Court); *Westland Helicopters Ltd.* v. *Arab Organization for Industrialization, ibid*., vol. 108, p. 564 (1994) (England, High Court). See also *Waite and Kennedy* v. *Germany*, *Eur. Court H.R.*, *Reports*, 1999–I, p. 393 (1999).

[834] See the work of the Institute of International Law under R. Higgins, *Yearbook of the Institute of International Law*, vol. 66–I (1995), p. 251, and vol. 66–II (1996), p. 444. See also P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Brussels, Bruylant Editions de l'Université de Bruxelles, 1998). See further WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (footnote 130).

[835] See footnote 636 above.

[836] General Assembly resolution 95 (I) of 11 December 1946. See also the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, elaborated by the International Law Commission, *Yearbook ... 1950*, vol. II, p. 374, document A/1316.

[837] See paragraph (6) of the commentary to chapter III of Part Two.

[838] See, e.g., article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, dealing with compensation for victims of torture.

[839] See, e.g., *Streletz, Kessler and Krenz* v. *Germany* (application Nos. 34044/96, 35532/97 and 44801/98), judgment of 22 March 2001, *Eur. Court H.R.*, *Reports*, 2001–II: "If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned. It remains to be established that alongside that State responsibility the applicants individually bore criminal responsibility at the material time" (para. 104).

State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.[840] Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25, paragraph 4, of the Rome Statute of the International Criminal Court, which provides that: "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law.[841]

(4) Article 58 reflects this situation, making it clear that the articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term "individual responsibility" has acquired an accepted meaning in the light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.

[840] Prosecution and punishment of responsible State officials may be relevant to reparation, especially satisfaction: see paragraph (5) of the commentary to article 36.

[841] See, e.g., the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle III (footnote 836 above), p. 375; and article 27 of the Rome Statute of the International Criminal Court.

### *Article 59. Charter of the United Nations*

**These articles are without prejudice to the Charter of the United Nations.**

*Commentary*

(1) In accordance with Article 103 of the Charter of the United Nations, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". The focus of Article 103 is on treaty obligations inconsistent with obligations arising under the Charter. But such conflicts can have an incidence on issues dealt with in the articles, as for example in the *Lockerbie* cases.[842] More generally, the competent organs of the United Nations have often recommended or required that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases.

(2) Article 59 accordingly provides that the articles cannot affect and are without prejudice to the Charter of the United Nations. The articles are in all respects to be interpreted in conformity with the Charter.

[842] *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; *(Libyan Arab Jamahiriya* v. *United States of America), ibid.*, p. 114.

# Annex 28

PUBLICATIONS DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE

*SÉRIE A — N° 17*

Le 13 septembre 1928

# RECUEIL DES ARRÊTS

## N° 13

## AFFAIRE RELATIVE A L'USINE DE CHORZÓW

(DEMANDE EN INDEMNITÉ)

(FOND)

PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

*SERIES A.—No. 17*

September 13th, 1928

# COLLECTION OF JUDGMENTS

## No. 13

## CASE CONCERNING THE FACTORY AT CHORZÓW

(CLAIM FOR INDEMNITY)

(MERITS)

LEYDE
SOCIÉTÉ D'ÉDITIONS
A. W. SIJTHOFF
1928

LEYDEN
A. W. SIJTHOFF'S
PUBLISHING COMPANY
1928

COUR PERMANENTE DE JUSTICE INTERNATIONALE

1928.
Le 13 septembre.
Dossier E. c. XIII.
Rôle XIV: 1.

QUATORZIÈME SESSION (ORDINAIRE)

*Présents :*

MM. ANZILOTTI, *Président,*
HUBER, *ancien Président,*
Lord FINLAY,
MM. LODER,
NYHOLM,
DE BUSTAMANTE, } *Juges,*
ALTAMIRA,
ODA,
PESSÔA,
M. BEICHMANN, *Juge suppléant,*
MM. RABEL,
EHRLICH, } *Juges nationaux.*

ARRÊT N° 13

# AFFAIRE RELATIVE A L'USINE DE CHORZÓW

## (DEMANDE EN INDEMNITÉ)

(FOND)

Entre le Gouvernement d'Allemagne, représenté par M. le Dr Erich Kaufmann, professeur à Berlin,

*Demandeur,*

et le Gouvernement de Pologne, représenté par M. le Dr Thadée Sobolewski, agent du Gouvernement polonais auprès du Tribunal arbitral mixte polono-allemand,

*Défendeur.*

PERMANENT COURT OF INTERNATIONAL JUSTICE.

FOURTEENTH (ORDINARY) SESSION.

1928.
September 13th.
File E. c. XIII.
Docket XIV: 1.

*Before :*

MM. ANZILOTTI, *President,*
HUBER, *Former President,*
Lord FINLAY,
MM. LODER,
NYHOLM,
DE BUSTAMANTE,
ALTAMIRA,
ODA,
PESSÔA,
*Judges,*
M. BEICHMANN, *Deputy-Judge,*
MM. RABEL,
EHRLICH,
*National Judges.*

JUDGMENT No. 13.

# CASE CONCERNING THE FACTORY AT CHORZÓW

## (CLAIM FOR INDEMNITY)

### (THE MERITS).

The Government of Germany, represented by Dr. Erich Kaufmann, Professor at Berlin,

*Applicant,*

*versus*

The Government of the Polish Republic, represented by Dr. Thadeus Sobolewski, Agent for the Polish Government before the Polish-German Mixed Arbitral Tribunal,

*Respondent.*

LA COUR,

composée ainsi qu'il est dit ci-dessus,

après avoir entendu les Parties en leurs observations et conclusions,

a rendu l'arrêt suivant :

Par Requête introductive d'instance, déposée au Greffe de la Cour le 8 février 1927, en conformité de l'article 40 du Statut et de l'article 35 du Règlement, le Gouvernement du Reich a introduit devant la Cour permanente de Justice internationale une instance relative à la réparation qui serait due par le Gouvernement polonais du chef du préjudice souffert par les Sociétés anonymes Oberschlesische Stickstoffwerke A.-G. (ci-après dénommée l'Oberschlesische) et Bayerische Stickstoffwerke A.-G. (ci-après dénommée la Bayerische) à la suite de l'attitude adoptée par ce Gouvernement, lors de la prise de possession par lui de l'usine d'azote sise à Chorzów, vis-à-vis de ces Sociétés, attitude que la Cour avait déclarée, dans son Arrêt n° 7 du 25 mai 1926, comme n'étant pas conforme aux dispositions des articles 6 et suivants de la Convention relative à la Haute-Silésie, conclue à Genève, le 15 mai 1922, entre l'Allemagne et la Pologne (et désignée ci-après sous le nom de Convention de Genève).

Au reçu, le 3 mars 1927, du Mémoire du Gouvernement allemand en l'affaire, le Gouvernement polonais souleva, le 14 avril 1927, une exception préliminaire qui, contestant la compétence de la Cour pour connaître de l'instance introduite devant elle, concluait à ce qu'il plaise à la Cour, « sans entrer dans le fond, se déclarer incompétente ».

Sur ce moyen, la Cour se prononça par son Arrêt n° 8 du 26 juillet 1927, par lequel elle décida de rejeter l'exception préliminaire soulevée par le Gouvernement de Pologne et de retenir, pour statuer au fond, l'instance introduite le 8 février 1927 par le Gouvernement d'Allemagne.

Cet arrêt chargeait, en outre, le Président de fixer les délais pour le dépôt des Contre-Mémoire, Réplique et Duplique sur le fond. Ces délais, fixés d'abord aux 30 septembre, 15 novembre et 30 décembre 1927, furent par la suite étendus, en vertu

THE COURT,

composed as above,

having heard the observations and conclusions of the Parties,

delivers the following judgment:

The Government of the German Reich, by an Application instituting proceedings filed with the Registry of the Court on February 8th, 1927, in conformity with Article 40 of the Statute and Article 35 of the Rules of Court, has submitted to the Permanent Court of International Justice a suit concerning the reparation which, in the contention of the Government of the Reich, is due by the Polish Government for the damage suffered by the Oberschlesische Stickstoffwerke A.-G. (hereinafter designated as the Oberschlesische) and the Bayerische Stickstoffwerke A.-G. (hereinafter designated as the Bayerische) in consequence of the attitude adopted by that Government towards those Companies in taking possession of the nitrate factory situated at Chorzów, which attitude has been declared by the Court in Judgment No. 7 (May 25th, 1926) not to have been in conformity with the provisions of Article 6 and the following articles of the Convention concerning Upper Silesia concluded at Geneva on May 15th, 1922, between Germany and Poland (hereinafter described as the Geneva Convention).

On receipt of the German Government's Case in the suit, on March 3rd, 1927, the Polish Government, on April 14th, 1927, raised a preliminary objection denying the Court's jurisdiction to hear the suit brought before it and submitting that the Court should, "without entering into the merits, declare that it had no jurisdiction".

The Court dealt with this plea in its Judgment No. 8 given on July 26th, 1927, by which it overruled the preliminary objection raised by the Polish Government and reserved for judgment on the merits the suit brought on February 8th, 1927, by the German Government.

Furthermore, under the terms of this judgment, the President was instructed to fix the times for the filing of the Counter-Case, Reply and Rejoinder on the merits. These times, which were in the first place fixed to expire on

de décisions successives, aux 30 novembre 1927, 20 février et 7 mai 1928 respectivement.

Les pièces de la procédure écrite furent dûment déposées au Greffe dans les délais définitivement fixés, et firent l'objet des communications prévues à l'article 43 du Statut.

Au cours des audiences tenues les 21, 22, 25, 27 et 29 juin 1928, la Cour a entendu, en leurs plaidoiries, réplique et duplique, les agents des Parties, indiqués ci-dessus.

* * *

Les conclusions formulées dans la Requête du 8 février 1927 du Gouvernement allemand étaient ainsi conçues :

« Plaise à la Cour,

Dire et juger,

1° que, en raison de son attitude vis-à-vis des Sociétés anonymes Oberschlesische Stickstoffwerke et Bayerische Stickstoffwerke, constatée par la Cour comme n'étant pas conforme aux dispositions des articles 6 et suivants de la Convention de Genève, le Gouvernement polonais est tenu à la réparation du préjudice subi de ce chef par lesdites Sociétés à partir du 3 juillet 1922 jusqu'à la date de l'arrêt demandé ;

2° que le montant des indemnités à payer par le Gouvernement polonais est de 59.400.000 Reichsmarks pour le dommage causé à l'Oberschlesische Stickstoffwerke A.-G. et de 16.775.200 Reichsmarks pour le dommage causé à la Bayerische Stickstoffwerke A.-G. ;

3° en ce qui concerne le mode de paiement :

*a*) que le Gouvernement polonais devra payer, pendant le délai d'un mois à dater de l'arrêt, les indemnités dues à l'Oberschlesische Stickstoffwerke A.-G. pour la reprise de son capital d'exploitation (matières premières, produits finis et demi-finis, matériel emmagasiné, etc.) et les indemnités dues à la Bayerische Stickstoffwerke A.-G. pour la période d'exploitation du 3 juillet 1922 jusqu'à l'arrêt ;

*b*) que le Gouvernement polonais devra payer les sommes restantes, au plus tard, le 15 avril 1928 ;

September 30th, November 15th and December 30th, 1927, were subsequently extended by successive decisions until November 30th, 1927, February 20th and May 7th, 1928, respectively.

The documents of the written proceedings were duly filed with the Registrar of the Court within the times finally fixed and were communicated to those concerned as provided in Article 43 of the Statute.

In the course of hearings held on June 21st, 22nd, 25th, 27th and 29th, 1928, the Court has heard the oral statements, reply and rejoinder submitted by the above-mentioned Agents for the Parties.

* * *

The submissions made in the German Government's Application of February 8th, 1927, were as follows:

It is submitted:

[*Translation.*]

(1) that by reason of its attitude in respect of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to make good the consequent damage sustained by the aforesaid Companies from July 3rd, 1922, until the date of the judgment sought;

(2) that the amount of the compensation to be paid by the Polish Government is 59,400,000 Reichsmarks for the damage caused to the Oberschlesische Stickstoffwerke Company and 16,775,200 Reichsmarks for the damage caused to the Bayerische Stickstoffwerke Company;

(3) in regard to the method of payment:

(*a*) that the Polish Government should pay within one month from the date of judgment, the compensation due to the Oberschlesische Stickstoffwerke Company for the taking possession of the working capital (raw material, finished and half-manufactured products, stores, etc.) and the compensation due to the Bayerische Stickstoffwerke Company for the period of exploitation from July 3rd, 1922, to the date of judgment;

(*b*) that the Polish Government should pay the sums remaining unpaid by April 15th, 1928, at latest;

*c*) que, à partir de l'arrêt, des intérêts à raison de 6 % l'an seront payés par le Gouvernement polonais ;

*d*) que les paiements visés sous *a*) — *c*) seront effectués sans aucune déduction au compte des deux Sociétés près la Deutsche Bank à Berlin ;

*e*) que, jusqu'au 30 juin 1931, aucune exportation de chaux azotée et de nitrate d'ammoniaque n'aura lieu en Allemagne, dans les États-Unis d'Amérique, en France et en Italie. »

Ces conclusions ont, au cours de la procédure soit écrite, soit orale, subi des modifications dont il sera rendu compte ci-après. La Cour ne s'étant pas prévalue, dans la présente espèce, du droit à elle conféré par l'article 48 du Statut, de déterminer par voie d'ordonnance les « formes et délais dans lesquels chaque Partie doit finalement conclure », elle admet, aux fins de cette instance, la faculté pour les Parties de modifier, conformément aux précédents établis, leurs conclusions primitives, non seulement dans les mémoire et contre-mémoire (article 40 du Règlement), mais aussi tant dans les pièces ultérieures de la procédure écrite que dans les déclarations qu'elles peuvent faire au cours des débats oraux (article 55 du Règlement), sous réserve, seulement, que l'autre Partie soit toujours en mesure de se prononcer sur les conclusions amendées.

La conclusion n° 1 de la Requête n'a pas été modifiée par la suite.

En ce qui concerne, par contre, la conclusion n° 2, des modifications importantes sont intervenues. Dans le Mémoire, cette conclusion se trouve libellée de la manière suivante :

« Dire et juger....

2) que le montant des indemnités à payer par le Gouvernement polonais est de 75.920.000 Reichsmarks, plus la valeur actuelle du capital d'exploitation (matières premières, produits finis et demi-finis, matières emmagasinées, etc.), saisi le 3 juillet 1922, pour le dommage causé à l'Oberschlesische Stickstoffwerke A.-G., et de 20.179.000 Reichsmarks pour le dommage causé à la Bayerische Stickstoffwerke A.-G. »

En comparant la conclusion 2) du Mémoire avec la conclusion 2) de la Requête, il convient de tenir compte des faits suivants résultant du Mémoire, savoir :

(*c*) that, from the date of judgment, interest at 6 % per annum should be paid by the Polish Government;

(*d*) that the payments mentioned under (*a*)—(*c*) should be made without deduction to the account of the two Companies with the Deutsche Bank at Berlin;

(*e*) that, until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy.

These submissions have, in the course of the written or oral proceedings, undergone modifications which will be indicated below. As the Court has not in the present suit availed itself of the right conferred upon it under Article 48 of the Statute to make orders as to "the form and time in which each Party must conclude its arguments", it, in this case, allows the Parties, in accordance with established precedent, to amend their original submissions, not only in the Case and Counter-Case (Article 40 of the Rules), but also both in the subsequent documents of the written proceedings and in declarations made by them in the course of the hearings (Article 55 of the Rules), subject only to the condition that the other Party must always have an opportunity of commenting on the amended submissions.

Submission No. 1 of the Application has not been subsequently amended.

On the other hand, with regard to submission No. 2, important amendments have been made. In the Case this submission is worded as follows:

It is submitted: . . . .

[*Translation.*]

(2) that the amount of the compensation to be paid by the Polish Government is 75,920,000 Reichsmarks, plus the present value of the working capital (raw materials, finished and half-manufactured products, stores, etc.) taken over on July 3rd, 1922, for the damage caused to the Oberschlesische Stickstoffwerke Company, and 20,179,000 Reichsmarks for the damage caused to the Bayerische Stickstoffwerke Company.

In comparing submission (2) of the Case with submission (2) of the Application, regard must be had to the following facts resulting from the Case:

*a*) que le montant de 59.400.000 indiqué dans la Requête comme le dommage de l'Oberschlesische est calculé au 3 juillet 1922 ;

*b*) que ce montant comprend la somme d'un million pour matières premières, produits finis et demi-finis, matières emmagasinées, etc. ;

*c*) que la somme de 75.920.000 indiquée dans le Mémoire à titre de dommage pour l'Oberschlesische se décompose en 58.400.000 de dommages au 3 juillet 1922, et 17.520.000 d'intérêts à 6 % sur 58.400.000 pour la période 3 juillet 1922 — 2 juillet 1927 ;

*d*) que cette somme ne comprend pas de montant pour le « capital d'exploitation », une indemnité pour ce capital « valeur actuelle » étant dans le Mémoire demandée en termes généraux ;

*e*) que la somme de 16.775.200 indiquée dans la Requête comme montant du dommage de la Bayerische est calculée au 3 juillet 1922 ; et

*f*) que la somme de 20.179.000 indiquée dans le Mémoire pour le dommage de la Bayerische est calculée au 2 (ou 3) juillet 1927 à un taux d'intérêt de 6 % ; le montant pour la Bayerische fourni dans la Requête serait entaché d'une erreur de calcul.

En dernier lieu, la conclusion 2) de la Requête a été modifiée dans la réplique orale de l'agent du Gouvernement allemand, savoir, en ce qui concerne l'indemnité réclamée pour le dommage causé à l'Oberschlesische. Ladite conclusion se trouve, en effet, dans les conclusions lues par l'agent à l'issue de sa réplique orale, libellée comme suit :

« Dire et juger que le montant des indemnités à payer au Gouvernement allemand est de 58.400.000 Reichsmarks, plus 1.656.000 Reichsmarks, plus les intérêts à 6 % de cette somme à partir du 3 juillet 1922 jusqu'à la date de l'arrêt (pour le dommage causé à l'Oberschlesische Stickstoffwerke A.-G.) ;

que le montant des indemnités à payer au Gouvernement allemand est de 20.179.000 Reichsmarks pour le dommage causé à la Bayerische Stickstoffwerke A.-G. »

Il s'ensuit que, pour l'Oberschlesische, le Gouvernement allemand *a*) revient à la somme de 58.400.000 au 3 juillet 1922 ;

(*a*) that the total of 59,400,000 mentioned in the Application as the figure representing the damage suffered by the Oberschlesische is calculated as on July 3rd, 1922;

(*b*) that this sum includes the sum of 1 million for raw materials, finished and half-manufactured products, stores, etc.;

(*c*) that the sum of 75,920,000 mentioned in the Case as the figure representing the damage suffered by the Oberschlesische is made up of 58,400,000 for damages as on July 3rd, 1922, and 17,520,000 for interest at 6 % on 58,400,000 for the period July 3rd, 1922, to July 2nd, 1927;

(*d*) that this sum does not include an amount for "working capital", compensation for the "present value" of this capital being in the Case sought in general terms;

(*e*) that the sum of 16,775,200 mentioned in the Application as the figure representing the damage suffered by the Bayerische is calculated as on July 3rd, 1922;

(*f*) that the sum of 20,179,000 mentioned in the Case as representing the damage suffered by the Bayerische is calculated as on July 2nd (or 3rd), 1927, at a rate of interest of 6 %; the amount for the Bayerische indicated in the Application is said to contain an error of calculation.

Lastly, submission (2) of the Application has been amended in the German Agent's oral reply as concerns the compensation claimed for the damage suffered by the Oberschlesische. This submission runs as follows in the submissions read by the Agent at the conclusion of his oral Reply:

It is submitted:
[*Translation.*]
that the total of the compensation to be paid to the German Government is 58,400,000 Reichsmarks, plus 1,656,000 Reichsmarks, plus interest at 6 % on this sum as from July 3rd, 1922, until the date of judgment (for the damage done to the Oberschlesische Stickstoffwerke A.-G.);

that the total of the compensation to be paid to the German Government is 20,179,000 Reichsmarks for the damage done to the Bayerische Stickstoffwerke A.-G.

It follows that, as regards the Oberschlesische, the German Government (*a*) reverts to the sum of 58,400,000 as on

*b*) fixe à 1.656.000 la valeur du capital d'exploitation à cette date ; *c*) demande sur ces deux sommes les intérêts à 6 % jusqu'à la date de l'arrêt, en renonçant au calcul forfaitaire avancé dans le Mémoire.

En ce qui concerne la conclusion 3) de la Requête du Gouvernement allemand, il y a à noter, dans la suite de la procédure, des modifications tant de forme que de fond.

Pour ce qui est de la forme, l'alinéa *e*) de la conclusion 3 de la Requête constitue, dans le Mémoire, à elle seule une nouvelle conclusion 3, tandis que la substance des alinéas *a*) — *d*) de la conclusion 3 de la Requête a été versée dans une nouvelle conclusion 4 *a*) — *d*) du Mémoire. Dans ces conditions, il est préférable de retracer les modifications survenues à chacun des alinéas de la conclusion 3 primitive.

L'alinéa 3 *a*) est ainsi libellé dans le Mémoire (où il porte le n° 4 *a*) :

« Dire et juger, en ce qui concerne le mode de paiement, que le Gouvernement polonais devra payer, pendant le délai d'un mois à dater de l'arrêt, les indemnités dues à l'Oberschlesische Stickstoffwerke A.-G., pour la reprise de son capital d'exploitation et les indemnités dues à la Bayerische Stickstoffwerke A.-G., pour la période d'exploitation du 3 juillet 1922 jusqu'à l'arrêt. »

Par rapport à la Requête, cet alinéa n'a, par conséquent, subi qu'une modification de pure forme (suppression d'une parenthèse explicative) ; elle n'a plus été amendée par la suite.

L'alinéa 3 *b*) est libellé de la manière suivante dans le Mémoire (où il porte le n° 4 *b*) :

« Dire et juger que le Gouvernement polonais devra payer les sommes restantes, au plus tard le 15 avril 1928 ;

subsidiairement que, pour autant que le paiement serait effectué par tranches, le Gouvernement polonais délivre, pendant le délai d'un mois à dater de l'arrêt, des lettres de change aux montants des tranches, y compris les intérêts, à payer aux dates d'échéance respectives à l'Oberschlesische Stickstoffwerke A.-G. et à la Bayerische Stickstoffwerke A.-G. »

July 3rd, 1922; (*b*) fixes as 1,656,000 the value of the working capital on that date; (*c*) claims on these two sums interest at 6 % until the date of judgment, thus abandoning the claim for a lump sum made in the Case.

As regards submission (3) of the German Government's Application, amendments both of form and of substance are to be noted in the course of the subsequent procedure.

As regards form, paragraph (*e*) of submission (3) of the Application constitutes by itself a new third submission in the Case, whilst the substance of paragraphs (*a*)—(*d*) of submission No. 3 of the Application has been embodied in a new submission No. 4 (*a*)—(*d*) in the Case. In these circumstances, it is preferable to trace back the modifications made to each of the paragraphs of the original third submission.

Paragraph 3 (*a*) is worded as follows in the Case (where it is numbered 4 (*a*)):

[*Translation.*]

that the Polish Government should pay, within one month from the date of judgment, the compensation due to the Oberschlesische Stickstoffwerke Company for the taking possession of the working capital and the compensation due to the Bayerische Stickstoffwerke Company for the period of exploitation from July 3rd, 1922, to the date of judgment.

As compared with the Application, therefore, this paragraph has undergone a purely superficial modification (deletion of an explanatory remark in parenthesis), and it has not subsequently been amended.

Paragraph 3 (*b*) is worded as follows in the Case (where it is numbered 4 (*b*)):

[*Translation.*]

that the Polish Government should pay the remaining sums by April 15th, 1928, at latest;

in the alternative, that, in so far as payment may be effected in instalments, the Polish Government shall deliver, within one month from the date of judgment, bills of exchange for the amounts of the instalments, including interest, payable on the respective dates on which they fall due to the Oberschlesische Stickstoffwerke Company and to the Bayerische Stickstoffwerke Company.

Ainsi, à la conclusion principale primitive a été ajoutée une conclusion subsidiaire visant l'éventualité d'un paiement par tranches.

Le même alinéa est formulé comme suit dans la Réplique orale :

« Dire et juger que le Gouvernement polonais doit payer les sommes restantes au plus tard dans un délai de quinze jours à dater du commencement de l'année budgétaire qui suit l'arrêt ; subsidiairement, que, pour autant que le paiement serait effectué par tranches, le Gouvernement polonais délivre, pendant le délai d'un mois à dater de l'arrêt, des lettres de change aux montants des tranches, y compris les intérêts à payer aux dates d'échéance respectives à l'Oberschlesische Stickstoffwerke A.-G. et à la Bayerische Stickstoffwerke A.-G. »

La modification par rapport à la version précédente consiste en la substitution à la date du 15 avril 1928, déjà écoulée, d'un délai calculé en rapport avec l'ouverture de l'année budgétaire polonaise.

L'alinéa 3 *c*) des conclusions de la Requête (4 *c*) du Mémoire) n'a pas subi de changements par la suite.

Par contre, l'alinéa 3 *d*) de la Requête figure dans le Mémoire sous la forme suivante (n° 4 *d*) du Mémoire) :

« Dire et juger que le Gouvernement polonais n'est pas autorisé à compenser contre la créance susdite du Gouvernement allemand d'être indemnisé sa créance résultant des assurances sociales en Haute-Silésie ; qu'il ne peut se prévaloir d'aucune autre compensation contre ladite créance d'indemnité ; et que les paiements visés sous *a*) — *c*) seront effectués sans aucune déduction au compte des deux Sociétés près la Deutsche Bank à Berlin. »

La conclusion primitive se trouve dans le dernier membre de phrase de cette formule, dont la partie principale demande maintenant une déclaration excluant toute possibilité de compensation extra-judiciaire.

La formule du Mémoire a été maintenue tant dans la Réplique écrite que dans la réplique orale, sauf addition d'une nouvelle conclusion subsidiaire, relative à la question de l'interdiction d'une compensation extra-judiciaire, et ainsi conçue :

Thus to the main original submission has been added an alternative contemplating the possibility of payment by instalments.

The same paragraph is couched in the following terms in the oral reply:

[*Translation.*]

It is submitted that the Polish Government should pay the remaining sums at latest within fifteen days after the beginning of the financial year following the judgment; in the alternative that, in so far as payment may be effected by instalments, the Polish Government should, within one month from the date of judgment, give bills of exchange for the amounts of the instalments, including interest, payable on maturity to the Oberschlesische Stickstoffwerke A.-G. and to the Bayerische Stickstoffwerke A.-G.

The modification as compared with the previous version consists in the substitution for the date April 15th, 1928, which had already passed, a time-limit fixed in relation to the beginning of the Polish financial year.

Paragraph 3 (*c*) of the submissions of the Application (4 (*c*) of the Case) has undergone no subsequent modification.

On the other hand, paragraph 3 (*d*) of the Application appears in the Case in the following form (No. 4 (*d*) of the Case):

[*Translation.*]

that the Polish Government is not entitled to set off, against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the above-mentioned claim for indemnity; and that the payments mentioned under (*a*)—(*c*) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin.

The original submission is contained in the last part of this paragraph, the principal clause of which now seeks a declaration excluding any possibility of extra-judicial set-off.

The wording of the Case is retained both in the written and in the oral reply, except that a new alternative submission is added in regard to the question of the prohibition of extra-judicial set-off. This addition runs as follows:

« Dire et juger, subsidiairement, qu'une compensation n'est autorisée que lorsque le Gouvernement polonais invoque à cette fin une créance reconnue par le Gouvernement allemand ou constatée par un arrêt rendu entre les deux Gouvernements. »

Venant, enfin, à l'alinéa 3 *e*) des conclusions de la Requête, il y a lieu de constater que ce dernier se retrouve sans aucun changement dans la conclusion 3 du Mémoire. Par contre, la Réplique écrite, tout en reproduisant également la formule de la Requête, y ajoute la conclusion subsidiaire suivante :

« Juger et décider que le Gouvernement polonais est obligé de cesser l'exploitation de l'usine, respectivement des installations chimiques pour transformer l'azote de chaux en nitrate d'ammoniaque, etc. »

Ainsi complétée, la conclusion dont il s'agit figure également dans la réplique orale, savoir dans la forme suivante :

« subsidiairement, pour le cas où la Cour n'adopterait pas les points de vue développés aux paragraphes 55 et 57 de la Réplique, dire et juger que le Gouvernement polonais est obligé de cesser l'exploitation de l'usine, respectivement des installations chimiques pour produire le nitrate d'ammoniaque, etc. »

* * *

À l'occasion de certaines conclusions présentées par le Gouvernement polonais et relatives à l'indemnisation de l'Oberschlesische, le Gouvernement allemand a non seulement demandé à la Cour de les rejeter, mais a encore formulé deux autres conclusions, savoir :

« Dire et juger

1° que le Gouvernement polonais n'est pas autorisé à refuser le paiement au Gouvernement allemand des indemnités en raison d'arguments tirés de l'article 256 et en raison d'égards vis-à-vis de la Commission des Réparations et d'autres tierces personnes ;

2° que l'obligation du Gouvernement polonais de payer l'indemnité allouée par la Cour n'est nullement écartée par un jugement rendu ou à rendre par un tribunal interne polonais dans un procès ayant pour objet la question de la propriété de l'usine sise à Chorzów. »

[*Translation.*]

In the alternative it is submitted that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments.

Turning lastly to paragraph 3 (*e*) of the submissions in the Application, it is to be observed that this reappears unchanged in submission 3 of the Case. On the other hand, in the written Reply, whilst the submission of the Application is repeated, the following alternative is added:

[*Translation.*]

It is submitted that the Polish Government should be obliged to cease the exploitation of the factory and of the chemical equipment for the transformation of nitrate of lime into ammonium nitrate, etc.

With this addition, this submission also appears in the oral reply in the following form:

[*Translation.*]

in the alternative, should the Court not adopt the points of view set out in paragraphs 55 and 57 of the Reply, it is submitted that the Polish Government should be obliged to cease the exploitation of the factory or of the chemical equipment for the production of ammonium nitrate, etc.

* * *

In connection with certain submissions made by the Polish Government in regard to the compensation of the Oberschlesische, the German Government has not merely asked the Court to reject these submissions but has also formulated two other submissions, namely:

[*Translation.*]

(1) that the Polish Government is not entitled to refuse to pay compensation to the German Government on the basis of arguments drawn from Article 256 and for motives of respect for the rights of the Reparation Commission and other third parties;

(2) that the Polish Government's obligation to pay the indemnity awarded by the Court is in no way set aside by a judgment given or to be given by a Polish municipal court in a suit concerning the question of the ownership of the factory at Chorzów.

Ces conclusions, formulées soit dans la Réplique écrite soit dans la première plaidoirie de l'agent allemand, ont été maintenues sans changement dans la réplique orale.

Abstraction faite de ces deux demandes complémentaires, les conclusions finales du Gouvernement allemand sont donc les suivantes :

« 1) que, en raison de son attitude vis-à-vis des Sociétés anonymes Oberschlesische Stickstoffwerke et Bayerische Stickstoffwerke constatée par la Cour comme n'étant pas conforme aux dispositions des articles 6 et suivants de la Convention de Genève, le Gouvernement polonais est tenu à la réparation du préjudice subi de ce chef par lesdites Sociétés à partir du 3 juillet 1922 jusqu'à la date de l'arrêt demandé ;

2) *a*) que le montant des indemnités à payer au Gouvernement allemand est de 58.400.000 Reichsmarks, plus 1.656.000 Reichsmarks, plus les intérêts à 6 % de cette somme à partir du 3 juillet 1922 jusqu'à la date de l'arrêt (pour le dommage causé à l'Oberschlesische Stickstoffwerke A.-G.) ;

*b*) que le montant des indemnités à payer au Gouvernement allemand est de 20.179.000 Reichsmarks pour le dommage causé à la Bayerische Stickstoffwerke A.-G. ;

3) que, jusqu'au 30 juin 1931, aucune exportation de chaux azotée et de nitrate d'ammoniaque n'aura lieu en Allemagne, dans les États-Unis d'Amérique, en France et en Italie ;

subsidiairement, que le Gouvernement polonais est obligé de cesser l'exploitation de l'usine, respectivement des installations chimiques pour produire le nitrate d'ammoniaque, etc. ;

4) *a*) que le Gouvernement polonais devra payer, pendant le délai d'un mois à dater de l'arrêt, les indemnités dues à l'Oberschlesische Stickstoffwerke A.-G. pour la reprise de son capital d'exploitation, et les indemnités dues à la Bayerische Stickstoffwerke A.-G. pour la période d'exploitation du 3 juillet 1922 jusqu'à l'arrêt ;

*b*) que le Gouvernement polonais doit payer les sommes restantes au plus tard pendant un délai de quinze jours à dater du commencement de l'année budgétaire qui suit l'arrêt ;

subsidiairement, que, pour autant que le paiement serait effectué par tranches, le Gouvernement polonais délivre, pendant le délai d'un mois à dater de l'arrêt, des lettres de change aux montants des tranches, y compris les intérêts à payer aux dates d'échéance respectives à l'Oberschlesische Stickstoffwerke A.-G. et à la Bayerische Stickstoffwerke A.-G. ;

*c*) que, à partir de l'arrêt, des intérêts à raison de 6 % l'an seront payés par le Gouvernement polonais ;

These submissions, which were made in the written Reply and in the first oral statement of the German Agent respectively, have been maintained unaltered in the oral reply.

Apart from the two additional claims just referred to, the final submissions of the German Government are therefore as follows:

[*Translation.*]

(1) that by reason of its attitude in respect of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to make good the consequent injury sustained by the aforesaid Companies from July 3rd, 1922, until the date of the judgment sought;

(2) (*a*) that the amount of the compensation to be paid to the German Government is 58,400,000 Reichsmarks, plus 1,656,000 Reichsmarks, plus interest at 6 % on this sum as from July 3rd, 1922, until the date of judgment (for the damage caused to the Oberschlesische Stickstoffwerke A.-G.);

(*b*) that the amount of the compensation to be paid to the German Government is 20,179,000 Reichsmarks for the damage caused to the Bayerische Stickstoffwerke A.-G.;

(3) that until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy;

in the alternative, that the Polish Government should be obliged to cease from exploiting the factory or the chemical equipment for the production of nitrate of ammonia, etc.;

(4) (*a*) that the Polish Government should pay, within one month from the date of judgment, the compensation due to the Oberschlesische Stickstoffwerke A.-G. for the taking possession of the working capital and the compensation due to the Bayerische Stickstoffwerke A.-G. for the period of exploitation from July 3rd, 1922, to the date of judgment;

(*b*) that the Polish Government should pay the remaining sums at latest within fifteen days after the beginning of the financial year following the judgment; in the alternative, that, in so far as payment may be effected by instalments, the Polish Government should within one month from the date of judgment, give bills of exchange for the amounts of the instalments, including interest, payable on maturity to the Oberschlesische Stickstoffwerke A.-G. and to the Bayerische Stickstoffwerke A.-G.;

(*c*) that from the date of judgment, interest at 6 % per annum should be paid by the Polish Government;

*d*) que le Gouvernement polonais n'est pas autorisé à compenser contre la créance susdite du Gouvernement allemand d'être indemnisé sa créance résultant des assurances sociales en Haute-Silésie ; qu'il ne peut se prévaloir d'aucune autre compensation contre ladite créance d'indemnité ; et que les paiements visés sous *a*) à *c*) seront effectués sans aucune déduction au compte des deux Sociétés près la Deutsche Bank à Berlin ;

subsidiairement, qu'une compensation n'est autorisée que lorsque le Gouvernement polonais invoque à cette fin une créance reconnue par le Gouvernement allemand ou constatée par un arrêt rendu entre les deux Gouvernements. »

Le Gouvernement polonais n'a pas soulevé d'objection en la forme contre les modifications apportées successivement aux conclusions primitives du Gouvernement allemand.

* * *

Les conclusions que le Gouvernement polonais a formulées en réponse à celles qui se trouvent exprimées dans la Requête et dans le Mémoire allemand sont libellées de la manière suivante dans le Contre-Mémoire :

« Plaise à la Cour :

A. Pour ce qui concerne l'Oberschlesische :

1) débouter le Gouvernement requérant de sa demande ;

2) subsidiairement, surseoir provisoirement sur la demande en indemnité ;

3) très subsidiairement, pour le cas où la Cour serait amenée à allouer une indemnité quelconque, dire et juger que celle-ci ne sera payable que : *a*) après le retrait préalable par ladite Société de sa requête pendante au Tribunal arbitral mixte germano-polonais relative à l'usine de Chorzów et après sa renonciation en bonne et due forme à toute prétention contre le Gouvernement polonais, du chef de la prise en possession et de l'exploitation de l'usine de Chorzów ; *b*) lorsque le procès civil intenté contre ladite Société par le Gouvernement polonais et ayant pour objet la validité de l'inscription de son titre de propriété au registre foncier sera définitivement jugé en faveur de la Société Oberschlesische.

4) En tout cas, dire et juger que le Gouvernement allemand doit, en premier lieu, livrer au Gouvernement polonais la totalité des actions de la Société anonyme Oberschlesische

(*d*) that the Polish Government is not entitled to sett off against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the said claim for indemnity; and that the payments mentioned under (*a*) to (*c*) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin;

in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments.

The Polish Government has made no formal objection to the amendments successively made in the original submissions of the German Government.

* * *

The submissions formulated by the Polish Government in reply to those set out in the Application and Case of the German Government are worded as follows in the Counter-Case:

It is submitted:

[*Translation.*]

A. In regard to the Oberschlesische:

(1) that the applicant Government's claim should be dismissed;

(2) in the alternative, that the claim for indemnity should be provisionally suspended;

(3) as a further alternative, in the event of the Court awarding some compensation, that such compensation should only be payable: (*a*) after the previous withdrawal by the said Company of the action brought by it and pending before the German-Polish Mixed Arbitral Tribunal in regard to the Chorzów factory and after the formal abandonment by it of any claim against the Polish Government in respect of the latter's taking possession and exploitation of the Chorzów factory; (*b*) when the civil action brought against the said Company by the Polish Government in respect of the validity of the entry of its title to ownership in the land register has been finally decided in favour of the Oberschlesische.

(4) In any case, it is submitted that the German Government should, in the first place, hand over to the Polish Government the whole of the shares of the Oberschlesische

Stickstoffwerke, de la valeur nominale de 110.000.000 de marks dont il dispose en vertu du contrat du 24 décembre 1919.

B. Pour ce qui concerne la Bayerische :

1) *a*) débouter le Gouvernement requérant de sa demande en indemnité pour le passé, pour autant qu'elle dépasse la somme de 1.000.000 de Reichsmarks ;
   *b*) allouer *pro futuro* une rente annuelle de 250.000 Reichsmarks payable à partir du 1er janvier 1928 jusqu'au 31 mars 1941 ;
   *c*) dire et juger que ces indemnités ne seront payables qu'après le retrait préalable par ladite Société de sa requête pendante au Tribunal arbitral mixte germano-polonais relative à l'usine de Chorzów, et après sa renonciation, en bonne et due forme, à toute prétention contre le Gouvernement polonais du chef de la prise en possession et de l'exploitation de l'usine de Chorzów ;
2) débouter le Gouvernement requérant de sa conclusion n° 3, tendant à ce qu'il soit dit et jugé que, jusqu'au 30 juin 1931, aucune exportation de chaux azotée et de nitrate d'ammoniaque n'aura lieu en Allemagne, dans les États-Unis d'Amérique, en France et en Italie.

C. Pour ce qui concerne l'Oberschlesische et la Bayerische en commun :

rejeter la conclusion n° 4 tendant à ce qu'il soit dit et jugé que le Gouvernement polonais n'est pas autorisé à compenser, contre la créance susdite du Gouvernement allemand d'être indemnisé, sa créance résultant des assurances sociales en Haute-Silésie ; qu'il ne peut se prévaloir d'aucune autre compensation contre ladite créance d'indemnité, et que les paiements visés sous 4 *a*) — *c*) seront effectués sans aucune déduction au compte des deux Sociétés près la Deutsche Bank à Berlin. »

Ces conclusions n'ont, par la suite, subi d'autres modifications que le retrait, opéré au moyen d'une déclaration insérée dans la Duplique écrite, de la conclusion A, 3 *b*).

Le Gouvernement allemand ayant contesté le droit pour le Gouvernement polonais de retirer cette conclusion, à laquelle le Gouvernement allemand avait opposé une demande de débouté, dans le stade de la procédure où ce retrait avait eu lieu, le Gouvernement polonais a déclaré maintenir le retrait.

Pour les motifs développés ci-dessus, la Cour estime qu'il n'y a rien qui puisse empêcher le Gouvernement polonais de

Stickstoffwerke Company, of the nominal value of 110,000,000 Marks, which are in its hands under the contract of December 24th, 1919.

B. In regard to the Bayerische:

(1) (*a*) that the applicant Government's claim for compensation in respect of the past, in excess of 1,000,000 Reichsmarks, should be dismissed;

(*b*) that, *pro futuro*, an annual rent of 250,000 Reichsmarks, payable as from January 1st, 1928, until March 31st, 1941, should be awarded;

(*c*) that these indemnities should only be payable after previous withdrawal by the said Company of the claim pending before the German-Polish Mixed Arbitral Tribunal in respect of the Chorzów factory and after the formal abandonment by it of any claim against the Polish Government in respect of the latter's taking possession and exploitation of the Chorzów factory;

(2) that the applicant Government's third submission to the effect that until June 30th, 1931, no exportation of nitrated lime or nitrate of ammonia should take place to Germany, the United States of America, France or Italy, should be dismissed.

C. In regard to the Oberschlesische and Bayerische jointly:

that submission No. 4—to the effect that it is not permissible for the Polish Government to set off, against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia, that it may not make use of any other set-off against the above-mentioned claim for indemnity, and that the payments mentioned under 4 (*a*)—(*c*) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin—should be rejected.

These submissions have not subsequently been amended except that submission A, 3 (*b*), was withdrawn by means of a declaration contained in the written Rejoinder.

The German Government having disputed the right of the Polish Government to withdraw this submission (the rejection of which had been demanded by the former) at the stage of the proceedings reached when the withdrawal took place, the latter Government maintained its withdrawal.

For the reasons given above, the Court holds that there is nothing to prevent the Polish Government for its part from

modifier, quant à lui, ses conclusions primitives, d'autant moins que cette modification s'est produite encore au cours de la phase écrite de la procédure et a pris la forme d'un abandon d'une partie des conclusions. De l'avis de la Cour, la seconde des « demandes complémentaires » du Gouvernement allemand, mentionnée ci-dessus, se dirigeait sans doute contre la conclusion polonaise qui a été abandonnée.

*

La Cour considère, par conséquent, qu'elle se trouve en présence de conclusions finales polonaises ainsi libellées :

« Plaise à la Cour :

A. pour ce qui concerne l'Oberschlesische :

1) débouter le Gouvernement requérant de sa demande ;

2) subsidiairement, surseoir provisoirement sur la demande en indemnité ;

3) très subsidiairement, pour le cas où la Cour serait amenée à allouer une indemnité quelconque, dire et juger que celle-ci ne sera payable qu'après le retrait préalable par ladite Société de sa requête pendante au Tribunal arbitral mixte germano-polonais relative à l'usine de Chorzów et après sa renonciation en bonne et due forme à toute prétention contre le Gouvernement polonais, du chef de la prise en possession et de l'exploitation de l'usine de Chorzów.

4) En tout cas, dire et juger que le Gouvernement allemand doit, en premier lieu, livrer au Gouvernement polonais la totalité des actions de la Société anonyme Oberschlesische Stickstoffwerke, de la valeur nominale de 110.000.000 de marks, dont il dispose en vertu du contrat du 24 décembre 1919.

B. Pour ce qui concerne la Bayerische :

1) *a*) débouter le Gouvernement requérant de sa demande en indemnité pour le passé, pour autant qu'elle dépasse la somme de 1.000.000 de Reichsmarks ;

*b*) allouer *pro futuro* une rente annuelle de 250.000 Reichsmarks payable à partir du 1er janvier 1928 jusqu'au 31 mars 1941 ;

*c*) dire et juger que ces indemnités ne seront payables qu'après le retrait préalable par ladite Société de sa requête pendante au Tribunal arbitral mixte germano-

amending its original submissions, especially seeing that this amendment occurred while the written proceedings were still in progress and took the form of the abandonment of a part of its submissions. In the Court's opinion, the second of the "additional claims" of the German Government mentioned above, was doubtless designed to meet the Polish submission which has been thus abandoned.

*

The Court therefore considers that the final submissions of the Polish Government may be set down as under:

"It is submitted:

A. As regards the Oberschlesische:

(1) that the claim of the applicant Government should be dismissed;

(2) in the alternative, that the claim for indemnity should be provisionally suspended;

(3) as a further alternative, in the event of the Court awarding some compensation, that such compensation should only be payable after the previous withdrawal by the said Company of the action brought by it and pending before the German-Polish Mixed Arbitral Tribunal in regard to the Chorzów factory, and after the formal abandonment by it of any claim against the Polish Government in respect of the latter's taking possession and exploitation of the Chorzów factory.

(4) In any case, it is submitted that the German Government should, in the first place, hand over to the Polish Government the whole of the shares of the Oberschlesische Stickstoffwerke Company, of the nominal value of 110,000,000 Marks, which are in its hands under the contract of December 24th, 1919.

B. As regards the Bayerische:

(1) (*a*) that the applicant Government's claim for compensation in respect of the past, in excess of 1,000,000 Reichsmarks, should be dismissed;

(*b*) that, *pro futuro*, an annual rent of 250,000 Reichsmarks, payable as from January 1st, 1928, until March 31st, 1941, should be awarded;

(*c*) that these indemnities should only be payable after previous withdrawal by the said Company of the claim pending before the German-Polish Mixed Arbitral

polonais relative à l'usine de Chorzów, et après sa renonciation, en bonne et due forme, à toute prétention contre le Gouvernement polonais du chef de la prise en possession et de l'exploitation de l'usine de Chorzów ;

2) débouter le Gouvernement requérant de sa conclusion n° 3 tendant à ce qu'il soit dit et jugé que, jusqu'au 30 juin 1931, aucune exportation de chaux azotée et de nitrate d'ammoniaque n'aura lieu en Allemagne, dans les États-Unis d'Amérique, en France et en Italie.

C. Pour ce qui concerne l'Oberschlesische et la Bayerische en commun :

rejeter la conclusion n° 4 tendant à ce qu'il soit dit et jugé que le Gouvernement polonais n'est pas autorisé à compenser contre la créance susdite du Gouvernement allemand d'être indemnisé, sa créance résultant des assurances sociales en Haute-Silésie ; qu'il ne peut se prévaloir d'aucune autre compensation contre ladite créance d'indemnité, et que les paiements visés sous 4 *a*) — *c*) seront effectués sans aucune déduction au compte des deux Sociétés près la Deutsche Bank à Berlin. »

* * *

D'une comparaison entre les conclusions finales allemandes et polonaises qui ont été ainsi établies, il ressort :

I. — A) en ce qui concerne la conclusion allemande n° 1 : qu'il y a désaccord entre les Parties, sauf pour ce qui est de la réparation du dommage subi par la Bayerische ;

B) en ce qui concerne la conclusion allemande n° 2 *a* : que le Gouvernement polonais demande que le Gouvernement allemand soit débouté ; et, subsidiairement, qu'il soit sursis provisoirement à la demande en indemnité ; c'est sans doute contre la demande subsidiaire opposée ainsi par le Gouvernement polonais à la conclusion n° 2 *a* du Gouvernement allemand que se dirige la première des « demandes complémentaires » de ce Gouvernement, mentionnées plus haut ;

C) en ce qui concerne la conclusion allemande n° 2 *b* : que le Gouvernement polonais demande que le Gouvernement allemand en soit débouté, sauf pour ce

Tribunal in respect of the Chorzów factory and after the formal abandonment by it of any claim against the Polish Government in respect of the latter's taking possession and exploitation of the Chorzów factory;

(2) that the applicant Government's third submission to the effect that until June 30th, 1931, no exportation of nitrate of lime or nitrate of ammonia should take place to Germany, the United States of America, France or Italy.

C. As regards the Oberschlesische and Bayerische jointly:

that submission No. 4—to the effect that it is not permissible for the Polish Government to set off against the above-mentioned claim for indemnity of the German Government its claim in respect of social insurances in Upper Silesia, that it may not make use of any other set-off against the above-mentioned claim for indemnity, and that the payments mentioned under 4 (*a*)—(*c*) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin—should be rejected.

* * *

A comparison between the German and Polish final submissions as thus set out leads to the following results:

I.—(A) as regards the first German submission: that the Parties are at variance except in regard to the reparation of the damage sustained by the Bayerische;

(B) as regards submission No. 2 *a* of the German Government: that the Polish Government asks that it should be dismissed; and, in the alternative, that the claim for indemnity should be provisionally suspended; it is doubtless the alternative claim thus put forward by Poland in reply to submission No. 2 *a* of the German Government that the first of the "additional claims" of the latter Government mentioned above is intended to meet;

(C) as regards submission No. 2 *b* of the German Government: that the Polish Government asks that it should be dismissed except as regards the award, in respect of

qui est de l'allocation, pour le passé, d'une somme ne dépassant pas 1.000.000 de Reichsmarks et, pour l'avenir, d'une rente annuelle de 250.000 Reichsmarks payable du 1er janvier 1928 au 31 mars 1941 ;

D) en ce qui concerne la conclusion allemande n° 3 : que le Gouvernement polonais demande que le Gouvernement allemand soit débouté de la conclusion *principale*, mais ne se prononce pas en forme de conclusion sur la conclusion *subsidiaire* inscrite sous ce numéro ;

E) en ce qui concerne les conclusions allemandes n° 4 *a*) — *c*) : que le Gouvernement polonais ne se prononce pas spécifiquement sur ces conclusions, sauf en formulant sa conclusion A 3, relative au sursis de paiement ;

F) en ce qui concerne la conclusion allemande n° 4 *d*) : que le Gouvernement polonais conclut au rejet de la conclusion *principale* portant ce numéro, mais ne se prononce pas en forme de conclusion sur la conclusion *subsidiaire* allemande.

II. — En ce qui concerne les conclusions polonaises : que la conclusion A 4, dépassant le cadre des conclusions allemandes, a provoqué de la part du Gouvernement allemand une demande en rejet, formulée au cours de la phase orale de la procédure.

* * *

C'est donc exclusivement sur les points de divergence ainsi constatés qu'il appartient à la Cour de statuer dans l'arrêt qu'elle va rendre. Il est vrai que les Parties ont formulé, au cours de la procédure tant écrite qu'orale, encore d'autres demandes. Pour autant, cependant, que ces demandes ne constituent pas des développements des conclusions primitives, ou des demandes subsidiaires à ces conclusions, la Cour ne saurait les regarder autrement que, suivant l'expression de l'agent du Gouvernement allemand, comme des « motivations à titre subsidiaire », ou bien comme de simples suggestions quant à la procédure à suivre ; cela est certainement le cas en ce qui concerne les nombreuses demandes tendant à obtenir la consul-

the past, of a sum not exceeding 1,000,000 Reichsmarks for the future, of an annual rent of 250,000 Reichsmarks payable as from January 1st, 1928, until March 31st, 1941;

(D) as regards the German submission No. 3: that the Polish Government asks that the German Government's *principal* submission should be dismissed but does not formulate a definite submission with regard to the *alternative* submission under this number;

(E) as regards the German submissions Nos. 4 (*a*)—(*c*): that the Polish Government does not say anything specific concerning these submissions except in so far as it formulates its submission A 3, regarding the suspension of payment;

(F) as regards the German Government's submission No. 4 (*d*): that the Polish Government submits that the *principal* submission under this number should be rejected, but does not formulate any definite submission regarding the *alternative* German submission.

II.— As regards the Polish submissions: that submission A 4, which goes beyond the scope of the German submissions, has given rise to a claim for its rejection on the part of the German Government, formulated during the oral proceedings.

* * *

It is therefore solely with the points of divergence as set out above that the Court has to deal in the judgment which it is about to deliver. It is true that the Parties have, both in the written and oral proceedings, formulated yet other claims. In so far, however, as these claims do not constitute developments of the original submissions, or alternatives to them, the Court cannot regard them otherwise than—to use the expression of the Agent of the German Government—as "subsidiary arguments" or as mere suggestions as to the procedure to be adopted; this is certainly the case as regards the numerous requests with a view to the consultation of experts or the hearing of witnesses. There is no occasion for the Court

tation d'experts ou l'audition de témoins. Sur toutes ces demandes, la Cour n'a pas besoin de statuer ; elle peut donc se borner à en tenir compte, dans la mesure où cela convient, au cours de la discussion, aux fins de l'exposé des motifs de l'arrêt des arguments avancés par les Parties à l'appui de leurs conclusions.

* * *

Les Parties ont soumis à la Cour de nombreux documents, soit comme annexes aux pièces de la procédure écrite, soit au cours des débats oraux, soit, enfin, à la suite de demandes formulées ou de questions posées par la Cour. (Annexe.)

## POINT DE FAIT.

Les faits qui se trouvent à la base de la présente affaire ont déjà été succinctement exposés ou rappelés dans les Arrêts n$^{os}$ 6, 7, 8 et 11 rendus par la Cour les 25 août 1925, 25 mai 1926, 26 juillet 1927, et 16 décembre 1927.

Le présent arrêt, cependant, doit s'occuper de l'affaire dite de l'usine de Chorzów à un point de vue où la Cour n'a pas eu à se placer antérieurement, savoir, à celui de la nature — et, le cas échéant, du montant ainsi que des modalités de paiement — de la réparation due éventuellement par la Pologne pour avoir, ainsi que l'a constaté la Cour par son Arrêt n° 7, adopté une attitude qui n'était pas conforme à la Convention de Genève du 15 mai 1922. Il y a donc lieu, avant d'aborder le point de droit soulevé par la Requête allemande du 8 février 1927, de retracer brièvement les faits pertinents à ce point de vue particulier.

Le 5 mars 1915 avait été conclu entre le chancelier de l'Empire allemand, pour le Reich et la Bayerische, un contrat aux termes duquel la Société s'engageait à « installer pour le Reich et à commencer immédiatement à construire », entre autres, une usine d'azote de chaux à Chorzów en Haute-Silésie. Les terrains nécessaires seraient acquis pour le compte du Reich

to pass upon all these requests; it may therefore confine itself to taking them into account, in so far as may be necessary during the discussion of the arguments advanced by the Parties in support of their submissions, for the purposes of stating the reasons of the judgment.

* * *

The Parties have presented to the Court numerous documents either as annexes to the documents of the written proceedings or in the course of the hearings, or, lastly, in response to requests made or questions put by the Court. (Annex.)

## THE FACTS.

The facts underlying the present suit have already been succinctly stated or referred to in Judgments Nos. 6, 7, 8 and 11, given by the Court on August 25th, 1925, May 25th, 1926, July 26th, 1927, and December 16th, 1927.

The present judgment, however, must deal with the so-called case of the factory at Chorzów from a point of view with which the Court has not hitherto had to concern itself, namely, that of the nature—and, if necessary, the amount and method of payment—of the reparation which may be due by Poland in consequence of her having, as established by the Court in Judgment No. 7, adopted an attitude not in conformity with the Geneva Convention of May 15th, 1922. Accordingly, it is necessary, before approaching the point of law raised by the German Application of February 8th, 1927, briefly to trace out the relevant facts from this particular standpoint.

On March 5th, 1915, a contract was concluded between the Chancellor of the German Empire, on behalf of the Reich, and the Bayerische, according to which that Company undertook "to establish for the Reich and forthwith to begin the construction of", amongst other things, a nitrate factory at Chorzów in Upper Silesia. The necessary lands were to be acquired on

et inscrits à son nom dans le livre foncier. Les installations mécaniques devaient être établies conformément aux brevets et licences ainsi qu'aux expériences de la Société, qui s'engageait à diriger, jusqu'au 31 mars 1941, l'exploitation de l'usine, en utilisant l'ensemble des brevets, licences, expériences et innovations, améliorations et perfectionnements, ainsi que tous contrats de fournitures et de livraisons qui lui revenaient. Dans ce but, une section spéciale de la Société devait être établie ; elle serait soumise, dans une certaine mesure, au contrôle du Reich, qui avait le droit de participer, pour chaque année financière, à l'excédent résultant de l'exploitation. Le Reich avait le droit de résilier au 31 mars de chaque année à partir du 31 mars 1926, après préavis de quinze mois, la direction de l'usine par la Société. Cette résiliation pouvait avoir lieu déjà à partir du 31 mars 1921, toujours après préavis de quinze mois, si la participation du Reich à l'excédent n'atteignait pas un niveau déterminé.

Ce contrat fut plus tard complété par une série de sept contrats additionnels, dont, cependant, seuls les deuxième et septième, conclus les 16 novembre 1916 et 22 novembre 1918 respectivement, ont trait à l'usine de Chorzów. Le 14 mai 1919, la Bayerische intenta un procès contre le Reich, demandant que celui-ci fût tenu à dédommager la Société pour le préjudice qu'elle aurait souffert à la suite de certains manquements allégués à l'exécution du contrat du 5 mars 1915 et des contrats additionnels. Cette affaire, toutefois, fut liquidée à l'amiable par une transaction conclue le 24 octobre 1919 entre le Reich et la Bayerische, transaction qui, remplaçant le cinquième contrat additionnel, n'avait pas trait à l'usine de Chorzów.

Le 24 décembre 1919 furent passés à Berlin divers actes juridiques notariés ayant pour but la création d'une nouvelle Société, l'Oberschlesische, au capital social de 250.000 marks, augmenté plus tard à 110.000.000 de marks, et la vente par le Reich à cette Société de l'usine de Chorzów, c'est-à-dire de l'ensemble des terrains, bâtiments et installations y appartenant, avec tous accessoires, réserves, matières premières et matériaux d'exploitation, ainsi que les stocks. La direction et l'exploita-

behalf of the Reich and entered in its name in the land register. The machinery and equipment were to be in accordance with the patents and licences of the Company and the experience gained by it, and the Company undertook to manage the factory until March 31st, 1941, making use of all patents, licences, experience gained, innovations and improvements, as also of all supply and delivery contracts of which it had the benefit. For this purpose, a special section of the Company was to be formed which was, to a certain extent, to be subject to the supervision of the Reich, which had the right to a share of the profits resulting from the working of the factory during each financial year. The Reich had the right, commencing on March 31st, 1926, to terminate the contract for the management of the factory by the Company on March 31st of any year upon giving fifteen months' notice. The contract could be determined as early as March 31st, 1921, always on condition of fifteen months' notice being given, if the Reich's share of the surplus did not reach a fixed level.

This contract was subsequently supplemented by a series of seven additional contracts, of which, however, only the second and seventh, concluded on November 16th, 1916, and November 22nd, 1918, respectively, relate to the Chorzów factory. On May 14th, 1919, the Bayerische brought an action against the Reich, claiming that the latter was bound to compensate the Company for the damage said to have been suffered by it, owing to certain alleged shortcomings with respect to the fulfilment of the contract of March 5th, 1915, and the additional contracts. This matter was, however, settled out of court by an arrangement concluded on October 24th, 1919, between the Reich and the Bayerische, an arrangement which replaced the fifth additional contract and did not relate to the Chorzów factory.

On December 24th, 1919, a series of legal instruments were signed and legalized at Berlin with a view to the formation of a new Company, the Oberschlesische Stickstoffwerke A.-G., with a share capital of 250,000 marks, increased subsequently to 110 millions of marks, and the sale by the Reich to this Company of the factory at Chorzów, that is to say, the whole of the land, buildings and installations belonging thereto, with all accessories, reserves, raw material, equipment and stocks. The

tion de l'usine devaient rester entre les mains de la Bayerische, qui utiliserait dans ce but ses brevets, licences, expériences et contrats. Ces rapports entre les deux Sociétés furent confirmés au moyen de lettres échangées entre elles, datées des 24 et 28 décembre 1919. L'Oberschlesische fut dûment inscrite, le 29 janvier 1920, à l'*Amtsgericht* de Königshütte, dans le livre foncier de Chorzów, comme propriétaire des biens-fonds qui constituaient l'usine d'azote de Chorzów. Le siège social de l'Oberschlesische qui, aux termes de l'acte de fondation, était établi à Chorzów, fut, dans la suite, par acte du 14 janvier 1920, transféré à Berlin.

Dans le contrat du 24 décembre 1919 entre le Reich et l'Oberschlesische nouvellement créée, intervint également une deuxième Société, à responsabilité limitée, créée le même jour, et appelée *Stickstoff Treuhand Gesellschaft m. b. H.* (ci-après dénommée la « Treuhand »), Société dont le capital social était de 300.000 marks, augmenté plus tard à 1.000.000 de marks. Aux termes du contrat, l'ensemble de l'usine pour la production de l'azote à chaux avec installations accessoires, sise à Chorzów, fut cédé par le Reich à l'Oberschlesische au prix de 110.000.000 de marks environ, prix calculé sur certaines données indiquées dans le contrat même, — la Treuhand reprenant aux lieu et place de l'Oberschlesische, comme débiteur unique et indépendant, toutes les obligations que le contrat imposait à cette Société à l'égard du Reich et obtenant, comme contre-prestation sans payement, des actions de l'Oberschlesische de la valeur nominale de 109.750.000 marks. Plus tard, la Treuhand a acquis également les actions restantes de l'Oberschlesische et est ainsi devenue l'actionnaire unique de cette Société. En garantie des créances appartenant au Reich en vertu du contrat, la Treuhand s'engageait à procurer au Reich le droit de gage sur toutes les actions de l'Oberschlesische. La Treuhand amortirait le prix d'achat exclusivement en versant au Reich des dividendes sur les actions de l'Oberschlesische. Néanmoins, la Treuhand était autorisée à payer, à tout moment, en tout ou en partie, le prix d'achat, ce qui aurait pour effet de libérer du gage les actions dont le capital nominal correspondrait au versement ainsi effectué. Le Reich était auto-

management and working of the factory were to remain in the hands of the Bayerische, which, for this purpose, was to utilize its patents, licences, experience gained and contracts. These relations between the two Companies were confirmed by means of letters dated December 24th and 28th, 1919, exchanged between them. The Oberschlesische was duly entered, on January 29th, 1920, at the *Amtsgericht* of Königshütte, in the Chorzów land register, as owner of the landed property constituting the nitrate factory at Chorzów. The registered office of the Oberschlesische which, under the memorandum of association, was established at Chorzów, was subsequently, by an amendment executed on January 14th, 1920, transferred to Berlin.

In the contract of December 24th, 1919, between the Reich and the newly created Oberschlesische, a second limited liability company, founded the same day and known as the *Stickstoff Treuhand Gesellschaft m. b. H.* (hereinafter called the "Treuhand") was also concerned. This Company had a share capital of 300,000 marks, subsequently increased to 1,000,000 marks. Under the contract, the whole of the factory for the production of nitrated lime, with the accessory installations, situated at Chorzów, was ceded by the Reich to the Oberschlesische at the price of approximately 110 million marks,—which price was calculated according to certain data indicated in the contract itself,—the Treuhand taking over, in the place of the Oberschlesische, as sole and independent debtor, all the obligations imposed by the contract upon the latter in regard to the Reich, and obtaining in consideration thereof, without payment, shares of the Oberschlesische—to the nominal value of 109,750,000 marks. Later, the Treuhand also acquired the rest of the shares of the Oberschlesische, thus becoming the sole shareholder of that Company. As guarantee for the sums due to the Reich under the contract, the Treuhand undertook to obtain for the Reich a lien on all the shares of the Oberschlesische. The Treuhand was to liquidate the purchase price exclusively by paying to the Reich the dividends on the shares of the Oberschlesische. Nevertheless, the Treuhand was authorized to pay at any time the whole or a part of the purchase price; this would have the effect of removing the lien on shares of a nominal value corresponding to the payment

risé à exercer lui-même tous les droits découlant de la possession des actions et en particulier le droit de vote à l'assemblée générale, mais se déclarait d'accord pour maintenir la direction de l'exploitation de l'Oberschlesische entre les mains de la Bayerische. Une aliénation des actions engagées ne serait autorisée, même après l'expiration du droit de gage, qu'avec l'assentiment du Reich. En garantie de l'exécution de cette obligation, le Reich conserverait, même après cette expiration, la possession des actions et l'exercice de tous les droits découlant de cette possession. Le prix réalisé lors d'une vente éventuelle des actions servirait en premier lieu à amortir le solde de la créance du Reich. De tout excédent, le Reich toucherait, le cas échéant, soit les 85 % — si la vente était faite par la Treuhand —, soit les 90 % — si elle était faite par le Reich ; dans les deux cas, le solde seulement reviendrait à la Treuhand, qui, cependant, dans la seconde éventualité, obtenait le droit d'acquérir les actions au prix auquel le Reich désirait les réaliser.

Le 15 mai 1922 fut signée à Genève entre l'Allemagne et la Pologne la Convention relative à la Haute-Silésie.

Après la signature de cette Convention, mais avant la cession effective de la Haute-Silésie polonaise à la Pologne, la Treuhand offrit, par lettre du 26 mai 1922, à une société suisse, la Compagnie d'azote et de fertilisants S. A. à Genève, une option jusqu'à la fin de l'année pour l'achat, au prix de cinq millions de francs suisses à verser au plus tard le 2 janvier 1923, de la moitié (55 millions de marks) des actions de l'Oberschlesische, moyennant quoi la société genevoise obtiendrait, entre autres, le droit de participer aux négociations avec le Gouvernement polonais. Cette offre n'aboutit pas.

Le 1er juillet 1922, le Tribunal polonais de Huta Krolewska, qui avait succédé à l'*Amtsgericht* de Königshütte, rendit une décision suivant laquelle l'enregistrement près ce Tribunal de l'Oberschlesische comme propriétaire de l'usine en question, déclaré nul, devait être rayé, la situation antérieure rétablie, et le droit de propriété sur les biens-fonds dont il s'agit enregistré au profit du Fisc de l'État polonais. Cette décision, qui

made. The Reich was authorized itself to exercise all the rights resulting from the possession of the shares, and in particular the right to vote at the general meeting of shareholders, but agreed that the management of the exploitation of the Oberschlesische should be left in the hands of the Bayerische. An alienation of the shares so pledged would be authorized only with the approval of the Reich, even after the lien had expired. As a guarantee for the fulfilment of this obligation, the Reich would, even after expiration of the lien, retain possession of the shares and the exercise of all rights resulting from such possession. The price realized in the event of a sale of the shares was in the first place to be devoted to the liquidation of the balance of the Reich's claim. Of any surplus, the Reich was to receive either 85%—if the sale were effected by the Treuhand—or 90 %—if it were effected by the Reich; in both cases, the balance only would fall to the Treuhand which, however, in the second case, would obtain a right to acquire the shares at the price at which the Reich wished that they should be disposed of.

On May 15th, 1922, was signed at Geneva between Germany and Poland the Convention concerning Upper Silesia.

After the signature of this Convention, but before the actual cession of Polish Upper Silesia to Poland, the Treuhand, by a letter dated May 26th, 1922, offered to a Swiss company, the *Compagnie d'azote et de fertilisants S. A.* at Geneva, an option until the end of the year for the purchase, at a price of five million Swiss francs, to be paid by January 2nd, 1923, at latest, of one half (55 million marks) of the shares of the Oberschlesische, in consideration of which the Genevese Company would, amongst other things, acquire the right to take part in the negotiations with the Polish Government. This offer came to nothing.

On July 1st, 1922, the Polish Court of Huta Krolewska, which had replaced the *Amtsgericht* of Königshütte, gave a decision to the effect that the registration with this Court of the Oberschlesische as owner of the factory, which was declared null and void, was to be cancelled and the previously existing situation restored and that the right of ownership in the landed property in question was to be registered in the name of the

invoquait l'article 256 du Traité de Versailles, ainsi que les lois polonaises des 14 juillet 1920 et 16 juin 1922, fut mise à exécution le même jour.

Le 3 juillet suivant, M. Ignacy Moscicki, nommé fondé de pouvoirs général de l'usine de Chorzów, par un décret ministériel polonais du 24 juin 1922, prit possession de l'usine et en assuma l'administration, conformément aux termes du décret ; le Gouvernement allemand a allégué, et le Gouvernement polonais n'a pas contesté, que ledit fondé de pouvoirs, en entreprenant la gestion de l'exploitation de l'usine, se mit en même temps en possession des biens meubles et des brevets, licences, etc.

Après avoir saisi l'usine, le Gouvernement polonais l'inscrivit sur la liste des biens à lui transférés en vertu de l'article 256 du Traité de Versailles, liste qu'il a dûment notifiée à la Commission des Réparations. Le Gouvernement polonais allègue qu'à la suite de l'Arrêt n° 7 de la Cour, le Gouvernement allemand a demandé la radiation de l'usine de la liste en question ; il n'a cependant pas été informé que cette radiation ait été effectuée.

Entre temps, l'Oberschlesische avait introduit, le 15 novembre 1922, devant le Tribunal arbitral mixte germano-polonais à Paris, une requête concluant à faire condamner le Gouvernement polonais notamment à la restitution de l'usine. Cette requête, signifiée au Gouvernement défendeur le 17 janvier 1923, fut retirée par l'Oberschlesische en juin 1928, avant que le Tribunal eût eu l'occasion de statuer.

L'Oberschlesische intenta une action parallèle concernant les biens meubles qui se trouvaient à Chorzów lors de la prise de l'usine, en ouvrant, le 24 novembre 1922, une procédure contre le Fisc polonais devant le Tribunal civil de Katowice, procédure dont le but était d'obtenir soit la restitution à l'Oberschlesische ou à la Bayerische de ces biens, soit le remboursement de leur valeur ; ce procès n'aboutit cependant à aucune décision quant au fond.

En ce qui la concerne, la Bayerische a, elle aussi, intenté, le 25 mars 1925, devant le Tribunal arbitral mixte germano-polo-

Polish Treasury. This decision, which cited Article 256 of the Treaty of Versailles and the Polish laws of July 14th, 1920, and June 16th, 1922, was carried into effect on the same day.

On July 3rd, 1922, M. Ignacy Moscicki, who was delegated with full powers to take charge of the factory at Chorzów by a Polish ministerial decree of June 24th, 1922, took possession of the factory and took over the management in accordance with the terms of the decree. The German Government contended, and the Polish Government did not deny, that the said delegate, in undertaking the control of the working of the factory, at the same time took possession of the movable property, patents, licences, etc.

After having taken over the factory, the Polish Government entered it in the list of property transferred to it under Article 256 of the Treaty of Versailles, which list was duly communicated to the Reparation Commission. The Polish Government alleges that after the pronouncement of Judgment No. 7 by the Court, the German Government asked that the factory should be struck out of the list in question; the former Government has not, however, been informed whether this has been done.

In the meantime, the Oberschlesische, on November 15th, 1922, had brought an action before the German-Polish Mixed Arbitral Tribunal at Paris, claiming, amongst other things, that the Polish Government should be ordered to restore the factory. This action, notice of which was served upon the respondent Government on January 17th, 1923, was withdrawn by the Oberschlesische in June 1928, before the Tribunal had been able to give a decision.

The Oberschlesische, on November 24th, 1922, instituted a parallel action in regard to the movable property existing at Chorzów at the time of the taking over of the factory, against the Polish Treasury before the Civil Court of Katowice, with a view to obtaining either the restitution to the Oberschlesische or the Bayerische of such property, or the payment of the equivalent value. This action however led to no decision on the merits.

As regards the Bayerische, that Company also, on March 25th, 1925, brought an action before the German-Polish Mixed

nais, une action contre le Fisc polonais, en vue d'obtenir une indemnité annuelle jusqu'à la restitution de l'usine à l'Oberschlesische et de se faire restituer la possession et la direction de l'usine. La requête introduisant cette instance fut signifiée au Gouvernement défendeur le 16 décembre 1925 ; mais l'affaire fut retirée en juin 1928, en même temps que l'instance introduite par l'Oberschlesische, et dans les mêmes conditions.

L'Arrêt n° 7 de la Cour fut rendu le 25 mai 1926. Cet arrêt fut la source d'événements qui se développèrent dans deux directions différentes.

D'une part, en effet, sur l'initiative du Gouvernement allemand, il vint à former le point de départ pour des négociations directes entre les deux Gouvernements intéressés. De ces négociations il y a lieu de retenir ici uniquement que, le 14 janvier 1927, le Gouvernement allemand avait reconnu que l'usine ne pouvait plus être restituée en nature, et que, par conséquent, la réparation due devait en principe prendre la forme du versement d'une indemnité, déclaration d'ailleurs formellement répétée dans le Mémoire. Les négociations, par ailleurs, n'aboutirent pas, à cause notamment du fait que, de l'avis du Gouvernement polonais, la nécessité d'une compensation entre l'indemnité à allouer à l'Allemagne et différents montants dont la Pologne serait créancière de l'Allemagne, s'imposerait. Leur insuccès eut pour résultat la présente instance.

D'autre part, l'Arrêt n° 7 de la Cour provoqua de la part du Gouvernement polonais une requête adressée au Tribunal polonais de Katowice contre l'Oberschlesische et demandant qu'il fût déclaré que celle-ci n'était pas devenue propriétaire des biens-fonds de Chorzów ; que l'inscription au registre foncier opérée en sa faveur le 29 janvier 1922 était dépourvue de validité ; et que — indépendamment des lois du 14 juillet 1920 et 16 juin 1922 — la propriété des biens-fonds en question revenait au Fisc de l'État polonais. L'arrêt du Tribunal sur cette requête — arrêt qui, rendu par contumace, fut publié le 12 novembre 1927 et entra en force de chose jugée le 2 janvier 1928 — fit droit à toutes les conclusions du demandeur.

Arbitral Tribunal against the Polish Treasury with a view to obtaining an annual indemnity until the restitution of the factory to the Oberschlesische, and to causing the possession and management of the factory to be restored to it. Notice of this action was served on the respondent Government on December 16th, 1925; but the case was withdrawn in June 1928, at the same time as the action brought by the Oberschlesische and in the same circumstances.

The Court's Judgment No. 7 was given on May 25th, 1926. This judgment was the source of developments tending in two different directions.

On the one hand, at the initiative of the German Government, it formed the starting point for direct negotiations between the two Governments concerned. In regard to these negotiations, it is only necessary here to note that, on January 14th, 1927, the German Government had recognized that the factory could no longer be restored in kind and that consequently the reparation due must, in principle, take the form of the payment of compensation, a statement which is moreover formally repeated in the Case. The negotiations were unsuccessful owing, amongst other things, to the fact that, in the opinion of the Polish Government, certain claims which Poland was said to have against Germany, must be set off against the indemnity to be awarded to Germany. The failure of the negotiations resulted in the institution of the present proceedings.

On the other hand, the Court's Judgment No. 7 gave rise on the part of the Polish Government to the bringing of an action before the Polish Court of Katowice against the Oberschlesische in order to obtain a declaration that that Company had not become owner of the landed property at Chorzów; that the entry in the land register made in its favour on January 29th, 1922, was not valid, and that—independently of the laws of July 14th, 1920, and June 16th, 1922,—the ownership of the landed property in question fell to the Polish Treasury. The judgment of the Court in this action—which was given by default—was published on November 12th, 1927, and took effect on January 2nd, 1928; it admitted all the submissions of the claimant.

Entre temps, la Cour avait été saisie, le 18 octobre 1927, d'une nouvelle requête, émanant du Gouvernement allemand qui, se fondant sur les dispositions de l'article 60 du Statut et l'article 66 du Règlement de la Cour, demanda à celle-ci de donner une interprétation de ses Arrêts n° 7, du 25 mai 1926, et n° 8, du 26 juillet 1927, dont le sens et la portée seraient devenus litigieux entre les deux Gouvernements, à savoir, sur le point qui avait servi d'origine à la procédure devant le Tribunal de Katowice.

La Cour rendit, le 16 décembre 1927, son arrêt, qui porte le n° 11, sur ladite requête. A teneur de cet arrêt, la Cour avait entendu reconnaître, par son Arrêt n° 7, avec force obligatoire pour les Parties au litige et dans le cas décidé, entre autres choses, le droit de propriété de l'Oberschlesische sur l'usine de Chorzów au point de vue du droit civil.

Tandis que la procédure relative à la demande en interprétation se poursuivait, le Gouvernement allemand, par Requête datée du 14 octobre 1927 et déposée au Greffe le 15 novembre suivant, demanda à la Cour d'indiquer au Gouvernement polonais qu'il devait payer au Gouvernement allemand, à titre provisoire, la somme de trente millions de Reichsmarks.

La Cour, statuant sur cette demande, qui était présentée sur la base de l'article 41 du Statut, décida par une Ordonnance, rendue le 21 novembre 1927, qu'il n'y avait pas lieu d'y donner suite, la demande du Gouvernement allemand devant être considérée comme visant non l'indication de mesures conservatoires, mais bien l'adjudication d'une partie des conclusions de la Requête du 8 février 1927.

Meanwhile, on October 18th, 1927, the Court had received a fresh application from the German Government which, relying on the terms of Article 60 of the Statute and Article 66 of the Rules of Court, prayed the Court to give an interpretation of its Judgments Nos. 7, of May 25th, 1926, and 8, of July 26th, 1927, alleging that a divergence of opinion had arisen between the two Governments in regard to the meaning and scope of these two judgments in connection with the point which had given rise to the proceedings before the Court of Katowice.

The Court, on December 16th, 1927, delivered its judgment in this suit (No. 11). According to this judgment the Court's intention in Judgment No. 7 had been to recognize, with binding effect between the Parties concerned and in respect of that particular case, amongst other things, the right of ownership of the Oberschlesische in the Chorzów factory under municipal law.

Whilst the proceedings in connection with the request for an interpretation were in progress, the German Government, by means of a Request dated October 14th, 1927, and filed with the Registry on November 15th, besought the Court to indicate to the Polish Government that it should pay to the German Government, as a provisional measure, the sum of 30 million Reichsmarks.

The Court gave its decision upon this request, which was submitted under the terms of Article 41 of the Statute, in the form of an Order made on November 21st, 1927. It held that effect could not be given to the request of the German Government, since it was to be regarded as designed to obtain not the indication of measures of protection, but judgment in favour of a part of the claim formulated in the Application of February 8th, 1927.

* * *

POINT DE DROIT.

I.

La Cour, avant d'aborder l'examen des conclusions des Parties, doit fixer le sens de la requête qui est à la base de la procédure actuelle, afin d'en établir la nature et la portée. C'est à la lumière de ces constatations qu'elle devra apprécier ensuite les conclusions qui lui ont été soumises au cours de la procédure tant écrite qu'orale.

La requête demande à la Cour :

1° de constater l'obligation du Gouvernement polonais, en raison de son attitude à l'égard des Sociétés Oberschlesische et Bayerische, attitude que la Cour a déclarée non conforme à la Convention de Genève, de réparer le préjudice subi de ce chef par lesdites Sociétés ;

2° d'allouer des indemnités, dont le montant est indiqué dans la requête, pour le dommage causé respectivement à l'une et à l'autre desdites Sociétés ;

3° de fixer le mode de paiement, entre autres de dire que les paiements à faire par le Gouvernement polonais devraient être effectués au compte des deux Sociétés près la Deutsche Bank à Berlin.

Au cours de la procédure orale, une divergence de vues s'est fait jour entre les Parties quant à la nature et à la portée de la requête. L'agent du Gouvernement allemand avait émis dans sa plaidoirie la thèse selon laquelle un gouvernement peut accepter une réparation dans toute forme qu'il jugera convenable, et que la réparation ne doit pas nécessairement consister en un dédommagement des personnes lésées. Il convient de retenir notamment le passage suivant :

« C'est, en effet, de son propre droit, du droit du Gouvernement allemand, qu'il s'agit. Le Gouvernement allemand n'intervient pas en qualité de représentant des individus qui ont souffert le dommage, mais il peut mesurer le dommage dont il réclame la réparation en son propre nom, d'après l'échelle des pertes subies par les sociétés pour lesquelles il a pris fait et

* * *

THE LAW.

I.

The Court, before proceeding to consider the Parties' submissions, must determine the import of the application which has given rise to the present proceedings, in order to ascertain its nature and scope. In the light of the results of this investigation, it will then proceed to consider the submissions made in the course of the written and oral proceedings.

In the application the Court is asked:

(1) to declare that the Polish Government, by reason of its attitude in respect of the Oberschlesische and Bayerische Companies, which attitude the Court had declared not to be in conformity with the Geneva Convention, is under an obligation to make good the consequent damage sustained by those Companies;

(2) to award compensation, the amount of which is indicated in the application, for the damage caused to each of the respective Companies;

(3) to fix the method of payment, and amongst other things to order the payments to be made by the Polish Government to be effected to the account of the two Companies with the Deutsche Bank at Berlin.

In the course of the oral proceedings, a difference of opinion between the two Parties became apparent as to the nature and scope of the application. The Agent for the German Government argued in his address to the Court that a government may content itself with reparation in any form which it may consider proper, and that reparation need not necessarily consist in the compensation of the individuals concerned. The following passage should especially be noted:

[*Translation.*]

"It is in fact a question of the German Government's own rights. The German Government has not brought this suit as representative of the individuals who have suffered injury, but it may estimate the damage for which it claims reparation on its own behalf, according to the measure provided by the losses suffered by the companies whose case it has

cause. Le Gouvernement allemand peut demander le paiement de cette indemnité à tout *locus solutionis* qui lui semble utile en l'espèce, que ce soit une caisse publique ou une caisse privée.

Le litige actuel est donc un litige entre gouvernements, et rien qu'un litige entre gouvernements ; il se distingue très nettement d'un procès ordinaire en dommages-intérêts, intenté par des particuliers par-devant un tribunal civil, comme le dit le Gouvernement polonais dans sa Duplique. »

L'agent du Gouvernement polonais, dans sa duplique, a dit estimer que cette manière de voir comportait une modification de l'objet du litige et, d'une certaine manière, aussi de la nature de la requête, car, selon la thèse polonaise, le demandeur aurait défini l'objet du litige comme étant l'obligation d'indemniser les deux Sociétés. Or, le dommage étant en corrélation avec l'indemnisation, la demande allemande se trouverait placée sur un autre terrain, dès qu'il s'agirait de l'indemnisation non plus des Sociétés, mais de l'État pour les torts par lui subis. L'agent du Gouvernement polonais a contesté au Gouvernement allemand le droit de faire ce changement dans l'état où se trouvait la procédure, et a refusé d'y consentir.

Même si les termes de la requête, ainsi que des conclusions ultérieures de la Partie demanderesse, permettaient de les interpréter comme visant une indemnisation due directement aux deux Sociétés pour les dommages subis par elles, et non une réparation due à l'Allemagne pour une violation de la Convention de Genève, il résulte toutefois des conditions dans lesquelles la Cour a été saisie de la présente affaire, ainsi que des considérations pour lesquelles elle l'a retenue, par son Arrêt n° 8, pour statuer quant au fond, que l'objet de la requête allemande ne peut viser que la réparation due pour un tort subi par l'Allemagne en sa qualité de Partie contractante de la Convention de Genève.

La présente requête se base explicitement et exclusivement sur l'Arrêt n° 7 qui a constaté que l'attitude du Gouvernement polonais à l'égard des deux Sociétés Oberschlesische et Bayerische n'était pas conforme aux dispositions des articles 6 et suivants de ladite Convention. Déjà dans l'Arrêt n° 6, qui a établi la compétence de la Cour pour statuer sur la violation alléguée de la Convention de Genève, il a été reconnu par la

taken up. The German Government may claim the payment of this compensation at any *locus solutionis* which it may think fit in this case, whether it be a public or a private office.

The present dispute is therefore a dispute between governments and nothing but a dispute between governments. It is very clearly differentiated from an ordinary action for damages, brought by private persons before a civil court, as the Polish Government has said in its Rejoinder."

The Agent for the Polish Government in his Rejoinder submitted that this method of regarding the question involved a modification of the subject of the dispute and, in some sort also, of the nature of the application, for, according to Poland's view, the subject of the dispute had been defined by Germany as the obligation to compensate the two Companies. But damage and compensation being interdependent conceptions, the German claim assumed another aspect if it was no longer a question of compensating the Companies, but of compensating the State for the injury suffered by it. The Agent for the Polish Government disputed the German Government's right to make this change at that stage of the proceedings and refused to accept it.

Even should it be possible to construe the terms of the application and of the subsequent submissions of the Applicant as contemplating compensation due directly to the two Companies for damages suffered by them and not reparation due to Germany for a breach of the Geneva Convention, it follows from the conditions in which the Court has been seized of the present suit, and from the considerations which led the Court to reserve it by Judgment No. 8 for decision on the merits, that the object of the German application can only be to obtain reparation due for a wrong suffered by Germany in her capacity as a contracting Party to the Geneva Convention.

The present application is explicitly and exclusively based on Judgment No. 7 which declared that the attitude of the Polish Government in respect of the two Companies, the Oberschlesische and Bayerische, was not in conformity with Article 6 and the following articles of the said Convention. Already in Judgment No. 6, establishing the Court's jurisdiction to deal with the alleged violation of the Geneva Convention, the

Cour, conformément à une thèse de la Partie demanderesse, qu'il s'agissait exclusivement d'une contestation entre États au sujet de l'interprétation et application d'une convention en vigueur entre eux. L'article 23 de la Convention de Genève ne vise que les divergences d'opinions résultant de l'interprétation et application des articles 6 à 22 de la Convention de Genève, qui s'élèveraient entre les deux Gouvernements signataires. En effet, la Cour a affirmé sa compétence pour statuer sur la réparation demandée parce qu'elle considérait la réparation comme le corollaire de la violation des obligations résultant d'un engagement entre États. Cette manière de voir, conforme au caractère général d'une juridiction internationale qui, en principe, ne connaît que des rapports d'État à État, s'impose avec une force particulière en l'espèce parce que la Convention de Genève, dans son système très développé d'instances de recours, a précisément créé ou maintenu pour certaines catégories de réclamations de particuliers des instances arbitrales d'un caractère international spécial, telles que le Tribunal arbitral haut-silésien et le Tribunal arbitral mixte germano-polonais. C'est en se basant, entre autres, sur le caractère purement interétatique de la contestation tranchée par l'Arrêt n° 7 que la Cour avait retenu l'affaire, nonobstant le fait que des réclamations introduites par les deux Sociétés étaient pendantes devant l'une des instances arbitrales mentionnées ci-dessus, réclamations relatives à la même dépossession qui a donné lieu à la requête actuellement soumise à la Cour par le Gouvernement allemand.

La Cour ayant, par son Arrêt n° 8, retenu cette requête pour statuer au fond, n'a pu le faire que sur les mêmes bases qu'elle a admises pour son Arrêt n° 7, arrêt qui est le point de départ pour la demande en réparation avancée actuellement par l'Allemagne. C'est donc à la lumière de cette conception qu'il convient d'interpréter les déclarations de la Partie demanderesse dans la présente procédure ; il y aurait également lieu de suivre cette méthode même si ladite Partie n'avait pas formulé aussi explicitement sa thèse dans sa plaidoirie.

Il est un principe de droit international que la réparation d'un tort peut consister en une indemnité correspondant au dommage que les ressortissants de l'État lésé ont subi par

Court recognized that—as had been maintained by the Applicant—the matter was exclusively a dispute between States as to the interpretation and application of a convention in force between them. Article 23 of the Geneva Convention only contemplates differences of opinion respecting the interpretation and application of Articles 6 to 22 of the Geneva Convention arising between the two Governments. The Court in fact declared itself competent to pass upon the claim for reparation because it regarded reparation as the corollary of the violation of the obligations resulting from an engagement between States. This view of the matter, which is in conformity with the general character of an international tribunal which, in principle, has cognizance only of interstate relations, is indicated with peculiar force in this case for the specific reason that the Geneva Convention, with its very elaborate system of legal remedies, has created or maintained for certain categories of private claims arbitral tribunals of a special international character, such as the Upper Silesian Arbitral Tribunal and the German-Polish Mixed Arbitral Tribunal. It was on the basis, amongst other things, of the purely interstate character of the dispute decided by Judgment No. 7 that the Court reserved the case for judgment, notwithstanding the fact that actions brought by the two Companies were pending before one of the arbitral tribunals above mentioned, actions which related to the same act of dispossession which led to the filing with the Court of the German Government's Application now before it.

The Court, which by Judgment No. 8 reserved the present application for judgment on the merits, could only do so on the grounds on which it had already based its Judgment No. 7 which constitutes the starting point for the claim for compensation now put forward by Germany. Accordingly the declarations of the Applicant in the present proceedings must be construed in the light of this conception and this method must also have been followed even if that Party had not stated its contention as explicitly as it has done in the German Agent's address to the Court.

It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered

suite de l'acte contraire au droit international. C'est même la forme de réparation la plus usitée ; l'Allemagne l'a choisie en l'espèce, et son admissibilité n'est pas contestée. Mais la réparation due à un État par un autre État ne change pas de nature par le fait qu'elle prend la forme d'une indemnité pour le montant de laquelle le dommage subi par un particulier fournira la mesure. Les règles de droit qui déterminent la réparation sont les règles de droit international en vigueur entre les deux États en question, et non pas le droit qui régit les rapports entre l'État qui aurait commis un tort et le particulier qui aurait subi le dommage. Les droits ou intérêts dont la violation cause un dommage à un particulier se trouvent toujours sur un autre plan que les droits de l'État auxquels le même acte peut également porter atteinte. Le dommage subi par le particulier n'est donc jamais identique en substance avec celui que l'État subira ; il ne peut que fournir une mesure convenable de la réparation due à l'État.

Le droit international n'exclut pas qu'un État accorde à un autre le droit de demander à des instances arbitrales internationales d'allouer directement aux ressortissants de ce dernier des indemnités pour des dommages qu'ils ont subis à la suite d'une violation du droit international par le premier État. Mais rien — ni dans les termes de l'article 23, ni dans les rapports entre cette clause et certaines autres dispositions d'ordre juridictionnel insérées dans la Convention de Genève — ne porte à croire que la juridiction établie par l'article 23 s'étende à des réparations autres que celles dues par une des Parties contractantes à l'autre comme conséquence d'une violation des articles 6 à 22 dûment constatée par la Cour.

Cette manière de voir peut, d'ailleurs, très bien se concilier avec les conclusions présentées par la Partie demanderesse. La première de ses conclusions vise, dans toutes les phases de la procédure, la constatation de l'obligation de réparer. Les indemnités à payer au Gouvernement allemand, selon la conclusion finale n° 2, constituent, aux termes de la conclusion 4 *d*, aussi bien du Mémoire que de la réplique orale, une créance de ce Gouvernement. La demande formulée dans la même conclusion et tendant à faire effectuer le paiement aux comptes des deux

as a result of the act which is contrary to international law. This is even the most usual form of reparation; it is the form selected by Germany in this case and the admissibility of it has not been disputed. The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State.

International law does not prevent one State from granting to another the right to have recourse to international arbitral tribunals in order to obtain the direct award to nationals of the latter State of compensation for damage suffered by them as a result of infractions of international law by the first State. But there is nothing—either in the terms of Article 23 or in the relation between this provision and certain others of a jurisdictional character included in the Geneva Convention—which tends to show that the jurisdiction established by Article 23 extends to reparation other than that due by one of the contracting Parties to the other in consequence of an infraction of Articles 6 to 22, duly recognized as such by the Court.

This view is moreover readily reconcilable with the submissions of the Applicant. The first of its submissions, throughout all stages of the proceedings, aims at the establishment of an obligation to make reparation. The indemnities to be paid to the German Government, according to No. 2 of the final submissions, constitute, in the terms of submission 4 *d*, as set out in both the Case and the oral reply, a debt due to that Government. The claim formulated in the same submission, to the effect that payment should be made to the account of the

Sociétés près la Deutsche Bank à Berlin est interprétée par l'agent du Gouvernement allemand comme visant seulement un *locus solutionis*.

La Cour est donc d'avis que la Partie demanderesse n'a pas changé l'objet du litige au cours de la procédure.

* * *

Il résulte de ce qui vient d'être exposé que la requête tend à obtenir, en faveur de l'Allemagne, une réparation dont le montant est déterminé par le dommage subi par les Sociétés Oberschlesische et Bayerische. Trois questions essentielles se posent :

1° L'existence de l'obligation de réparer.

2° L'existence des dommages qui doivent servir de base pour l'évaluation du montant de l'indemnité.

3° L'étendue de ces dommages.

Quant au premier point, la Cour constate que c'est un principe du droit international, voire une conception générale du droit, que toute violation d'un engagement comporte l'obligation de réparer. Déjà dans son Arrêt n° 8, la Cour, statuant sur la compétence qu'elle dérivait de l'article 23 de la Convention de Genève, a dit : la réparation est le complément indispensable d'un manquement à l'application sans qu'il soit nécessaire que cela soit inscrit dans la convention même. L'existence du principe établissant l'obligation de réparer comme un élément du droit international positif n'a du reste jamais été contestée au cours des procédures relatives aux affaires de Chorzów.

L'obligation de réparer étant reconnue en principe, il s'agit de savoir si une violation d'un engagement international a en effet eu lieu dans le cas d'espèce. Or, à cet égard, la Cour se trouve en présence d'une chose jugée. La non-conformité de l'attitude de la Pologne envers les deux Sociétés avec les articles 6 et suivants de la Convention de Genève est établie par le point n° 2 du dispositif de l'Arrêt n° 7. L'application du principe à la présente espèce s'impose donc.

two Companies with the Deutsche Bank at Berlin, is interpreted by the Agent for the German Government as solely relating to the *locus solutionis*.

The Court therefore is of opinion that the Applicant has not altered the subject of the dispute in the course of the proceedings.

* * *

It follows from the foregoing that the application is designed to obtain, in favour of Germany, reparation the amount of which is determined by the damage suffered by the Oberschlesische and Bayerische. Three fundamental questions arise:

(1) The existence of the obligation to make reparation.
(2) The existence of the damage which must serve as a basis for the calculation of the amount of the indemnity.
(3) The extent of this damage.

As regards the first point, the Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. In Judgment No. 8, when deciding on the jurisdiction derived by it from Article 23 of the Geneva Convention, the Court has already said that reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself. The existence of the principle establishing the obligation to make reparation, as an element of positive international law, has moreover never been disputed in the course of the proceedings in the various cases concerning the Chorzów factory.

The obligation to make reparation being in principle recognized, it remains to be ascertained whether a breach of an international engagement has in fact taken place in the case under consideration. Now this point is *res judicata*. The non-conformity of Poland's attitude in respect of the two Companies with Article 6 and the following articles of the Geneva Convention is established by No. 2 of the operative provisions of Judgment No. 7. The application of the principle to the present case is therefore evident.

Pour ce qui est du deuxième point, la question de savoir si un dommage a résulté du tort qui est constant, n'est aucunement résolue par les arrêts antérieurs de la Cour relatifs à l'affaire de Chorzów. La Partie demanderesse ayant calculé le montant de la réparation qu'elle réclame sur la base du dommage subi par les deux Sociétés par suite de l'attitude du Gouvernement polonais, il est nécessaire, pour la Cour, de vérifier si ces Sociétés ont effectivement subi un dommage de ce chef.

En ce qui concerne la Bayerische, la Pologne reconnaît l'existence d'un dommage qui donne lieu à réparation ; la divergence entre les Parties n'a trait qu'à l'étendue de ce dommage et aux modalités de la réparation ; par contre, la Pologne conteste pour l'Oberschlesische l'existence d'un dommage donnant lieu à réparation et conclut, par conséquent, à débouter l'Allemagne de sa demande. Le fait de la dépossession de l'Oberschlesische n'est aucunement contesté. Mais, selon le Gouvernement polonais, cette Société n'aurait nonobstant pas subi de dommage ; il allègue, en effet, d'une part, que le droit de propriété revendiqué par l'Oberschlesische aurait été entaché de nullité ou d'annulabilité ; et, d'autre part, que le contrat du 24 décembre 1919 attribuait au Reich des droits et avantages si considérables qu'en substance un dommage éventuel ne frapperait pas la Société. Subsidiairement, le Gouvernement polonais fait valoir que ces mêmes circonstances ont pour conséquence au moins de réduire essentiellement le dommage pouvant entrer en ligne de compte en ce qui concerne ladite Société.

Abstraction faite de ces objections de nature préalable, il y a désaccord entre les Parties sur le montant et les modalités de paiement d'une réparation éventuelle.

Dans ces conditions, il incombe à la Cour d'examiner tout d'abord s'il y a eu, non seulement pour la Bayerische, mais aussi pour l'Oberschlesische, un dommage susceptible de donner lieu à réparation.

As regards the second point, the question whether damage has resulted from the wrongful act which is common ground, is in no wise settled by the Court's previous decisions relating to the Chorzów case. The Applicant having calculated the amount of the reparation claimed on the basis of the damage suffered by the two Companies as a result of the Polish Government's attitude, it is necessary for the Court to ascertain whether these Companies have in fact suffered damage as a consequence of that attitude.

As regards the Bayerische, Poland admits the existence of a damage affording ground for reparation; the Parties only differ as to the extent of this damage and the mode of reparation; on the other hand, Poland denies the existence of any damage calling for reparation in the case of the Oberschlesische and consequently submits that Germany's claim should be dismissed. The fact of the dispossession of the Oberschlesische is in no way disputed. But notwithstanding this, in the contention of the Polish Government, that Company has suffered no damage: it argues, first, that the right of ownership claimed by the Oberschlesische was null and void or subject to annulment, and, secondly, that the contract of December 24th, 1919, attributed to the Reich rights and benefits so considerable that any possible damage would not materially affect the Company. In the alternative, the Polish Government contends that these same circumstances at all events have the effect of essentially diminishing the extent of the damage to be taken into account in so far as the said Company is concerned.

Apart from these preliminary objections, the Parties are at issue as to the amount and method of payment of any compensation which may be awarded.

In these circumstances, the Court must first of all consider whether damage affording ground for reparation has ensued as regards not only the Bayerische but also the Oberschlesische.

II.

Abordant cet examen, il convient de constater avant tout que, pour évaluer le dommage causé par un acte illicite, il faut tenir compte exclusivement de la valeur des biens, droits et intérêts qui ont été atteints et dont le titulaire est la personne au profit de laquelle l'indemnité est réclamée ou le dommage de qui doit servir de mesure pour l'évaluation de la réparation réclamée. Ce principe, admis dans la jurisprudence arbitrale, a pour conséquence, d'une part, d'exclure du préjudice à évaluer, les dommages causés aux tiers par l'acte illicite, et d'autre part de n'en pas exclure le montant des dettes et autres obligations à la charge du lésé. Le montant du préjudice causé à l'Oberschlesische du fait de la dépossession de l'entreprise de Chorzów est donc égal à la valeur totale — mais exclusivement à la valeur totale — des biens, droits et intérêts de cette Société dans ladite entreprise, sans déduction de passifs.

Le Gouvernement polonais soutient en premier lieu que l'Oberschlesische n'a pas subi de dommage à la suite de la dépossession, parce qu'elle n'était pas la propriétaire légitime, son droit de propriété n'ayant jamais été valable et, en tout cas, ayant cessé de l'être en vertu de l'arrêt rendu le 12 novembre 1927 par le Tribunal de Katowice ; de sorte qu'à partir de cette date tout au moins aucun dommage subi par ladite Société ne pourrait donner lieu pour elle à réparation.

A cet égard, la Cour constate ce qui suit : la Cour a été déjà appelée, lors de la procédure terminée par l'Arrêt n° 7, à s'occuper, comme d'un point incident et préalable, de la question de la validité des transactions en vertu desquelles la propriété de l'usine de Chorzów est passée du Reich à l'Oberschlesische. Elle est arrivée à la conclusion que les diverses transactions dont il s'agit étaient des actes réels et de bonne foi ; et c'est pourquoi elle a pu considérer l'usine de Chorzów comme appartenant à une société contrôlée par des ressortissants allemands, savoir, l'Oberschlesische. Quel que soit l'effet de cette décision incidente sur le droit de propriété du point de vue du droit civil, il est évident que le fait que l'usine

## II.

On approaching this question, it should first be observed that, in estimating the damage caused by an unlawful act, only the value of property, rights and interests which have been affected and the owner of which is the person on whose behalf compensation is claimed, or the damage done to whom is to serve as a means of gauging the reparation claimed, must be taken into account. This principle, which is accepted in the jurisprudence of arbitral tribunals, has the effect, on the one hand, of excluding from the damage to be estimated, injury resulting for third parties from the unlawful act and, on the other hand, of not excluding from the damage the amount of debts and other obligations for which the injured party is responsible. The damage suffered by the Oberschlesische in respect of the Chorzów undertaking is therefore equivalent to the total value—but to that total only—of the property, rights and interests of this Company in that undertaking, without deducting liabilities.

The Polish Government argues in the first place that the Oberschlesische has suffered no loss as a result of its dispossession, because it was not the lawful owner, its right of ownership having never been valid and having in any case ceased to be so in virtue of the judgment given on November 12th, 1927, by the Court of Katowice; so that from that date at all events no damage for which reparation should be made could ensue as regards that Company.

In regard to this the Court observes as follows: the Court has already, in connection with Judgment No. 7, had to consider as an incidental and preliminary point, the question of the validity of the transactions in virtue of which the ownership of the Chorzów factory passed from the Reich to the Oberschlesische. It then arrived at the conclusion that the various transactions in question were genuine and bona fide; that is why it was able to regard the Chorzów factory as belonging to a company controlled by German nationals, namely, the Oberschlesische. Whatever the effect of this incidental decision may be as regards the right of ownership under municipal law, it is evident that the fact that the

de Chorzów appartenait à l'Oberschlesische était la condition logique de la décision de la Cour d'après laquelle l'attitude du Gouvernement polonais à l'égard de l'Oberschlesische n'était pas conforme aux articles 6 et suivants de la Convention de Genève. Car, si l'usine n'appartenait pas à l'Oberschlesische, cette Société non seulement n'aurait pu subir aucun dommage du fait de la dépossession, mais elle n'aurait pas même pu être l'objet d'une dépossession contraire à la Convention de Genève ; or, par son Arrêt n° 7, la Cour a constaté que tel était le cas. Il y a lieu de faire observer que dans son Arrêt n° 7 la Cour ne s'est pas bornée à constater l'incompatibilité, avec ladite Convention, de l'application de la loi du 14 juillet 1920 aux propriétés inscrites au registre foncier au nom de sociétés contrôlées par des ressortissants allemands, mais, en répondant aux objections soulevées par la Partie défenderesse, a dû s'occuper aussi de la question de savoir si cette inscription était le résultat de transactions fictives et frauduleuses ou bien réelles et de bonne foi. C'est la Pologne elle-même qui a allégué contre la deuxième conclusion de la Requête allemande du 15 mai 1925 que l'inscription de l'Oberschlesische au registre foncier, étant basée sur une transaction fictive et frauduleuse, n'était en tout cas pas valable, et qui a ainsi amené la Cour à se prononcer sur ce point.

Or, la requête qui donne lieu au présent arrêt étant basée sur le tort constaté par l'Arrêt n° 7, il n'est pas possible que le droit de l'Oberschlesische à l'usine de Chorzów soit apprécié d'une manière différente pour les besoins dudit Arrêt n° 7 et par rapport à la demande en réparation basée sur cet arrêt. La Cour ayant été d'avis que le droit de l'Oberschlesische sur l'usine de Chorzów justifiait la conclusion que l'attitude du Gouvernement polonais à l'égard de ladite Société n'était pas conforme aux articles 6 et suivants de la Convention de Genève, elle ne saurait se départir de cet avis alors qu'il s'agit actuellement d'apprécier la même situation juridique aux fins de statuer sur la demande en réparation fondée sur l'acte dont la non-conformité à la Convention a été constatée par la Cour.

Le Gouvernement polonais fait maintenant observer qu'après le prononcé de l'Arrêt n° 7, le Tribunal civil de Katowice, qui,

Chorzów factory belonged to the Oberschlesische was the necessary condition precedent to the Court's decision that the attitude of the Polish Government in respect of the Oberschlesische was not in conformity with Article 6 and the following articles of the Geneva Convention. For if the factory did not belong to the Oberschlesische Stickstoffwerke, not only would that Company not have suffered damage as a result of dispossession, but furthermore it could not have been subjected to a dispossession contrary to the Geneva Convention, but the Court established by Judgment No. 7 that such was the case. It should be noted that the Court in Judgment No. 7 has not confined itself to recording the incompatibility with the Geneva Convention of the application of the law of July 14th, 1920, to properties entered in the land register in the name of companies controlled by German nationals, but has, in replying to the objections put forward by the Respondent, also had to deal with the question whether such entry was the outcome of fictitious and fraudulent transactions or of genuine and bona-fide transactions. Poland herself objected in connection with the second submission of the German Application of May 15th, 1925, that the entry of the Oberschlesische in the land register was in any case not valid as it was based on a fictitious and fraudulent transaction and thus caused the Court to deal with this point.

As the application now under consideration is based on the damage established by Judgment No. 7, it is impossible that the Oberschlesische's right to the Chorzów factory should be looked upon differently for the purposes of that judgment and in relation to the claim for reparation based on the same judgment. The Court, having been of opinion that the Oberschlesische's right to the Chorzów factory justified the conclusion that the Polish Government's attitude in respect of that Company was not in conformity with Article 6 and the following articles of the Geneva Convention, must necessarily maintain that opinion when the same situation at law has to be considered for the purpose of giving judgment in regard to the reparation claimed as a result of the act which has been declared by the Court not to be in conformity with the Convention.

The Polish Government now points out that, after Judgment No. 7 had been rendered, the Civil Court of Katowice

selon les règles du droit international, est sans doute compétent pour connaître des contestations civiles touchant les immeubles situés dans sa circonscription, a déclaré non valable du point de vue du droit civil, et cela indépendamment des lois polonaises des 14 juillet 1920 et 16 juin 1922, l'inscription de l'Oberschlesische au registre foncier comme propriétaire ; il allègue également que la Cour, en statuant maintenant sur la question de la réparation, devrait tenir compte de ce fait nouveau.

La Cour n'a pas besoin de se prononcer sur la question de savoir quelle aurait été la situation juridique par rapport à la Convention de Genève, si la dépossession avait été précédée d'un jugement régulièrement rendu par une instance compétente. Il suffit de rappeler que la Cour, dans son Arrêt n° 8, a dit que la violation de la Convention de Genève qui consistait dans la dépossession d'un propriétaire protégé par les articles 6 et suivants de la Convention de Genève ne pouvait être effacée par un jugement national qui, après coup, enlèverait la base à l'applicabilité de la Convention, base que la Cour avait admise dans son Arrêt n° 7. Le jugement du Tribunal de Katowice du 12 novembre 1927 — jugement rendu par défaut vis-à-vis de l'Oberschlesische, et le Reich n'ayant pas été partie au procès — ne contient pas, dans le texte qui est connu de la Cour, les motifs pour lesquels l'inscription de la propriété en faveur de l'Oberschlesische est déclarée nulle ; mais il résulte de la requête qui a donné lieu à ce jugement que les motifs invoqués par le Fisc polonais sont essentiellement les mêmes que ceux qui ont été déjà débattus sur la base des conclusions du Gouvernement polonais devant la Cour dans la procédure qui a abouti à l'Arrêt n° 7, et qui, de l'avis de la Cour, n'ont pas suffi pour considérer l'Oberschlesische comme ne tombant pas sous le coup des articles 6 et suivants de la Convention de Genève. Si, considérant que l'usine n'appartenait pas à l'Oberschlesische, la Cour niait l'existence d'un dommage au détriment de cette Société, elle se mettrait en contradiction avec un des motifs sur lesquels elle a fondé son Arrêt n° 7 et elle admettrait qu'un jugement national pût infirmer indirectement un arrêt rendu par une instance internationale, ce qui est impossible. Quel que soit l'effet du jugement du Tribunal de Katowice, du 12 novembre 1927, du point de vue du

which, under International Law, doubtless has jurisdiction in disputes at civil law concerning immovable property situated within its district, has declared the entry of the Oberschlesische in the land register as owner not to be valid under the municipal law applicable to the case, and this apart from the Polish laws of July 14th, 1920, and June 16th, 1922; it further contends that the Court, in now giving judgment on the question of damages, should bear in mind this new fact.

There is no need for the Court to consider what would have been the situation at law as regards the Geneva Convention, if dispossession had been preceded by a judgment given by a competent tribunal. It will suffice to recall that the Court in Judgment No. 8 has said that the violation of the Geneva Convention consisting in the dispossession of an owner protected by Article 6 and following of the Geneva Convention could not be rendered non-existent by the judgment of a municipal court which, after dispossession had taken place, nullified the grounds rendering the Convention applicable, which grounds were relied upon by the Court in Judgment No. 7. The judgment of the Tribunal of Katowice given on November 12th, 1927,—which judgment was given by default as regards the Oberschlesische, the Reich not being a Party to the proceedings,—does not contain in the text known to the Court the reasons for which the entry of the property in the name of the Oberschlesische was declared null and void; but it appears from the application upon which this judgment was given that the reasons advanced by the Polish Treasury are essentially the same as those already discussed before the Court on the basis of the Polish Government's submissions in the proceedings leading up to Judgment No. 7, which reasons, in the opinion of the Court, did not suffice to show that the Oberschlesische did not fall within the scope of Article 6 and the following articles of the Geneva Convention. If the Court were to deny the existence of a damage on the ground that the factory did not belong to the Oberschlesische, it would be contradicting one of the reasons on which it based its Judgment No. 7 and it would be attributing to a judgment of a municipal court power indirectly to invalidate a judgment of an international court, which is impossible. Whatever the

droit interne, ce jugement ne saurait ni effacer la violation de la Convention de Genève constatée par la Cour dans son Arrêt n° 7, ni soustraire à cet arrêt une des bases sur lesquelles il est fondé.

C'est à l'objection dont la Cour vient de s'occuper, ainsi qu'à la conclusion y relative, formulée par le Gouvernement polonais dans son Contre-Mémoire mais retirée par lui plus tard, que se réfère la conclusion du Gouvernement allemand à l'effet

que l'obligation du Gouvernement polonais de payer l'indemnité allouée par la Cour n'est nullement écartée par un jugement rendu ou à rendre par un tribunal interne polonais dans un procès ayant pour objet la question de la propriété de l'usine sise à Chorzów.

Cette conclusion a été maintenue malgré le retrait de ladite conclusion polonaise.

La Cour, étant d'avis que cette dernière conclusion doit être considérée comme valablement retirée, mais que, nonobstant, l'objection à laquelle elle se référait subsiste, estime qu'il n'y a pas lieu de statuer en termes exprès sur la conclusion y relative formulée par le Gouvernement allemand, autrement qu'en rejetant la thèse du Gouvernement polonais fondée sur le jugement du Tribunal de Katowice.

* * *

Le Gouvernement polonais ne s'est pas borné à contester l'existence d'un dommage en alléguant que l'Oberschlesische ne serait pas ou aurait cessé d'être propriétaire de l'usine de Chorzów ; il soutient en outre, à différents points de vue, que les droits que le Reich possède dans l'entreprise, étant passés à la Pologne, ne pourraient entrer en ligne de compte pour l'évaluation du dommage dont dépendra le montant de la réparation due par la Pologne à l'Allemagne.

Admettant, par hypothèse, que le contrat du 24 décembre 1919 ne soit pas nul, mais doive être traité comme un acte juridique réel et valable, le Gouvernement polonais considère que, d'après ledit contrat, c'est le Gouvernement allemand qui

effect of the judgment of the Tribunal of Katowice of November 12th, 1927, may be at municipal law, this judgment can neither render inexistent the violation of the Geneva Convention recognized by the Court in Judgment No. 7 to have taken place, nor destroy one of the grounds on which that judgment is based.

It is to the objection dealt with above and to a submission connected therewith which the Polish Government made in its Counter-Case but subsequently withdrew, that the following submission of the German Government relates:

[*Translation.*]

that the obligation of the Polish Government to pay the indemnity awarded by the Court is in no way set aside by a judgment given or to be given by a Polish municipal court in a suit concerning the question of the ownership of the factory situated at Chorzów.

This submission has been maintained notwithstanding the withdrawal of the Polish submission referred to.

The Court, being of opinion that this latter submission is to be regarded as having been validly withdrawn, but that, nevertheless, the objection to which it referred still subsists, considers that there is no need expressly to deal with the submission in regard thereto made by the German Government, save in order to dismiss the submission of the Polish Government based on the judgment of the Tribunal of Katowice.

* * *

The Polish Government not only disputes the existence of a damage for the reason that the Oberschlesische is not or is no longer owner of the factory at Chorzów, but also contends from various points of view that the rights possessed by the Reich in the undertaking, having passed into the hands of Poland, cannot be included amongst the assets to be taken into account in the calculation of the damage sustained on which calculation will depend the amount of the reparation due by Poland to Germany.

The Polish Government, admitting, for the sake of argument, that the contract of December 24th, 1919, was not null and void, but must be regarded as a genuine and valid legal instrument, holds that, according to that contract, the Ger-

est le propriétaire de la totalité des actions de l'Oberschlesische lesquelles représentent l'unique bien de celle-ci, à savoir l'usine. Il en tire la conclusion qu'il s'agit de la transformation d'une entreprise fiscale en une entreprise d'État par actions, et comme il est d'avis que les biens d'une société allemande, dont la totalité des actions appartient au Reich, rentrent dans la catégorie des « biens et propriétés appartenant à l'Empire » qui seraient dévolus à la Pologne en vertu de l'article 256 du Traité de Versailles, il estime qu'il est « difficile de se rendre compte quels furent les droits de l'Oberschlesische auxquels il a été porté atteinte par le Gouvernement polonais ».

Il a développé cette argumentation en insistant notamment sur ce que l'Oberschlesische serait en réalité une société contrôlée par le Gouvernement allemand et non une société contrôlée par des ressortissants allemands, non plus qu'une entreprise privée dans laquelle le Reich posséderait seulement des intérêts prépondérants.

Même s'il n'en était pas ainsi et qu'on voulût, par hypothèse, traiter l'acte du 24 décembre 1919 comme un contrat effectif et réel de vente de l'usine par le Reich à l'Oberschlesische, on ne saurait, selon le Gouvernement polonais, omettre de tenir compte de la circonstance que l'État allemand a conservé toute une série d'intérêts et droits dans l'entreprise. Comme l'indemnité demandée par le Gouvernement allemand est calculée, entre autres, sur la mesure du dommage présumé de l'Oberschlesische, il ne serait pas « fondé logiquement de reconnaître à cette Société des indemnités pour les droits et intérêts qui, dans l'entreprise de Chorzów, appartenaient au Reich ». Il faudrait donc éliminer ces droits des droits de l'Oberschlesische, lesquels, cette élimination effectuée, se réduiraient au seul *nudum jus domini*.

Le Gouvernement polonais invoque, en outre, qu'en vertu de l'article 256 du Traité de Versailles, les droits et intérêts du Gouvernement allemand dans l'entreprise de Chorzów sont transférés à l'État polonais, au plus tard à partir du moment du transfert à la Pologne de la souveraineté sur la partie de la Haute-Silésie à elle attribuée, et que, à supposer que le contrat du 24 décembre 1919 ait donné à l'État allemand la

man Government is the owner of the whole of the shares of the Oberschlesische representing the sole property of that Company, namely the factory. It deduces from this that the transaction consists in the transformation of an ordinary State enterprise into a State enterprise with a share capital, and as it holds that the property of a German company, the whole of the shares of which belong to the Reich, falls within the category of "property and possessions belonging to the Empire" acquired by Poland under Article 256 of the Treaty of Versailles, it considers that it is "difficult to see what the rights of the Oberschlesische were which had been infringed by the Polish Government".

In developing this argument, it has laid special stress on the allegation that the Oberschlesische is in reality a company controlled by the German Government and not a company controlled by German nationals, or even a private enterprise in which the Reich merely possesses preponderating interests.

Even if this should not be the case and if the instrument of December 24th, 1919, were, for argument's sake, to be regarded as an effective and genuine contract for the sale of the factory by the Reich to the Oberschlesische, the Polish Government contends that it is impossible not to take into account the circumstance that the German State retained a whole complex of rights and interests in the undertaking. As the indemnity claimed by the German Government is calculated, amongst other things, on the extent of the damage presumed to have been sustained by the Oberschlesische, it would not be "logically correct to award to that Company compensation for rights and interests in the Chorzów undertaking which belonged to the Reich". These rights should therefore be eliminated from the rights of the Oberschlesische, which, if this were done, would amount simply to a *nudum jus domini*.

The Polish Government also alleges that, under Article 256 of the Treaty of Versailles, the rights and interests of the German Government in the Chorzów undertaking are transferred to the Polish State, at latest as from the date of the transfer to Poland of sovereignty over the part of Upper Silesia allotted to her, and that, on the supposition that the contract of December 24th, 1919, gave the German State

totalité des actions de l'Oberschlesische afin de garantir au Reich ses droits et de lui permettre d'en faire usage, ces actions, à la possession desquelles sont attachés les droits du Reich, doivent être livrées à la Pologne. Si l'acte du 24 décembre 1919 doit être traité comme réel et effectif, le Gouvernement polonais estime que pour déterminer l'indemnité éventuellement due à l'Oberschlesische, il faudrait d'abord éliminer les droits du Reich ; et comme il est d'avis que cette élimination ne peut être réalisée que sous une seule forme, savoir la livraison par l'État allemand à la Pologne des actions de l'Oberschlesische d'une valeur nominale de 110 millions de marks, le Gouvernement polonais, à ce sujet, a formulé, dans son Contre-Mémoire, sous le n° A 4, une conclusion ainsi conçue :

« En tout cas, dire et juger que le Gouvernement allemand doit, en premier lieu, livrer au Gouvernement polonais la totalité des actions de la Société anonyme Oberschlesische Stickstoffwerke de la valeur nominale de 110.000.000 de marks dont il dispose en vertu du contrat du 24 décembre 1919. »

A l'égard de cette conclusion, le Gouvernement allemand a, dans sa Réplique, fait les observations suivantes :

« D'abord, le Gouvernement polonais n'invoque aucune disposition sur laquelle peut être basée la compétence de la Cour pour connaître de cette question, qui résulte de l'interprétation de l'article 256. Dans les procédures antérieures, le Gouvernement polonais avait fortement souligné que l'interprétation de cet article ne serait pas même admissible en tant que question incidente et préalable pour l'interprétation des articles 6 à 22 de la Convention de Genève.

Le Gouvernement allemand ignore si le Gouvernement polonais pense au traité général d'arbitrage signé à Locarno et d'après lequel toute contestation d'ordre juridique doit être soumise à l'arbitrage, et, faute d'entente sur un tribunal arbitral spécial, à la Cour permanente de Justice internationale. Mais quoi qu'il en soit, le Gouvernement allemand, animé du désir d'assurer au Traité de Locarno toute l'étendue qu'il comporte sans s'arrêter aux questions des formes y prévues, et de voir vidée définitivement l'affaire de Chorzów, s'abstient d'entreprendre un examen détaillé sur les questions d'incompétence ou de prématurité même si ces questions entraient en considération pour la demande reconventionnelle que le Gouvernement allemand veut voir dans la conclusion A 4 du Contre-Mémoire. Il se borne à rappeler l'article 40, alinéa 2, chiffre 4, du

the whole of the shares of the Oberschlesische, as guarantee for its rights, and to enable it to exercise those rights, these shares, on the possession of which depend the rights of the Reich, should be transferred to Poland. If the contract of December 24th, 1919, is to be regarded as genuine and effective, the Polish Government holds that, in order to determine the indemnity which may be due to the Oberschlesische, the rights of the Reich must first be eliminated; and as it is of opinion that this can only be done in one way, namely, by the handing over by Germany to Poland of the shares of the Oberschlesische to the nominal value of 110 million marks, the Polish Government has in regard to this point made the following submission (No. A 4) in its Counter-Case:

[*Translation.*]

"In any case, it is submitted that the German Government should, in the first place, hand over to the Polish Government the whole of the shares of the Oberschlesische Company of the nominal value of 110,000,000 marks, which are in its hands under the contract of December 24th, 1919."

The German Government in its Reply made the following observations in regard to this submission:

[*Translation.*]

"In the first place, the Polish Government cites no provision on which it is possible to base the Court's jurisdiction to take cognizance of this question, which arises from the interpretation of Article 256. In the previous proceedings, the Polish Government strongly maintained that the interpretation of this article would not be admissible even as a question incidental and preliminary to the interpretation of Articles 6 to 22 of the Geneva Convention.

The German Government does not know whether the Polish Government has in mind the general treaty of arbitration signed at Locarno, according to which any dispute of a legal nature must be submitted to arbitration, and, unless some special arbitral tribunal is agreed upon, to the Permanent Court of International Justice. But, however that may be, the German Government, being animated by a wish to ensure that full scope shall be given to the Treaty of Locarno, without pausing to debate questions as to the procedure therein provided for, and also to see the Chorzów case settled once and for all, abstains from undertaking a detailed examination of the questions of lack of jurisdiction or prematurity, even though these questions might enter into account in connection with the counter-claim which, in the German Government's

Règlement de la Cour, en vertu duquel la Cour peut statuer sur des demandes reconventionnelles pour autant que ces dernières rentrent dans la compétence de la Cour. Entre l'Allemagne et la Pologne, ce cas est réalisé pour toute question de droit litigieuse entre elles. On pourrait uniquement discuter le point de savoir si, pour le jeu dudit article du Règlement, aussi les conditions de forme et de délais doivent être remplies, ou s'il suffit que les conditions matérielles soient remplies. Mais ce point peut rester indécis puisque le Gouvernement allemand accepte la juridiction de la Cour pour la question soulevée par le Contre-Mémoire. Lors des négociations relatives à l'affaire de Chorzów, le plénipotentiaire allemand avait déjà proposé au plénipotentiaire polonais de soumettre cette question à la Cour. »

Dans les débats ultérieurs, le Gouvernement polonais ne s'est pas prononcé sur la question de la compétence de la Cour. On ne saurait donc dire s'il accepte la manière de voir du Gouvernement allemand selon laquelle cette compétence pourrait être déduite de la Convention entre l'Allemagne et la Pologne, paraphée à Locarno le 16 octobre 1925, ou s'il revendique la compétence en vertu d'un autre titre. En tout cas, il est constant qu'il n'a pas retiré sa demande et que, partant, il désire que la Cour statue sur la conclusion en question. D'autre part, le Gouvernement allemand, tout en fondant la compétence sur la Convention de Locarno, paraît avant tout désirer que la Cour statue sur cette conclusion au cours de la présente procédure.

Il y a donc accord entre les Parties pour soumettre à la décision de la Cour la question soulevée par ladite conclusion. Comme la Cour l'a dit dans son Arrêt n° 12, relatif à certains droits de minorités en Haute-Silésie, l'article 36 du Statut consacre le principe suivant lequel la juridiction de la Cour dépend de la volonté des Parties ; la Cour est donc toujours compétente du moment où celles-ci acceptent sa juridiction, car il n'y a aucun différend que les États admis à ester devant la Cour ne puissent lui soumettre, sauf dans les cas exceptionnels où le différend serait de la compétence exclusive

contention, is formulated in submission A 4 of the Counter-Case. It will simply refer to Article 40, paragraph 2, No. 4, of the Rules of Court, according to which the Court may give judgment on counter-claims in so far as the latter come within its jurisdiction. As between Germany and Poland this applies in respect of any question of law in dispute between them. The only point which might be disputed is the question whether, for the application of this article of the Rules, the conditions respecting forms and times must also be fulfilled, or whether it is enough that the material conditions should be fulfilled. This point, however, may be left open, since the German Government accepts the jurisdiction of the Court in regard to the question raised in the Counter-Case. In the course of the negotiations in regard to the Chorzów case, the German plenipotentiary had already proposed to the Polish plenipotentiary that this question should be referred to the Court."

In the subsequent proceedings, the Polish Government has not made any statement in regard to the question of the Court's jurisdiction. It is impossible, therefore, to say whether it accepts the view of the German Government according to which it may be inferred that such jurisdiction exists under the Convention between Germany and Poland initialled at Locarno on October 16th, 1925, or whether it contends that the Court has jurisdiction on some other basis. In any case, it is certain that it has not withdrawn its claim and that, consequently, it wishes the Court to give judgment on the submission in question. For its part the German Government, though basing the Court's jurisdiction on the Locarno Convention, seems above all anxious that the Court should give judgment on this submission in the course of the present proceedings.

The Parties therefore are agreed in submitting to the Court for decision the question raised by this submission. As the Court has said in Judgment No. 12, concerning certain rights of minorities in Upper Silesia, Article 36 of the Statute establishes the principle that the Court's jurisdiction depends on the will of the Parties; the Court therefore is always competent once the latter have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it, save in exceptional cases where a dispute may be within the exclusive jurisdiction of some other body.

d'un autre organe. Or, tel n'est pas le cas en ce qui concerne la conclusion en question.

La Cour constate, en outre, que la demande reconventionnelle est basée sur l'article 256 du Traité de Versailles, qui constitue le fondement de l'exception soulevée par la Partie défenderesse, et que, partant, elle se trouve en rapport de connexité juridique avec la demande principale.

D'autre part, l'article 40 du Règlement de la Cour que le Gouvernement allemand a invoqué, stipule, entre autres, que les contre-mémoires comprennent :

> « 4° des conclusions fondées sur les faits énoncés. Ces conclusions peuvent comprendre des demandes reconventionnelles, pour autant que ces dernières rentrent dans la compétence de la Cour. »

La demande ayant été formulée dans le Contre-Mémoire, les conditions de forme exigées par le Règlement pour des demandes reconventionnelles se trouvent donc réalisées en l'espèce aussi bien que les conditions de fond.

En ce qui concerne les rapports qui existent entre les demandes allemandes et la conclusion polonaise dont il s'agit, la Cour croit utile d'ajouter ce qui suit : Bien qu'étant formellement une demande reconventionnelle, car elle tend à condamner la Partie demanderesse à une prestation envers la défenderesse — en réalité, si l'on tient compte des motifs sur lesquels elle se fonde, la conclusion contient un moyen opposé à la demande de l'Allemagne tendant à obtenir de la Pologne une indemnité dont le montant serait calculé, entre autres, sur la base du dommage subi par l'Oberschlesische. Il s'agit, en effet, d'éliminer du montant de cette indemnité ce qui correspondrait à la valeur des droits et intérêts que le Reich possédait dans l'entreprise en vertu du contrat du 24 décembre 1919, valeur qui, selon le Gouvernement polonais, ne constitue pas une perte pour l'Oberschlesische, parce que ces droits et intérêts appartiendraient au Gouvernement polonais lui-même en vertu de l'article 256 du Traité de Versailles. La Cour ayant, par son Arrêt n° 8, admis sa compétence en vertu de l'article 23 de la Convention de Genève pour connaître de la réparation due du chef du dommage causé aux deux Sociétés par l'attitude du Gouvernement polonais envers elles, elle ne saurait se soustraire à l'examen des objections qui ont pour

But this is not the case as regards the submission in question.

The Court also observes that the counter-claim is based on Article 256 of the Versailles Treaty, which article is the basis of the objection raised by the Respondent, and that, consequently, it is juridically connected with the principal claim.

Again, Article 40 of the Rules of Court, which has been cited by the German Government, lays down amongst other things that counter-cases shall contain:

> "4° conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court."

The claim having been formulated in the Counter-Case, the formal conditions required by the Rules as regards counter-claims are fulfilled in this case, as well as the material conditions.

As regards the relationship existing between the German claims and the Polish submission in question, the Court thinks it well to add the following: Although in form a counter-claim, since its object is to obtain judgment against the Applicant for the delivery of certain things to the Respondent—in reality, having regard to the arguments on which it is based, the submission constitutes an objection to the German claim designed to obtain from Poland an indemnity the amount of which is to be calculated, amongst other things, on the basis of the damage suffered by the Oberschlesische. It is in fact a question of eliminating from the amount of this indemnity a sum corresponding to the value of the rights and interests which the Reich possessed in the enterprise under the contract of December 24th, 1919, which value, according to the Polish Government, does not constitute a loss to the Oberschlesische because these rights and interests are said to belong to the Polish Government itself under Article 256 of the Treaty of Versailles. The Court, having by Judgment No. 8 accepted jurisdiction, under Article 23 of the Geneva Convention, to decide as to the reparation due for the damage caused to the two Companies by the attitude of the Polish Government towards them, cannot dispense with an examination of the objections the

but de démontrer soit qu'un tel dommage n'existe pas, soit qu'il n'a pas l'étendue que prétend la Partie demanderesse. Cela étant, il semble naturel de reconnaître aussi, en vertu du même titre, la compétence pour statuer sur les moyens allégués par le Gouvernement polonais afin d'obtenir que l'indemnité soit limitée au montant correspondant au dommage effectivement subi.

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Passant maintenant à l'examen des objections susdites du Gouvernement polonais, la Cour estime utile, tout d'abord, de préciser quelle est, selon son avis, la nature des droits que le Gouvernement allemand possède à l'égard de l'entreprise de Chorzów en vertu du contrat du 24 décembre 1919, dont le contenu essentiel se trouve exposé plus haut. Renvoyant à cet exposé, la Cour constate que c'est la Treuhand et non le Reich allemand qui, en droit, est propriétaire des actions de l'Oberschlesische. Le Reich est créancier de la Treuhand et a, en cette qualité, un droit de gage sur les actions. Il a aussi, à côté de ce droit de gage, tous les droits découlant de la possession des actions, y compris le droit à la plus grande partie du prix en cas de vente de celles-ci. Ce droit, qui peut être considéré comme prépondérant, est, au point de vue économique, très proche de la propriété, mais il n'est pas la propriété ; et on ne peut, même en se plaçant au point de vue économique, faire abstraction des droits de la Treuhand.

Telle étant la situation en droit, vouloir maintenant identifier l'Oberschlesische avec le Reich, ce qui aurait pour conséquence que la propriété de l'usine serait dévolue à la Pologne en vertu de l'article 256 du Traité de Versailles, serait se mettre en opposition avec la manière de voir adoptée par la Cour dans son Arrêt n° 7 et maintenue ci-dessus, manière de voir qui est le fondement de la décision selon laquelle l'attitude de la Pologne, aussi bien vis-à-vis de l'Oberschlesische que vis-à-vis de la Bayerische, n'était pas conforme aux dispositions de la Convention de Genève.

Il en est de même en ce qui concerne la thèse suivant laquelle l'Oberschlesische serait une société contrôlée non par des ressortissants allemands, mais par le Reich. Il est vrai, comme l'a rappelé le Gouvernement polonais, que la Cour, dans

aim of which is to show either that no such damage exists or that it is not so great as it is alleged to be by the Applicant. This being so, it seems natural on the same grounds also to accept jurisdiction to pass judgment on the submissions which Poland has made with a view to obtaining the reduction of the indemnity to an amount corresponding to the damage actually sustained.

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Proceeding now to consider the above-mentioned objections of the Polish Government, the Court thinks it well first of all to define what is, in its opinion, the nature of the rights which the German Government possesses in respect of the Chorzów undertaking under the contract of December 24th, 1919, the main features of which have been described above. Referring to this description, the Court points out that the Treuhand, and not the Reich, is legally the owner of the shares of the Oberschlesische. The Reich is the creditor of the Treuhand and in this capacity has a lien on the shares. It also has, besides this lien, all rights resulting from possession of the shares, including the right to the greater portion of the price in the event of the sale of these shares. This right, which may be regarded as preponderating, is, from an economic standpoint, very closely akin to ownership, but it is not ownership; and even from an economic point of view it is impossible to disregard the rights of the Treuhand.

Such being the situation at law, to endeavour now to identify the Oberschlesische with the Reich—the effect of which would be that the ownership of the factory would have passed to Poland under Article 256 of the Treaty of Versailles—would be in conflict with the view taken by the Court in Judgment No. 7 and reaffirmed above, on which view is based the decision to the effect that Poland's attitude as regards both the Oberschlesische and Bayerische was not in conformity with the provisions of the Geneva Convention.

The same applies in regard to the contention that the Oberschlesische is a company controlled not by German nationals but by the Reich. It is true, as the Polish Government has recalled, that the Court in Judgment No. 7 has declared

son Arrêt n° 7, a déclaré ne pas avoir besoin d'examiner la question de savoir si l'Oberschlesische, vu les droits que le contrat du 24 décembre 1919 confère au Reich, doit être considérée comme contrôlée par ce dernier et, au cas où cette hypothèse se trouverait réalisée, quelles conséquences pourraient en découler pour l'application de la Convention de Genève. Mais la raison en était que la Cour était d'avis que le Gouvernement polonais n'avait pas soulevé cette question et que, abstraction faite de sa thèse relative à la fictivité des actes du 24 décembre 1919, il ne paraissait pas avoir contesté que ladite Société fût contrôlée par des ressortissants allemands.

En tout cas, il est clair que c'est seulement en estimant que ladite Société est, au point de vue de l'article 6 de la Convention de Genève, à considérer comme une société contrôlée par des ressortissants allemands, que la Cour a pu constater que l'attitude du Gouvernement polonais vis-à-vis de cette Société n'était pas conforme aux dispositions des articles 6 et suivants de ladite Convention.

Même si la question n'était pas préjugée et si la Cour était libre de l'examiner à nouveau maintenant, elle devrait arriver à la conclusion que l'Oberschlesische était contrôlée par la Bayerische. Car, vu que, d'après le contrat du 24 décembre 1919, le Reich s'était déclaré d'accord pour maintenir la direction de l'entreprise de Chorzów entre les mains de la Bayerische aux conditions antérieurement convenues avec le Reich, et que, par le contrat ultérieur, conclu entre la Bayerische et la Treuhand à la date du 25 novembre 1920, il avait été stipulé qu'à cette fin la Bayerische désignerait au moins deux membres de sa propre direction comme membres de la direction de l'Oberschlesische, c'est, de l'avis de la Cour, la Bayerische plutôt que le Reich qui a le contrôle sur l'Oberschlesische.

La Cour conclut donc que n'est pas fondée la thèse polonaise suivant laquelle l'Oberschlesische n'a pas subi de dommage parce que cette Société doit être considérée comme s'identifiant avec le Reich, et suivant laquelle les biens dont ladite Société a été privée par l'acte du Gouvernement polonais sont acquis à la Pologne en vertu de l'article 256 du Traité de Versailles.

that there was no need for it to consider the question whether the Oberschlesische, having regard to the rights conferred by the contract of December 24th, 1919, on the Reich, should be considered as controlled by the Reich, and, should this be the case, what consequences would ensue as regards the application of the Geneva Convention. But the reason for this was that the Court held that the Polish Government had not raised this question, and that, apart from its contention as to the fictitious character of the instruments of December 24th, 1919, that Government did not seem to have disputed that the Company was controlled by German nationals.

At all events, it is clear that only by regarding the said Company as a company controlled by German nationals within the meaning of Article 6 of the Geneva Convention, was the Court able to declare that the attitude of the Polish Government towards that Company was not in conformity with the terms of Article 6 and the following articles of the said Convention.

Even if the question were still open and the Court were now free once more to consider it, it would be bound to conclude that the Oberschlesische was controlled by the Bayerische. For seeing that, under the contract of December 24th, 1919, the Reich had declared that it agreed to leave the management of the Chorzów undertaking in the hands of the Bayerische, under the conditions previously settled with the Reich, and that, under the subsequent contract concluded on November 25th, 1920, between the Bayerische and the Treuhand, it had been stipulated that for this purpose the Bayerische was to appoint at least two members of its own board as members of the board of the Oberschlesische, the Court considers that the Bayerische, rather than the Reich, controls the Oberschlesische.

The Court, therefore, arrives at the conclusion that the Polish contention to the effect that the Oberschlesische has not suffered damage, because that Company is to be regarded as identifiable with the Reich, and that the property of which the said Company was deprived by the action of the Polish Government has passed to Poland under Article 256 of the Treaty of Versailles, is not well founded.

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A titre subsidiaire, le Gouvernement polonais a allégué que, même si les droits que le Reich possède d'après le contrat du 24 décembre 1919 dans l'entreprise de Chorzów ne devaient pas être considérés comme comportant la propriété des actions de l'Oberschlesische, la valeur de ces droits, qui tomberaient sous le coup de l'article 256 du Traité de Versailles, devrait néanmoins être déduite de l'indemnité réclamée du chef de l'Oberschlesische. La Cour ne saurait davantage accepter cette thèse.

A ce sujet, il y a lieu de remarquer que l'article 256 pose deux conditions, savoir qu'il s'agisse de « biens et propriétés » appartenant à l'Empire ou aux États allemands, et que ces « biens et propriétés » soient « situés » dans un territoire allemand cédé en vertu du Traité.

Il s'agit donc de savoir, entre autres, si les droits du Reich selon le contrat du 24 décembre 1919 sont « situés » dans la partie de la Haute-Silésie cédée à la Pologne. En tant que créance contre la Treuhand, il est clair que cette créance ne peut être considérée comme située dans la Haute-Silésie polonaise, la Treuhand étant une société dont le siège social est en Allemagne et dont les parts appartiennent à des sociétés qui ont également leur siège en Allemagne, et sur lesquelles le contrôle appartient sans conteste à des ressortissants allemands. Le fait que cette créance est garantie par un droit de gage sur les actions, dont les bénéfices, de même que le prix obtenu en cas de vente, serviront à amortir la créance, ne peut, de l'avis de la Cour, justifier l'opinion suivant laquelle les droits du Reich seraient situés en Haute-Silésie polonaise où se trouve l'usine. Ce ne sont que des droits sur les actions, lesquels, si on ne veut pas les considérer comme situés là où se trouvent les actions, doivent être regardés comme étant localisés au siège de la société, siège qui, en l'espèce, est à Berlin et non en Haute-Silésie polonaise. Le transfert du siège de l'Oberschlesische de Chorzów à Berlin après l'entrée en vigueur du Traité de Versailles ne peut être considéré comme illégal et nul ; les motifs pour lesquels la Cour, dans son Arrêt n° 7,

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Alternatively, the Polish Government has contended that, even if the rights possessed by the Reich under the contract of December 24th, 1919, in the Chorzów undertaking are not to be considered as involving ownership of the shares of the Oberschlesische, the value of these rights, which fall within the scope of Article 256 of the Treaty of Versailles, should nevertheless be deducted from the indemnity claimed as regards the Oberschlesische. The Court is likewise unable to admit this contention.

In this respect, it should be noted that Article 256 contains two conditions, namely, that the "property and possessions" with which it deals must belong to the Empire or to the German States, and that such "property and possessions" must be "situated" in German territory ceded under the Treaty.

It must therefore be ascertained, amongst other things, whether the rights of the Reich under the contract of December 24th, 1919, are "situated" in the part of Upper Silesia ceded to Poland. In so far as these rights consist in a claim against the Treuhand, it is clear that this claim cannot be regarded as situated in Polish Upper Silesia, since the Treuhand is a company whose registered office is in Germany and whose shares belong to companies which also have their registered office in Germany and which are undeniably controlled by German nationals. The fact that this claim is guaranteed by a lien on the shares on which the profit, as well as the price obtained in the event of sale, is to be devoted to the payment of this claim, does not, in the Court's opinion, justify the view that the rights of the Reich are situated in Polish Upper Silesia where the factory is. These are only rights in respect of the shares; and these rights, if not regarded as situated where the shares are, must be considered as localized at the registered office of the Company which in this case in at Berlin and not in Polish Upper Silesia. The transfer of the registered office of the Oberschlesische from Chorzów to Berlin after the coming into force of the Treaty of Versailles cannot be regarded as illegal and null:

a considéré que des aliénations de biens publics sis dans la zone soumise au plébiscite n'étaient pas interdites par ledit Traité, s'appliquent à plus forte raison à l'acte par lequel une société anonyme a transféré son siège de cette zone en Allemagne.

C'est encore en vain que le Gouvernement polonais invoque le paragraphe 10 de l'annexe aux articles 297 et 298 du Traité de Versailles, paragraphe qui établit le devoir pour l'Allemagne de remettre « à chaque Puissance alliée ou associée tous les contrats, certificats, actes et autres titres de propriété se trouvant entre les mains de ses ressortissants et se rapportant à des biens, droits et intérêts situés sur le territoire de ladite Puissance alliée ou associée, y compris les actions, obligations ou autres valeurs mobilières de toutes sociétés autorisées par la législation de cette Puissance ». Même abstraction faite de la circonstance que l'Oberschlesische a été constituée sous le régime des lois allemandes et n'a pas été « autorisée » par la législation polonaise, ladite disposition est étrangère à l'article 256 et se réfère seulement aux articles en annexe auxquels elle se trouve.

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L'exposé qui précède ayant établi que, selon l'opinion de la Cour, l'article 256 du Traité de Versailles n'est pas applicable aux droits que le Reich possède en vertu du contrat du 24 décembre 1919, il s'ensuit qu'il faut rejeter la thèse polonaise basée sur l'applicabilité dudit article, et selon laquelle il est nécessaire d'éliminer du montant de l'indemnité à allouer la valeur de ces droits. Il en est de même en ce qui concerne la conclusion du Gouvernement polonais demandant la remise à la Pologne de la totalité des actions de l'Oberschlesische, conclusion dont le but exprès est d'aboutir à une telle élimination. Car cette conclusion, elle aussi, a pour seul fondement la prétendue applicabilité dudit article du Traité de Versailles.

the reasons for which the Court, in Judgment No. 7, held that alienations of public property situated in the plebiscite zone were not prohibited by that Treaty, apply *a fortiori* in respect of the transfer by a company of its registered office from this zone to Germany.

It is also in vain that the Polish Government cites paragraph 10 of the Annex to Articles 297 and 298 of the Treaty of Versailles, which paragraph lays down that Germany shall deliver "to each Allied or Associated Power all securities, certificates, deeds, or other documents of title held by its nationals and relating to property, rights or interests situated in the territory of that Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power". Even disregarding the circumstances that the Oberschlesische was constituted under German law and has not been "incorporated" in accordance with the laws of Poland, the clause quoted has nothing to do with Article 256 and relates only to the articles to which it is annexed.

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Since, as has been shown above, Article 256 of the Treaty of Versailles is not, in the Court's opinion, applicable to the rights possessed by the Reich under the contract of December 24th, 1919, it follows that the Polish Government's contention—based on the applicability of that article—to the effect that the value of these rights should be eliminated from the amount of the indemnity to be awarded, must be rejected. The same is true as regards the Polish Government's submission that the whole of the shares of the Oberschlesische should be handed over to Poland, a submission the aim of which is precisely to bring about the elimination referred to. For this submission is likewise based solely on the alleged applicability of the same article of the Treaty of Versailles.

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A titre subsidiaire, également au sujet de la demande d'une indemnité fondée sur le préjudice subi par l'Oberschlesische, le Gouvernement polonais a prié la Cour de « surseoir provisoirement » sur ladite demande en indemnité.

Les raisons pour lesquelles il demande ce sursis paraissent être les suivantes :

Le Gouvernement polonais a notifié à la Commission des Réparations la prise de possession, en vertu de l'article 256 du Traité de Versailles, de l'usine de Chorzów, en la portant sur la liste des biens d'État allemands acquis conformément audit article. Il appartient à la Commission des Réparations de fixer la valeur de ces biens, valeur qui doit être payée à la Commission par l'État cessionnaire pour être portée au crédit de l'Allemagne à valoir sur les sommes dues au titre des réparations. Or, après que la Cour eut rendu son Arrêt n° 7, le Gouvernement allemand avait demandé à la Commission des Réparations de radier l'usine de Chorzów de la liste des biens transférés à la Pologne, sans que, cependant, la Commission eût encore pris de décision à cet égard. La question de savoir si la Pologne doit être débitée de la valeur de l'usine reste donc en suspens, et le Gouvernement polonais est d'avis que, tant que cette question n'est pas tranchée et que la Commission des Réparations n'a pas radié l'usine de Chorzów de la liste, le Gouvernement polonais ne peut être contraint à un paiement en faveur de l'Oberschlesische.

A côté de ces considérations, le Gouvernement polonais invoque encore la Convention d'armistice et l'article 248 du Traité de Versailles. Ce dernier établit que, « sous réserve des dérogations qui pourraient être accordées par la Commission des Réparations, un privilège de premier rang est établi sur tous les biens et ressources de l'Empire et des États allemands, pour le règlement des réparations et autres charges résultant du présent Traité, ou de tous autres traités et conventions complémentaires, ou des arrangements conclus entre l'Allemagne et les Puissances alliées ou associées pendant l'armistice et ses prorogations ». Le Gouvernement polonais constate que, dans son Arrêt n° 7, la Cour a jugé que la Pologne, n'ayant pas

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Alternatively, and also in regard to the claim for an indemnity based on the damage sustained by the Oberschlesische, the Polish Government has asked the Court "provisionally to suspend" its decision on the claim for indemnity.

The reasons for which it seeks this suspension appear to be as follows:

The Polish Government has notified the Reparation Commission of the taking over of the Chorzów factory, under Article 256 of the Treaty of Versailles, by entering it on the list of German State property acquired under that article. It is for the Reparation Commission to fix the value of such property, which value is to be paid to the Commission by the succession State and credited to Germany on account of the sums due for reparations. Now after the Court had delivered Judgment No. 7, the German Government asked the Reparation Commission to strike out the Chorzów factory from the list of property transferred to Poland, but the Commission has not yet taken any decision in regard to this. The question whether Poland is to be debited with the value of the factory therefore remains undecided, and the Polish Government considers that, until this question has been decided and the Reparation Commission has struck the Chorzów factory off the list, it—the Polish Government—cannot be compelled to make a payment in favour of the Oberschlesische.

In addition to these considerations, the Polish Government also cites the Armistice Convention and Article 248 of the Treaty of Versailles. The latter lays down that, "subject to such exceptions as the Reparation Commission may approve, a first charge upon all the assets and revenues of the German Empire and its constituent States shall be the cost of reparation and all other costs arising under the present Treaty or any treaties or agreements supplementary thereto or under arrangements concluded between Germany and the Allied and Associated Powers during the armistice or its extensions". The Polish Government says that in Judgment No. 7 the Court has decided first that Poland, not having been a party

pris part à la Convention d'armistice, n'a pas le droit de se prévaloir des stipulations de celle-ci pour considérer nulle et non avenue l'aliénation de l'usine, et qu'elle ne peut se réclamer individuellement, dans le même but, de l'article 248 du Traité de Versailles. Mais il semble soutenir que, vu le droit que les États signataires de la Convention d'armistice peuvent avoir à s'opposer à la vente de l'usine, et vu le droit de la Commission des Réparations à veiller sur l'acquittement de la dette de réparation en général, et vu spécialement le droit qui lui est réservé par l'article 248, l'obligation de la Pologne de payer à l'Allemagne une indemnité en faveur de l'Oberschlesische dépend d'une approbation préalable desdits États ainsi que de la Commission des Réparations.

De son côté, le Gouvernement allemand, tout en contestant le bien-fondé desdites objections du Gouvernement polonais, a déclaré admettre la compétence de la Cour pour statuer sur celles-ci « en tant que questions préalables, pour les questions de la forme, du montant et des modes du paiement des indemnités qu'il réclame, questions pour lesquelles la Cour a déjà affirmé sa compétence ». Il a prié la Cour de rejeter la conclusion subsidiaire polonaise et de dire et juger :

« que le Gouvernement polonais n'est pas autorisé à refuser le paiement au Gouvernement allemand des indemnités en raison d'arguments tirés de l'article 256 ou en raison d'égards vis-à-vis de la Commission des Réparations ou d'autres tierces personnes ».

La Cour est d'avis que sa compétence pour statuer sur la conclusion polonaise en question n'est pas douteuse, mais que cette conclusion doit être rejetée comme non fondée.

A ce sujet, il y a lieu de remarquer, tout d'abord, que les faits allégués par la Pologne ne peuvent empêcher la Cour, saisie maintenant d'une demande en indemnité sur la base de son Arrêt n° 7, de statuer sur cette demande en ce qui concerne la fixation d'une indemnité correspondant, entre autres, au montant du dommage subi par l'Oberschlesische, dommage dont l'élément le plus important est représenté par la perte de l'usine. Car, en constatant par son Arrêt n° 7 que l'attitude du Gouvernement polonais vis-à-vis de l'Oberschle-

to the Armistice Convention, is not entitled to avail itself of the terms of that instrument in order to establish that the alienation of the factory is null and void, and secondly, that that country cannot, on her own account, cite Article 248 of the Treaty of Versailles for the same purpose. It would seem, however, that the said Government contends that, in view of the right which the States signatory to the Armistice Convention may have to oppose the sale of the factory and in view of the right of the Reparation Commission to ensure the discharge of reparation debts in general and especially in view of the right reserved to it under Article 248, Poland's obligation to pay to Germany an indemnity in favour of the Oberschlesische is dependent on the previous approval of the said States and of the Reparation Commission.

The German Government, for its part, whilst disputing the justice of these objections of the Polish Government, has accepted the jurisdiction of the Court to decide upon them "as preliminary points in regard to the questions of form, amount and methods of payment of the indemnities claimed by it, questions with which the Court has already declared itself competent to deal". It has asked the Court to dismiss the Polish alternative submission and to decide:

"that the Polish Government is not justified in refusing to pay compensation to the German Government on the basis of arguments drawn from Article 256 or for motives of respect for the rights of the Reparation Commission or other third parties".

The Court considers that there is no doubt as to its jurisdiction to pass judgment upon the Polish submission in question, but that this submission must be rejected as not well-founded.

In this respect, it should be observed in the first place that the facts cited by Poland cannot prevent the Court, which now has before it a claim for indemnity based on its Judgment No. 7, from passing judgment upon this claim in so far as concerns the fixing of an indemnity corresponding, amongst other things, to the amount of the damage sustained by the Oberschlesische, of which damage the most important element is represented by the loss of the factory. For the Court, when it declared in Judgment No. 7 that the attitude

sische n'était pas conforme aux dispositions des articles 6 et suivants de la Convention de Genève, — attitude qui consistait à considérer et à traiter ladite usine comme acquise par la Pologne en vertu de l'article 256 du Traité de Versailles, — la Cour a écarté, avec effet entre les Parties, l'applicabilité dudit article à l'usine de Chorzów. D'autre part, il ressort des documents soumis à la Cour par les Parties que la Commission des Réparations ne revendique pas la compétence pour statuer sur la question de savoir si tel ou tel bien est, oui ou non, acquis par un État cessionnaire en vertu dudit article. Elle accepte à ce sujet la solution que la question a pu recevoir, soit par les moyens dont disposent les intéressés — négociations diplomatiques, arbitrages, etc. — soit par un acte unilatéral de l'État cessionnaire lui-même. Et si maintenant les Parties sont d'accord sur ce que la Pologne doit conserver l'usine, cela n'est pas à cause de l'article 256 du Traité de Versailles, mais en raison de l'impossibilité pratique de restituer l'usine. Il ne semble pas douteux, dans ces circonstances, que la Pologne ne court aucun risque de devoir payer à nouveau la valeur de l'usine à la Commission des Réparations, si, conformément à la demande de l'Allemagne, elle paie à cet État la valeur de l'usine.

En ce qui concerne la Convention d'armistice et l'article 248 du Traité de Versailles, la question se pose autrement. La Convention d'armistice semble avoir été invoquée dans le but de réserver la possibilité de faire invalider la vente de l'usine à l'Oberschlesische par une action que les États signataires de ladite Convention intenteraient à cet effet. Comme, cependant, la Cour, dans son Arrêt n° 7, a estimé que la Pologne ne peut pas se prévaloir des dispositions de cette Convention, à laquelle elle n'est pas partie, la Cour ne saurait, sans inconséquence, lui reconnaître le droit d'invoquer la Convention aux fins d'obtenir un sursis à la réparation du dommage qu'elle avait causé par une attitude non conforme aux obligations résultant pour elle de la Convention de Genève.

Comme il a déjà été dit, la Cour, dans son Arrêt n° 7, a déclaré que la Pologne ne peut pas se réclamer individuellement de l'article 248 du Traité de Versailles aux fins d'annuler

of the Polish Government in regard to the Oberschlesische was not in conformity with the provisions of Article 6 and the following articles of the Geneva Convention—which attitude consisted in considering and treating the Chorzów factory as acquired by Poland under Article 256 of the Treaty of Versailles—established that, as between the Parties, that article was not applicable to the Chorzów factory. Again it appears from the documents submitted to the Court by the Parties that the Reparation Commission does not claim to be competent to decide whether any particular property is or is not acquired by a succession State under the said article. The Commission accepts in this respect the solution arrived at in regard to this question either by the means at the disposal of those concerned—diplomatic negotiations, arbitration, etc.—or as the result of a unilateral act on the part of the succession State itself. The fact that the Parties are now agreed that Poland must retain the factory has nothing to do with Article 256 of the Treaty of Versailles, but is owing to the impracticability of returning it. In these circumstances there seems to be no doubt that Poland incurs no risk of having again to pay the value of the factory to the Reparation Commission, if, in accordance with Germany's claim, she pays this value to that State.

With regard to the Armistice Convention and Article 248 of the Treaty of Versailles, the question assumes a different aspect. The Armistice Convention appears to have been cited in order to reserve the possibility of getting the sale of the factory to the Oberschlesische declared invalid by means of an action to be brought to that end by the States signatory to that Convention. As, however, the Court, in Judgment No. 7, has held that Poland cannot avail itself of the provisions of the said Convention to which she is not a party, the Court cannot without inconsistency admit that country's right to invoke the Convention in order to delay making reparation for the damage resulting from her adoption of an attitude not in conformity with her obligations under the Geneva Convention.

As has already been said, the Court in Judgment No. 7 has declared that Poland cannot on her own account rely on Article 248 of the Treaty of Versailles in order to obtain the

la vente de l'usine ; en outre, la Cour a constaté que cet article ne comporte pas de défense d'aliénation et que les droits réservés aux Puissances alliées et associées dans ledit article sont exercés par l'intermédiaire de la Commission des Réparations. Mais il serait difficile de comprendre comment lesdits droits pourraient être lésés du fait du versement au Reich, à titre d'indemnité, de la valeur de l'usine, vu que, sans un tel versement, les droits du Reich dans l'entreprise perdraient probablement toute valeur. L'objection basée sur cet article doit donc, elle aussi, être écartée.

La Cour estime devoir se borner à rejeter la conclusion par laquelle le Gouvernement polonais demande un sursis, considérant que, par ce rejet, ainsi que par le rejet des exceptions présentées par le Gouvernement polonais sur la base de l'article 256 du Traité de Versailles, elle fait droit à la conclusion allemande, dans toute la mesure où cette conclusion est justifiée ; en effet, la Cour ne saurait examiner la conclusion dont il s'agit pour autant qu'elle se réfère à des tierces personnes qui ne sont pas spécifiées.

## III.

L'existence d'un dommage à indemniser étant reconnue par la Partie défenderesse en ce qui concerne la Bayerische, et les objections soulevées par cette Partie contre l'existence d'un dommage justifiant une indemnisation de l'Oberschlesische étant écartées, la Cour doit maintenant fixer les critères d'après lesquels il y a lieu de procéder à la détermination du montant de l'indemnité due.

L'acte de la Pologne que la Cour a jugé être contraire à la Convention de Genève, n'est pas une expropriation à laquelle n'aurait manqué, pour être légitime, que le paiement d'une indemnité équitable ; c'est une mainmise sur des biens, droits et intérêts qui ne pouvaient être expropriés même contre indemnité, sauf dans les conditions exceptionnelles déterminées par l'article 7 de ladite Convention. Comme la Cour l'a expressément constaté dans son Arrêt n° 8, la réparation est, en l'espèce, la conséquence non pas de l'application des articles 6 à 22 de la Convention de Genève, mais d'actes qui sont contraires aux dispositions de ces articles.

annulment of the sale of the factory. Furthermore, the Court has stated that this article does not involve a prohibition of alienation, and that the rights reserved to the Allied and Associated Powers in the article are exercised through the Reparation Commission. But it would be difficult to understand how these rights could be affected by the payment to the Reich, as an indemnity, of the value of the factory, seeing that, without such a payment, the rights of the Reich in the enterprise would probably lose all value. The objection based on this article must therefore also be overruled.

The Court considers that it should confine itself to rejecting the submission whereby the Polish Government asks for a suspension, since by so doing and by overruling the objections raised by the Polish Government on the basis of Article 256 of the Treaty of Versailles, it is deciding in conformity with the German submission to the extent that that submission is well-founded; the Court cannot, in fact, consider the submission in question in so far as it relates to third parties who are not specified.

## III.

The existence of a damage to be made good being recognized by the respondent Party as regards the Bayerische, and the objections raised by the same Party against the existence of any damage that would justify compensation to the Oberschlesische being set aside, the Court must now lay down the guiding principles according to which the amount of compensation due may be determined.

The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation—to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention. As the Court has expressly declared in Judgment No. 8, reparation is in this case the consequence not of the application of Articles 6 to 22 of the Geneva Convention, but of acts contrary to those articles.

Il s'ensuit que l'indemnité due au Gouvernement allemand n'est pas nécessairement limitée à la valeur qu'avait l'entreprise au moment de la dépossession, plus les intérêts jusqu'au jour du paiement. Cette limitation ne serait admissible que si le Gouvernement polonais avait eu le droit d'exproprier et que si son tort se réduisait à n'avoir pas payé aux deux Sociétés le juste prix des choses expropriées ; dans le cas actuel, elle pourrait aboutir à placer l'Allemagne et les intérêts protégés par la Convention de Genève, et pour lesquels le Gouvernement allemand a pris fait et cause, dans une situation plus défavorable que celle dans laquelle l'Allemagne et ces intérêts se trouveraient si la Pologne avait respecté ladite Convention. Une pareille conséquence serait non seulement inique, mais aussi et avant tout incompatible avec le but visé par les articles 6 et suivants de la Convention, voire la défense, en principe, de liquider des biens, droits et intérêts des ressortissants allemands et des sociétés contrôlées par des ressortissants allemands en Haute-Silésie, car elle équivaudrait à identifier la liquidation licite et la dépossession illicite en ce qui concerne leurs effets financiers.

Le principe essentiel, qui découle de la notion même d'acte illicite et qui semble se dégager de la pratique internationale, notamment de la jurisprudence des tribunaux arbitraux, est que la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si ledit acte n'avait pas été commis. Restitution en nature, ou, si elle n'est pas possible, paiement d'une somme correspondant à la valeur qu'aurait la restitution en nature ; allocation, s'il y a lieu, de dommages-intérêts pour les pertes subies et qui ne seraient pas couvertes par la restitution en nature ou le paiement qui en prend la place ; tels sont les principes desquels doit s'inspirer la détermination du montant de l'indemnité due à cause d'un fait contraire au droit international.

Cette conclusion s'impose avec une force toute particulière à l'égard de la Convention de Genève, qui a pour but d'assurer le maintien de la vie économique en Haute-Silésie sur la base du respect du *statu quo*. La dépossession d'une entreprise industrielle, que la Convention défendait d'exproprier, a donc

It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated; in the present case, such a limitation might result in placing Germany and the interests protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland had respected the said Convention. Such a consequence would not only be unjust, but also and above all incompatible with the aim of Article 6 and following articles of the Convention—that is to say, the prohibition, in principle, of the liquidation of the property, rights and interests of German nationals and of companies controlled by German nationals in Upper Silesia—since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

This conclusion particularly applies as regards the Geneva Convention, the object of which is to provide for the maintenance of economic life in Upper Silesia on the basis of respect for the *status quo*. The dispossession of an industrial undertaking—the expropriation of which is prohibited by the

pour conséquence l'obligation de la restituer, et, si cela n'est pas possible, d'en payer la valeur à l'époque de l'indemnisation destinée à remplacer la restitution devenue impossible. A cette obligation s'ajoute, en vertu des principes généraux du droit international, celle d'indemniser les pertes éprouvées à la suite de la mainmise. L'impossibilité, constatée par un accord des Parties, de restituer l'usine de Chorzów ne saurait donc avoir d'autre effet que celui de remplacer la restitution par le paiement de la valeur de l'entreprise ; il ne serait conforme ni aux principes juridiques, ni à la volonté des Parties, d'en déduire que la question de l'indemnité doit désormais être traitée comme si l'on était sur le terrain d'une véritable expropriation.

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Tels étant les principes d'après lesquels il y a lieu de procéder à la détermination de l'indemnité due, il convient maintenant de rechercher si les dommages à indemniser doivent être évalués distinctement pour chacune des deux Sociétés, comme l'a fait la Partie demanderesse, ou s'il est préférable d'en déterminer la valeur globale.

Si la Cour était en présence de dommages qui, tout en étant causés par un même acte, auraient frappé des personnes indépendantes les unes des autres, la méthode qui s'imposerait naturellement serait l'évaluation séparée du dommage éprouvé par chacune d'elles ; la somme des indemnités ainsi évaluées constituerait alors le montant de la réparation due à l'État.

En l'espèce, la situation est différente. L'unité économique de l'entreprise de Chorzów, que la Cour a déjà fait remarquer dans son Arrêt n° 6, se manifeste surtout par le fait que les intérêts possédés par les deux Sociétés dans ladite entreprise sont interdépendants et complémentaires ; il s'ensuit qu'on ne saurait les additionner purement et simplement, sous peine d'indemniser deux fois le même dommage ; car tout ce que la Bayerische aurait retiré de sa participation à l'entreprise (redevances et parts des bénéfices) aurait été à la charge de l'Oberschlesische. La valeur du droit d'option de la Bayerische à

Geneva Convention—then involves the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible. To this obligation, in virtue of the general principles of international law, must be added that of compensating loss sustained as the result of the seizure. The impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution; it would not be in conformity either with the principles of law or with the wish of the Parties to infer from that agreement that the question of compensation must henceforth be dealt with as though an expropriation properly so called was involved.

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Such being the principles to be followed in fixing the compensation due, the Court may now consider whether the damage to be made good is to be estimated separately for each of the two Companies, as the Applicant has claimed, or whether it is preferable to fix a lump sum.

If the Court were dealing with damage which, though caused by a single act, had affected persons independent the one of the other, the natural method to be applied would be a separate assessment of the damage sustained by each of them; the total amount of compensation thus assessed would then constitute the amount of reparation due to the State.

In the present case, the situation is different. The economic unity of the Chorzów undertaking, pointed out by the Court in its Judgment No. 6, is shown above all in the fact that the interests possessed by the two Companies in the said undertaking are interdependent and complementary; it follows that they cannot simply be added together without running the risk of the same damage being compensated twice over; for all that the Bayerische would have obtained from its participation in the undertaking (sums due and shares in the profits) would have been payable by the Oberschlesische. The value

l'achat de l'usine dépendait également de la valeur de l'entreprise. Tous les dommages que l'une ou l'autre des Sociétés ont subis à la suite de la dépossession, pour autant qu'ils ont trait à la suppression de l'exploitation et à la perte des bénéfices qu'elle aurait rapportés, sont déterminés par la valeur de l'entreprise comme telle ; partant, les indemnités à fixer de ce chef doivent se tenir dans ce cadre.

D'autre part, il est clair que les rapports juridiques entre les deux Sociétés sont tout à fait étrangers à la procédure internationale et ne sauraient constituer un obstacle à ce que la Cour se place sur le terrain d'une évaluation globale, correspondant à la valeur de l'entreprise, si, comme elle l'estime, cette évaluation est plus simple et donne plus de garanties d'arriver à une juste appréciation du montant du dommage et d'éviter des doubles emplois.

Une réserve cependant s'impose. L'évaluation globale, ci-dessus visée, ne concerne que l'entreprise de Chorzów et n'exclut pas la possibilité de tenir compte d'autres dommages que les Sociétés auraient subis du fait de la dépossession, mais en dehors de l'entreprise elle-même. Aucun dommage de cette nature n'a été allégué en ce qui concerne l'Oberschlesische, et il ne semble guère concevable qu'il en existe, car toute l'activité de l'Oberschlesische était concentrée dans l'entreprise. Par contre, il est possible que des dommages de cet ordre se soient vérifiés pour ce qui est de la Bayerische, laquelle possède ou exploite d'autres usines du même genre que celle de Chorzów ; la Cour examinera plus tard si de tels dommages entrent en ligne de compte pour la fixation du montant de l'indemnité.

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Placée devant la nécessité de déterminer quelle est la somme qu'il convient d'allouer au Gouvernement allemand afin de lui permettre de remettre, autant que possible, les Sociétés dépossédées dans la situation économique dans laquelle elles se trouveraient vraisemblablement si la mainmise n'avait pas eu lieu, la Cour ne croit pas pouvoir se contenter des éléments d'évaluation qui lui ont été fournis par les Parties.

of the Bayerische's option on the factory depended also on the value of the undertaking. The whole damage suffered by the one or the other Company as the result of dispossession, in so far as concerns the cessation of the working and the loss of profit which would have accrued, is determined by the value of the undertaking as such; and, therefore, compensation under this head must remain within these limits.

On the other hand, it is clear that the legal relationship between the two Companies in no way concerns the international proceedings and cannot hinder the Court from adopting the system of a lump sum corresponding to the value of the undertaking, if, as is the Court's opinion, such a calculation is simpler and gives greater guarantees that it will arrive at a just appreciation of the amount, and avoid awarding double damages.

One reservation must, however, be made. The calculation of a lump sum referred to above concerns only the Chorzów undertaking, and does not exclude the possibility of taking into account other damage which the Companies may have sustained owing to dispossession, but which is outside the undertaking itself. No damage of such a nature has been alleged as regards the Oberschlesische, and it seems hardly conceivable that such damage should exist, for the whole activity of the Oberschlesische was concentrated in the undertaking. On the other hand, it is possible that damage of such a nature may be shown to exist as regards the Bayerische, which possesses or works other factories of the same nature as Chorzów; the Court will consider later whether such damage must be taken into account in fixing the amount of compensation.

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Faced with the task of determining what sum must be awarded to the German Government in order to enable it to place the dispossessed Companies as far as possible in the economic situation in which they would probably have been if the seizure had not taken place, the Court considers that it cannot be satisfied with the data for assessment supplied by the Parties.

Les frais de construction de l'usine de Chorzów, que le demandeur a pris pour base de son calcul en ce qui concerne l'indemnité de l'Oberschlesische, ont soulevé de la part du défendeur des objections et des critiques, qui ne sont peut-être pas dénuées de tout fondement. Sans entrer dans cette discussion et sans nier l'importance que les frais de construction pourront avoir dans la détermination de la valeur de l'entreprise, la Cour se borne à observer qu'il n'est certainement pas exclu que les frais encourus pour la construction d'une usine ne soient pas en rapport avec la valeur qu'aura l'usine une fois bâtie. Cette possibilité doit entrer particulièrement en ligne de compte lorsque, comme dans le cas présent, l'usine a été bâtie par l'État en vue de faire face à des exigences impérieuses d'intérêt public et au milieu de circonstances exceptionnelles comme celles créées par la guerre.

D'autre part, la Cour ne saurait pas non plus s'arrêter au prix stipulé dans le contrat du 24 décembre 1919 entre le Reich, l'Oberschlesische et la Treuhand, ou à l'offre de vente d'actions de l'Oberschlesische à la Compagnie de l'azote et des fertilisants de Genève faite le 26 mai 1922. Il a déjà été observé ci-dessus que la valeur de l'entreprise au moment de la dépossession ne constitue pas nécessairement la mesure pour la fixation de l'indemnité. Or, il est constant que le moment auquel remontent le contrat de vente et les négociations avec la Société genevoise appartient à une période de crise économique et monétaire profonde ; l'écart entre la valeur qu'avait alors l'entreprise et la valeur qu'elle aurait eu actuellement peut donc être fort considérable. Tout cela sans compter que le prix stipulé dans le contrat de 1919 était déterminé par des circonstances et accompagné de clauses qui, en réalité, ne permettent guère de le regarder comme la véritable expression de la valeur que les Parties attribuaient à l'usine ; et que l'offre à la Société genevoise s'explique probablement par la crainte de mesures du genre de celles que le Gouvernement polonais a effectivement prises peu après contre l'entreprise de Chorzów et que la Cour a jugé n'avoir pas été conformes à la Convention de Genève.

The cost of construction of the Chorzów factory, which the Applicant has taken as a basis for his calculation as regards compensation to the Oberschlesische, gave rise to objections and criticisms by the Respondent which are perhaps not without some foundation. Without entering into this discussion and without denying the importance which the question of cost of construction may have in determining the value of the undertaking, the Court merely observes that it is by no means impossible that the cost of construction of a factory may not correspond to the value which that factory will have when built. This possibility must more particularly be considered when, as in the present case, the factory was built by the State in order to meet the imperious demands of public necessity and under exceptional circumstances such as those created by the war.

Nor yet can the Court, on the other hand, be satisfied with the price stipulated in the contract of December 24th, 1919, between the Reich, the Oberschlesische and the Treuhand, or with the offer of sale of the shares of the Oberschlesische to the Geneva *Compagnie d'azote et de fertilisants* made on May 26th, 1922. It has already been pointed out above that the value of the undertaking at the moment of dispossession does not necessarily indicate the criterion for the fixing of compensation. Now it is certain that the moment of the contract of sale and that of the negotiations with the Genevese Company belong to a period of serious economic and monetary crisis; the difference between the value which the undertaking then had and that which it would have had at present may therefore be very considerable. And further, it must be considered that the price stipulated in the contract of 1919 was determined by circumstances and accompanied by clauses which in reality seem hardly to admit of its being considered as a true indication of the value which the Parties placed on the factory; and that the offer to the Genevese Company is probably to be explained by the fear of measures such as those which the Polish Government in fact adopted afterwards against the Chorzów undertaking, and which the Court has judged not to be in conformity with the Geneva Convention.

Pour ce qui est enfin de la somme sur laquelle les deux Gouvernements, à un moment donné, étaient tombés d'accord au cours des négociations qui suivirent l'Arrêt n° 7 — somme, d'ailleurs, à laquelle ni l'une ni l'autre Partie n'a cru devoir se référer au cours de la présente procédure —, il suffit de rappeler que la Cour ne saurait faire état des déclarations, admissions ou propositions qu'ont pu faire les Parties au cours des négociations directes qui ont eu lieu entre elles, lorsque ces négociations n'ont pas abouti à un accord complet.

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Dans ces circonstances, la Cour, afin d'éclairer sa religion, avant toute détermination de l'indemnité que le Gouvernement polonais doit payer au Gouvernement allemand, fera procéder, conformément à l'article 50 de son Statut et aux suggestions mêmes de la Partie demanderesse, à une expertise. Cette expertise, dont les modalités sont déterminées par une Ordonnance en date de ce jour d'hui, portera sur les questions suivantes :

I. — A. Quelle était la valeur, exprimée en Reichsmarks actuels, au 3 juillet 1922, de l'entreprise pour la fabrication de produits azotés dont l'usine était sise à Chorzów, en Haute-Silésie polonaise, telle que cette entreprise (y compris les terrains, bâtiments, outillage, stocks, procédés dont elle disposait, contrats de fourniture et de livraison, clientèle et chances d'avenir) se trouvait à la date indiquée entre les mains des Bayerische et Oberschlesische Stickstoffwerke ?

B. Quels auraient été les résultats financiers, exprimés en Reichsmarks actuels (profits ou pertes), que l'entreprise ainsi constituée aurait vraisemblablement donnés depuis le 3 juillet 1922 jusqu'à la date du présent arrêt, entre les mains desdites Sociétés ?

II. — Quelle serait la valeur, exprimée en Reichsmarks actuels, à la date du présent arrêt, de ladite entreprise de Chorzów, si cette entreprise (y compris les terrains, bâtiments, outillage, stocks, procédés disponibles, contrats de fourniture et de livraison, clientèle et chances d'avenir), étant restée entre les mains des Bayerische et Oberschlesische Stickstoffwerke, soit était demeurée essentiellement en l'état de 1922, soit avait reçu, toutes proportions gardées, un développement analogue à

And finally as regards the sum agreed on at one moment by the two Governments during the negotiations which followed Judgment No. 7—which sum, moreover, neither Party thought fit to rely on during the present proceedings—it may again be pointed out that the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement.

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This being the case, and in order to obtain further enlightenment in the matter, the Court, before giving any decision as to the compensation to be paid by the Polish Government to the German Government, will arrange for the holding of an expert enquiry, in conformity with Article 50 of its Statute and actually with the suggestions of the Applicant. This expert enquiry, directions for which are given in an Order of Court of to-day's date, will refer to the following questions:

I.—A. What was the value, on July 3rd, 1922, expressed in Reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products of which the factory was situated at Chorzów in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated, in the hands of the Bayerische and Oberschlesische Stickstoffwerke?

B. What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by the undertaking thus constituted from July 3rd, 1922, to the date of the present judgment, if it had been in the hands of the said Companies?

II.—What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzów) if that undertaking (including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, and had either remained substantially as it was in 1922 or had been developed proportionately on

celui d'autres entreprises du même genre, dirigées par la Bayerische, par exemple l'entreprise dont l'usine est sise à Piesteritz ?

La question I a pour but d'établir la valeur en argent, tant de l'objet qui aurait dû être restitué en nature que du dommage supplémentaire, sur la base de la valeur estimée de l'entreprise, y compris les stocks, au moment de la prise de possession par le Gouvernement polonais, augmentée du profit éventuel présumable de cette entreprise entre la date de la prise de possession et celle de l'expertise.

D'autre part, la question II vise à arriver à la valeur actuelle en se fondant sur la situation au moment de l'expertise et en laissant de côté la situation présumée en 1922.

Cette question envisage la valeur actuelle de l'entreprise à deux points de vue : en premier lieu, on suppose que l'usine serait restée essentiellement dans l'état où elle se trouvait à la date du 3 juillet 1922, et en second lieu on envisage l'usine telle que celle-ci aurait hypothétiquement, mais raisonnablement, dû être entre les mains de l'Oberschlesische et de la Bayerische, si, au lieu d'être prise en 1922 par la Pologne, l'entreprise avait pu poursuivre son développement présumé normal à partir de cette époque. Le caractère hypothétique de cette question est atténué considérablement par la possibilité de la comparaison avec d'autres entreprises du même genre, dirigées par la Bayerische, et surtout avec l'usine de Piesteritz, dont l'analogie avec l'usine de Chorzów, de même d'ailleurs que certaines différences entre les deux, ont été signalées à maintes reprises au cours de la présente procédure.

A cet égard, il y a lieu d'observer que l'agent du Gouvernement allemand a déposé, au cours de la séance publique du 21 juin 1928, deux certificats notariés contenant un résumé des contrats passés le 16 avril 1925 et le 27 août 1927 entre la *Mitteldeutsche Stickstoffwerke A.-G.* et la Bayerische avec adhésion des *Vereinigte Industrie-Unternehmungen A.-G.*, contrats moyennant lesquels les Mitteldeutsche donnent en bail à la Bayerische les biens-fonds à Piesteritz leur appartenant avec toutes les installations et pertinences y afférentes. L'agent du Gouvernement polonais cependant, dans sa plaidoirie du 25 juin,

lines similar to those applied in the case of other undertakings of the same kind, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz?

The purpose of question I is to determine the monetary value, both of the object which should have been restored in kind and of the additional damage, on the basis of the estimated value of the undertaking including stocks at the moment of taking possession by the Polish Government, together with any probable profit that would have accrued to the undertaking between the date of taking possession and that of the expert opinion.

On the other hand, question II is directed to the ascertainment of the present value on the basis of the situation at the moment of the expert enquiry and leaving aside the situation presumed to exist in 1922.

This question contemplates the present value of the undertaking from two points of view: firstly, it is supposed that the factory had remained essentially in the state in which it was on July 3rd, 1922, and secondly, the factory is to be considered in the state in which it would (hypothetically but probably) have been in the hands of the Oberschlesische and Bayerische, if, instead of being taken in 1922 by Poland, it had been able to continue its supposedly normal development from that time onwards. The hypothetical nature of this question is considerably diminished by the possibility of comparison with other undertakings of the same nature directed by the Bayerische, and, in particular, with the Piesteritz factory, the analogy of which with Chorzów, as well as certain differences between the two, have been many times pointed out during the present proceedings.

In regard to this, it should be observed that the Agent for the German Government, at the public sitting of June 21st, 1928, handed in two certificates by notaries containing a summary of contracts concluded on April 16th, 1925, and August 27th, 1927, between the *Mitteldeutsche Stickstoffwerke A.-G.* and the Bayerische, and adhered to by the *Vereinigte Industrie-Unternehmungen A.-G.*, under which contracts the Mitteldeutsche leased to the Bayerische the landed properties at Piesteritz belonging to it, together with all installations, etc., connected therewith. The Agent for the Polish Govern-

a déclaré que, ne connaissant pas les contrats, et ne pouvant nullement apprécier si les résumés en question contiennent tous les éléments nécessaires pour faire des calculs exacts, il s'opposait formellement à ce que lesdits résumés fussent pris pour base des présents débats.

En ce qui concerne le *lucrum cessans,* par rapport à la question II, il convient d'observer que les dépenses d'entretien des choses corporelles faisant partie de l'entreprise et même les dépenses d'amélioration et de développement normal des installations et de la propriété industrielle y incorporée, doivent absorber en première ligne les profits, présumables ou réels, de l'entreprise. Il y a donc lieu de faire abstraction, jusqu'à un certain point, des profits éventuels, car ils se trouveront être compris dans la valeur hypothétique ou réelle de l'entreprise au moment actuel. Si, cependant, de la réponse que les experts donneront à la question I B, il devait résulter qu'après compensation des déficits des années pendant lesquelles l'usine a fonctionné à perte et après application aux dépenses d'entretien et d'amélioration normale pendant les années suivantes, il reste une marge de profits, le montant de cette marge devrait être additionné à l'indemnité à allouer.

D'autre part, si le développement normal présupposé par la question II représentait un élargissement de l'entreprise et un investissement de capitaux nouveaux, leur montant devrait être déduit de la valeur recherchée.

La Cour ne manque pas de se rendre compte des difficultés que présentent ces deux questions : difficultés d'ailleurs inhérentes au cas spécial dont il s'agit et liées avec le temps qui s'est écoulé entre la dépossession et la demande en indemnité et avec les transformations de l'usine et les progrès de l'industrie qui en forme l'objet. C'est en vue de ces difficultés qu'elle estime préférable de chercher à arriver par des méthodes différentes à la valeur recherchée, afin de permettre une comparaison et de pouvoir éventuellement compléter les résultats de l'une par ceux des autres. Partant, la Cour se réserve toute liberté d'apprécier les évaluations visées par les diverses formules ; c'est sur la base des résultats desdites évaluations, ainsi que des faits et documents qui lui ont été soumis, qu'elle procédera à la fixation de la somme qu'il convient d'allouer

ment, however, in his speech on June 25th, said that, not being acquainted with the contracts and being entirely unable to form an opinion as to whether the summaries in question contained all the data necessary for accurate calculations, he formally objected to the said summaries being taken as a basis in the present proceedings.

As regards the *lucrum cessans*, in relation to question II, it may be remarked that the cost of upkeep of the corporeal objects forming part of the undertaking and even the cost of improvement and normal development of the installation and of the industrial property incorporated therein, are bound to absorb in a large measure the profits, real or supposed, of the undertaking. Up to a certain point, therefore, any profit may be left out of account, for it will be included in the real or supposed value of the undertaking at the present moment. If, however, the reply given by the experts to question I B should show that after making good the deficits for the years during which the factory was working at a loss, and after due provision for the cost of upkeep and normal improvement during the following years, there remains a margin of profit, the amount of such profit should be added to the compensation to be awarded.

On the other hand, if the normal development presupposed by question II represented an enlargement of the undertaking and an investment of fresh capital, the amount of such sums must be deducted from the value sought for.

The Court does not fail to appreciate the difficulties presented by these two questions, difficulties which are however inherent in the special case under consideration, and closely connected with the time that elapsed between the dispossession and the demand for compensation, and with the transformations of the factory and the progress made in the industry with which the factory is concerned. In view of these difficulties, the Court considers it preferable to endeavour to ascertain the value to be estimated by several methods, in order to permit of a comparison and if necessary of completing the results of the one by those of the others. The Court, therefore, reserves every right to review the valuations referred to in the different formulæ; basing itself on the results of the said valuations and of facts and documents submitted to it, it will then

au Gouvernement allemand, conformément aux principes de droit qui ont été résumés ci-dessus.

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Il convient de constater que l'usine de Chorzów, à évaluer par les experts, comprend aussi l'usine chimique.

Le Gouvernement polonais, à côté des arguments qui, dans son opinion, auraient pour effet de démontrer que l'exploitation de ladite usine n'aurait pu être profitable — arguments qu'il appartiendra aux experts d'apprécier —, a fait valoir que l'exploitation dépendait d'une autorisation spéciale, et que les autorités polonaises étaient en droit de la refuser. Mais la Cour est d'avis que cette thèse n'est pas fondée.

L'autorisation visée semble être celle dont il est question dans le paragraphe 18 de la loi prussienne de 1861, aux termes duquel, sauf dispositions contraires d'un traité international, les personnes morales étrangères ne peuvent exercer une industrie sans l'autorisation du Gouvernement. Or, dans le cas dont il s'agit, il est certain que la Convention de Genève constitue bien le traité international qui, garantissant aux entreprises industrielles la continuation de leur activité, exclut toute nécessité de l'autorisation spéciale requise par la loi de 1861.

Le fait que l'usine chimique non seulement ne fonctionnait pas, mais encore n'était pas même achevée lors du transfert du territoire à la Pologne, ne saurait entrer en ligne de compte ; en effet, l'industrie chimique de toute espèce était expressément mentionnée dans les statuts de l'Oberschlesische comme un des buts de l'activité de cette Société, et les sections et installations de l'usine chimique, d'ailleurs étroitement liées aux sections et installations où était produite la chaux azotée, avaient été déjà prévues et mentionnées dans le contrat de construction et d'exploitation du 5 mars 1915 ; de la sorte, l'entrée en fonctionnement de l'usine n'était que le développement normal et prévu de l'activité industrielle que l'Oberschlesische avait le droit d'exercer en Haute-Silésie polonaise.

proceed to determine the sum to be awarded to the German Government, in conformity with the legal principles set out above.

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It must be stated that the Chorzów factory to be valued by the experts includes also the chemical factory.

Besides the arguments which, in the Polish Government's opinion, tend to show that the working of the said factory was not established on a profitable basis—arguments which it will be for the experts to consider—that Government has claimed that the working depended on a special authorization, which the Polish authorities were entitled to refuse. But the Court is of opinion that this argument is not well-founded.

The authorization referred to seems to be that envisaged by paragraph 18 of the Prussian law of 1861, under which, failing international treaty provisions to the contrary, moral persons of foreign nationality cannot engage in industry without the authorization of the Government. In the present case, it is certain that the Geneva Convention does actually constitute the international treaty which, guaranteeing to industrial undertakings the continuation of their activities, does away with any necessity for the special authorization required by the law of 1861.

The fact that the chemical factory was not only not working, but not even completed, at the time of transfer of the territory to Poland, can be of no importance; for chemical industry of all kinds was expressly mentioned in the articles of the Oberschlesische Company as one of the objects of that Company's activities, and the sections and plant of the chemical factory, which were, moreover, closely connected with the sections and plant producing nitrate of lime, had already been provided for and mentioned in the contract for construction and exploitation of March 5th, 1915; thus, the entry into working of the factory was only the normal and duly foreseen development of the industrial activity which the Oberschlesische had the right to exercise in Polish Upper Silesia.

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De l'avis de la Cour, la valeur envisagée par les questions formulées ci-dessus suffira pour lui permettre de fixer, en connaissance de cause, le montant de l'indemnité à laquelle a droit le Gouvernement allemand, en prenant comme mesure les dommages subis par les deux Sociétés dans l'entreprise de Chorzów.

Il est vrai que le Gouvernement allemand a fait valoir à plusieurs reprises, au cours de la procédure écrite et orale, qu'une indemnisation équitable du dommage éprouvé par la Bayerische ne saurait se borner au montant de la valeur de ce qu'on a appelé les « droits contractuels », savoir, la rémunération stipulée dans les contrats entre le Reich ou l'Oberschlesische et ladite Société, pour la mise à disposition de ses brevets, licences, expériences, etc., ainsi que pour la direction et l'organisation de la vente des produits finis. La raison en serait que cette rémunération, acceptée en vue des rapports particuliers qui liaient les Parties, ne correspondrait guère à la rémunération équitable à laquelle la Bayerische aurait pu, pour les mêmes prestations, prétendre d'un tiers quelconque, comme le Gouvernement polonais. C'est en partant de ce point de vue que le Gouvernement allemand a proposé de prendre pour base de l'évaluation du dommage souffert par la Bayerische, un contrat de licence, qui serait supposé conclu entre un tiers et ladite Société, dans des conditions normales et équitables.

Le point de vue auquel s'est placée la Cour en posant aux experts les questions indiquées ci-dessus, donne cependant satisfaction à la thèse du Gouvernement allemand pour autant qu'elle est justifiée. Car, si la Bayerische avait demandé une redevance plus élevée ou des paiements supplémentaires en sa faveur, ou bien si elle avait stipulé d'autres conditions à son profit, la valeur de son apport pour l'Oberschlesische en serait diminuée dans la même mesure, ce qui prouve que la relation entre prestation et contre-prestation n'entre pas en ligne de compte pour la valeur de l'entreprise dans son ensemble. Si la Bayerische avait eu, non seulement la direction, mais aussi la propriété de l'entreprise, cette valeur serait encore la même ;

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In the Court's opinion, the value to which the above questions relate will be sufficient to permit it with a full knowledge of the facts to fix the amount of compensation to which the German Government is entitled, on the basis of the damage suffered by the two Companies in connection with the Chorzów undertaking.

It is true that the German Government has pointed out several times during the written and oral proceedings that fair compensation for damage suffered by the Bayerische could not be limited to the value of what has been called the "contractual rights", namely, the remuneration provided for in the contracts between the Reich or the Oberschlesische and the said Company for having made available its patents, licences and experience gained, for the management and for the organization of the sale of the finished products. The reason given is that this remuneration, which was accepted in view of the special relationship between the Parties, would hardly correspond to the fair remuneration which the Bayerische might have claimed from any third party, like the Polish Government, for the same consideration. It was on these grounds that the German Government proposed to take as a basis for the calculation of damage suffered by the Bayerische a licence supposed to be granted by the said Company to a third party under fair and normal conditions.

The method adopted by the Court in putting the questions set out above to the experts meets the German Government's contention, in so far as that contention is justified. For if the Bayerische had demanded a larger sum or additional payments in its favour, or if it had stipulated for other conditions to its advantage, the value to the Oberschlesische of its participation would to the same extent be diminished; this shows that the relation between value given and value received does not enter into consideration in calculating the worth of the enterprise as a whole. If the Bayerische had not merely managed but also owned the undertaking, this amount would still be the same; in fact, all the elements constituting the

en effet, tous les éléments qui constituent l'entreprise — l'usine avec ses accessoires, d'une part, l'apport incorporel et autre de la Bayerische, d'autre part — sont indépendants des avantages qu'aux termes de ses contrats chacune des deux Sociétés peut retirer de l'entreprise.

Pour cette raison, la différence qui pourrait exister entre les conditions stipulées dans les contrats de 1915, 1919 et 1920 et celles d'un supposé contrat de licence avec un tiers, est sans importance pour l'évaluation du dommage.

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Il ne reste alors qu'à examiner si, conformément à la réserve faite ci-dessus, la Bayerische a subi, par suite de la dépossession, des dommages autres que ceux qu'a subis l'entreprise et qui pourraient entrer en ligne de compte aux fins de l'indemnisation demandée par le Gouvernement allemand.

Bien que la position prise à cet égard par ledit Gouvernement ne lui semble pas claire, la Cour peut constater qu'il n'a pas manqué d'appeler l'attention sur certaines circonstances qui seraient de nature à démontrer l'existence de dommages de cet ordre. La possibilité d'une concurrence nuisible aux usines de la Bayerische par une tierce personne qui, moyennant un fait illicite, se serait procurée la connaissance et l'utilisation des procédés de fabrication de cette Société, est certainement la circonstance la plus importante et la plus facile à saisir dans cet ordre d'idées.

La Cour doit cependant observer qu'elle ne se trouve pas en possession d'éléments permettant de déterminer l'existence et l'étendue du dommage qui résulterait de la concurrence que l'usine de Chorzów aurait faite aux usines de la Bayerische ; la Cour ne saurait pas même dire, en connaissance de cause, si l'on a employé et si l'on emploie encore à Chorzów les méthodes de la Bayerische, ni si les produits de cette usine se trouvent sur les marchés où la Bayerische vend ou pourrait vendre les produits de ses usines. Dans ces conditions, la Cour ne peut que constater le fait que le dommage qui aurait résulté de la concurrence est insuffisamment établi.

undertaking—the factory and its accessories on the one hand, the non-corporeal and other values supplied by the Bayerische on the other—are independent of the advantages which, under its contracts, each of the two Companies may derive from the undertaking.

For this reason, any difference which might exist between the conditions fixed in the contracts of 1915, 1919 and 1920 and those laid down in a contract supposed to be concluded with a third party, is of no importance in estimating the damage.

* * *

It therefore only remains to be considered whether, in conformity with the reservation made above, the Bayerische has, owing to the dispossession, suffered damage, other than that sustained by the undertaking, such as might be considered in calculating the compensation demanded by the German Government.

Although the position taken up on this subject by the German Government does not seem clear to it, the Court is in a position to state that this Government has not failed to draw attention to certain circumstances which are said to prove the existence of damage of such a nature. The possibility of competition injurious to the Bayerische's factories by a third party, alleged to have unlawfully become acquainted with and have obtained means of making use of that Company's processes, is certainly the circumstance which is most important and easiest to appreciate in this connection.

The Court must however observe that it has not before it the data necessary to enable it to decide as to the existence and extent of damage resulting from alleged competition of the Chorzów factory with the Bayerische factories; the Court is not even in a position to say for certain whether the methods of the Bayerische have been or are still being employed at Chorzów, nor whether the products of that factory are to be found in the markets in which the Bayerische sells or might sell products from its own factories. In these circumstances, the Court can only observe that the damage alleged to have resulted from competition is insufficiently proved.

Il rentrerait en outre dans la catégorie des dommages possibles mais éventuels et indéfinis dont, conformément à la jurisprudence arbitrale, il n'y a pas lieu de tenir compte.

Il en est de même, à plus forte raison, du dommage qui pourrait résulter du fait que la Bayerische a vu restreindre le champ où elle peut faire des expériences, perfectionner ses procédés et en trouver des nouveaux, ainsi que du dommage qui pourrait résulter du fait qu'elle n'est plus à même de faire sentir son influence sur le marché dans la mesure où elle aurait pu le faire si elle était restée à la direction de l'usine de Chorzów.

La Cour ayant écarté, faute de preuves suffisantes, les dommages que la Bayerische aurait subis hors de l'entreprise, il n'est pas nécessaire d'examiner si les intérêts dont il s'agit seraient protégés par les articles 6 à 22 de la Convention de Genève.

* * *

En plus de l'*indemnité en argent* au bénéfice de la Bayerische, le Gouvernement allemand demande à la Cour de dire et juger :

« que, jusqu'au 30 juin 1931, aucune exportation de chaux azotée et de nitrate d'ammoniaque n'aura lieu en Allemagne, dans les États-Unis d'Amérique, en France et en Italie ;

subsidiairement, que le Gouvernement polonais est obligé de cesser l'exploitation de l'usine, respectivement des installations chimiques pour produire le nitrate d'ammoniaque, etc. »

Au sujet de ces conclusions, il convient de constater, tout d'abord, qu'elles ne sauraient viser le dommage qui s'est déjà produit, mais uniquement celui que pourrait souffrir la Bayerische à l'avenir.

Si la défense d'exportation a pour objet le dommage résultant de la concurrence que l'usine de Chorzów serait à même de faire aux usines de la Bayerische, elle doit être écartée sans autre, en vertu du résultat auquel la Cour est arrivée ci-dessus. Aux raisons sur lesquelles se fondait ce résultat s'ajoute, en ce qui concerne la défense d'exportation, que la Partie demanderesse n'a fourni aucun renseignement qui permette à

Moreover, it would come under the heading of possible but contingent and indeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account.

This is more especially the case as regards damage which might arise from the fact that the field in which the Bayerische can carry out its experiments, perfect its processes and make fresh discoveries has been limited, and from the fact that the Company can no longer influence the market in the manner that it could have done if it had continued to work the Chorzów factory.

As the Court has discarded for want of evidence, indemnity for damage alleged to have been sustained by the Bayerische outside the undertaking, it is not necessary to consider whether the interests in question would be protected by Articles 6 to 22 of the Geneva Convention.

* * *

In addition to pecuniary damages for the benefit of the Bayerische, the German Goverment asks the Court to give judgment:

"that, until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy;

in the alternative, that the Polish Government should be obliged to cease working the factory or the chemical equipment for the production of nitrate of ammonia, etc."

In regard to these submissions, it should be observed in the first place that they cannot contemplate damage already sustained, but solely damage which the Bayerische might suffer in the future.

If the prohibition of export is designed to prevent damage arising from the competition which the Chorzów factory might offer to the Bayerische factories, this claim must be at once dismissed, in view of the result arrived at above by the Court. To the reasons on which this result was based, it is to be added, in so far as the prohibition of export is concerned, that the Applicant has furnished no information

la Cour d'admettre le bien-fondé de la conclusion allemande relativement à la désignation de certains pays dans lesquels aucune exportation ne devrait avoir lieu, et à une durée déterminée de cette défense.

Il convient encore d'observer que si la défense avait pour but de protéger les droits de propriété industrielle de la Bayerische et d'exclure le dommage que celle-ci pourrait éprouver par l'usage de ces droits par la Pologne en contradiction avec des licences accordées par la Bayerische à d'autres personnes ou sociétés, le Gouvernement allemand aurait dû fournir des renseignements précis en ce qui concerne l'existence et la durée des brevets et licences en question. Mais, malgré les demandes expresses formulées à ce sujet par le Gouvernement polonais, le Gouvernement allemand n'en a pas présenté. Cela s'explique, d'ailleurs, par le fait que le Gouvernement allemand ne paraît pas vouloir fonder sur l'existence de ces brevets et licences sa demande visant une défense d'exportation.

Par contre, la demande du Gouvernement allemand semble envisager la défense d'exportation sous la forme d'une clause qui aurait dû se trouver dans un contrat de licence juste et équitable, conclu entre la Bayerische et une tierce personne quelconque ; à ce sujet, il y a lieu de faire les observations suivantes :

Le simple fait d'exclure de tel ou tel marché les produits d'une entreprise déterminée ne saurait évidemment en lui-même être dans l'intérêt ni de cette entreprise, ni, en tant que telles, des personnes qui y sont intéressées. Si la Bayerische — qui, tout en participant avec l'Oberschlesische dans l'entreprise de Chorzów, constitue une entreprise absolument distincte de celle de Chorzów et pouvant même avoir des intérêts contraires, dans une certaine mesure, à ceux de Chorzów — limitait par une clause contractuelle les débouchés de l'usine en sa faveur, il s'ensuivrait que les bénéfices qu'elle retirerait de sa participation à l'entreprise de Chorzów se trouveraient éventuellement diminués dans une mesure correspondante. La Cour ayant, comme il est dit plus haut, adopté pour le calcul de l'indemnité à allouer au Gouvernement allemand une méthode suivant laquelle cette indemnité comprendra la valeur globale de l'entreprise, il s'ensuit que les bénéfices de la Bayerische seront évalués sans déduction des avantages qui pourraient résulter pour elle d'une clause limitant la faculté d'ex-

enabling the Court to satisfy itself as to the justification for the German submission naming certain countries to which export should not be allowed and stating a definite period for which this prohibition should be in force.

It must further be observed that if the object of the prohibition were to protect the industrial property rights of the Bayerische and to prevent damage which the latter might suffer as a result of the use of these rights by Poland, in conflict with licences granted by the Bayerische to other persons or companies, the German Government should have furnished definite data as regards the existence and duration of the patents or licences in question. But notwithstanding the express requests made in this respect by the Polish Government, the German Government has produced no such data. The explanation no doubt is that the German Government does not appear to wish to base its claim respecting a prohibition of export upon the existence of these patents and licences.

On the contrary, the German Government's claim seems to present the prohibition of export as a clause which should have been included in a fair and equitable licensing contract concluded between the Bayerische and any third party; in this connection the following remarks should be made:

The mere fact that the produce of any particular undertaking is excluded from any particular market cannot evidently in itself be in the interests of such undertaking, nor of the persons who, as such, are interested therein. If the Bayerische —which, whilst participating with the Oberschlesische in the Chorzów undertaking, constitutes an entirely separate undertaking from that of Chorzów and one that may even to a certain extent have interests conflicting with those of Chorzów —were to limit in its own favour, by contract, the number of the markets of that factory, it would follow that the profit which it would draw from its share in the Chorzów undertaking might be correspondingly diminished. The Court having, as is said above, adopted, in calculating the compensation to be awarded to the German Government, a method by which such compensation shall include the total value of the undertaking, it follows that the profits of the Bayerische will be estimated without deducting the advantages which that Company might draw from a clause limiting export. The

portation. La défense d'exportation demandée par le Gouvernement allemand ne saurait donc être accordée sous peine de donner deux fois la même indemnité.

Dès lors, la Cour n'a pas besoin de s'occuper de la question de savoir si une telle défense, tout en étant usitée dans les contrats entre particuliers, pourrait faire l'objet d'une injonction adressée par la Cour à un gouvernement, même si ce gouvernement, en tant que fisc, exploitait l'usine dont les exportations devraient être limitées, ni si la défense demandée serait équitable et appropriée dans les circonstances.

Pour ce qui est de la défense d'exploitation, subsidiairement demandée par le Gouvernement allemand, il y a lieu d'ajouter qu'elle ne semble guère compatible avec l'allocation d'une indemnité représentant la valeur actuelle de l'entreprise, car, lorsqu'aura été versée cette indemnité qui comprendra les chances d'avenir et sera constituée par une somme d'argent portant intérêts, le Gouvernement polonais aura acquis le droit de continuer l'exploitation de l'entreprise telle qu'elle aura été évaluée, d'autant plus qu'il y a accord entre les Parties pour reconnaître que l'usine doit rester entre les mains du Gouvernement polonais. Cet accord ne saurait être interprété dans ce sens que l'usine devrait rester une usine morte ou être adaptée à une destination différente, si la réparation envisagée ne comprenait pas, en dehors d'une indemnité pécuniaire, la défense d'exportation demandée. Il est d'ailleurs fort douteux que, abstraction faite de toute autre considération, une défense d'exploitation soit admissible sous l'empire de la Convention de Genève, laquelle a pour but d'assurer le maintien des entreprises industrielles, et qui, à cet effet, en permet même exceptionnellement l'expropriation (article 7).

## IV.

La Cour estime préférable de ne pas examiner dès maintenant les conclusions des Parties concernant certaines conditions et modalités du paiement de l'indemnité à allouer, qui sont étroitement liées, soit au montant de la somme à payer, soit aux circonstances qui pourront exister au moment où le paiement devra être fait. Il en est ainsi notamment de la conclusion allemande n° 4 *a*) — *b*) — *c*) et des conclusions

prohibition of export asked for by the German Government cannot therefore be granted, or the same compensation would be awarded twice over.

This being so, the Court need not deal with the question whether such a prohibition, although customary in contracts between individuals, might form the subject of an injunction issued by the Court to a government, even if that government were working, as a State enterprise, the factory of which export was to be limited, nor if the prohibition asked for would be fair and appropriate in the circumstances.

As regards the German Government's alternative claim for a prohibition of exploitation, it may be added that this seems hardly compatible with the award of compensation representing the present value of the undertaking; for when that compensation, which is to cover future prospects and will consist in a sum of money bearing interest, has been paid, the Polish Government will have acquired the right to continue working the undertaking as valued, more especially as the Parties agree that the factory shall remain in the hands of the Polish Government. This agreement cannot, in fact, be construed as meaning that the factory should remain inoperative or be adapted to some other purpose, if the reparation contemplated did not include, in addition to a pecuniary indemnity, the prohibition of export sought for. It is moreover very doubtful whether, apart from any other consideration, prohibition of exploitation is admissible under the Geneva Convention, the object of which is to provide for the maintenance of industrial undertakings, and which, for this purpose, even permits them, in exceptional cases, to be expropriated (Article 7).

## IV.

The Court thinks it preferable not to proceed at this stage to consider the Parties' submissions concerning certain conditions and methods in regard to the payment of the indemnity to be awarded, which conditions and methods are closely connected either with the amount of the sum to be paid or with circumstances which may exist when the time comes for payment. This applies more especially as regards the

polonaises A 3 et B I *c*), sur lesquelles, partant, la Cour se réserve de statuer dans l'arrêt qui fixera l'indemnité.

Il est, par contre, possible et convenable de trancher dès à présent la question dite de la compensation, à laquelle ont trait respectivement la conclusion n° 4 *d*) de la Partie demanderesse et la conclusion C de la Partie défenderesse.

La demande du Gouvernement allemand à cet égard a pris finalement la forme suivante :

« Dire et juger, que le Gouvernement polonais n'est pas autorisé à compenser contre la créance susdite du Gouvernement allemand d'être indemnisé, sa créance résultant des assurances sociales en Haute-Silésie ; qu'il ne peut se prévaloir d'aucune autre compensation contre ladite créance d'indemnité ; subsidiairement, qu'une compensation n'est autorisée que lorsque le Gouvernement polonais invoque à cette fin une créance reconnue par le Gouvernement allemand ou constatée par un arrêt rendu entre les deux Gouvernements. »

Quant au Gouvernement polonais, il s'est borné à demander le rejet de la susdite conclusion.

Si l'on prend la conclusion allemande au pied de la lettre, on peut croire qu'elle vise en premier lieu à exclure un cas de compensation concret, savoir la compensation qui résulterait de la créance que le Gouvernement polonais prétend avoir en vertu des assurances sociales en Haute-Silésie, et qui fut cause de l'échec des négociations entre les deux Gouvernements à la suite de l'Arrêt n° 7. Mais, si l'on examine la conclusion à la lumière des observations contenues dans le Mémoire et surtout dans la Réplique, il est facile de constater que la créance résultant des assurances sociales en Haute-Silésie n'est visée qu'à titre d'exemple. En réalité, le Gouvernement allemand demande à la Cour une décision de principe, dont l'effet serait, soit d'exclure toute compensation de la créance résultant du futur arrêt de la Cour, soit, subsidiairement, de n'admettre pareille compensation que dans des circonstances déterminées.

Quant au Gouvernement polonais, s'il se borne, comme on l'a vu plus haut, à demander dans sa conclusion le rejet de la conclusion allemande, il résulte avec certitude des motifs à

German submission No. 4 (*a*)—(*b*)—(*c*), and the Polish submissions A 3 and B I (*c*), which the Court therefore reserves for the judgment fixing the indemnity.

On the other hand, it is possible and convenient at once to decide the so-called question of set-off to which submission No. 4 (*d*) of the Applicant and submission C of the Respondent respectively relate.

The claim of the German Government in regard to this matter has, in the last instance, been couched in the following terms:

[*Translation.*]

"It is submitted that the Polish Government is not entitled to set off, against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the above-mentioned claim for indemnity; in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments."

The Polish Government, for its part, has simply asked for the rejection of this submission.

If the German submission is read literally, it is possible to regard it as mainly designed to prevent a specific case of set-off, that is to say, the setting-off in this case of the claim which the Polish Government contends that it possesses in respect of social insurances in Upper Silesia, and which was the cause of the failure of the negotiations between the two Governments following Judgment No. 7. But, if we consider the submission in the light of the observations contained in the Case and more especially in the Reply, it is easy to see that the claim in respect of social insurances in Upper Silesia is only taken as an example. In reality, the German Government asks the Court for a decision of principle the effect of which would be either to prevent the set-off of any counter-claim against the indemnity fixed in the judgment to be given by the Court, or, alternatively, only to allow such set-off in certain defined circumstances.

Though, as has been seen, the Polish Government for its part confines itself in its submission to asking the Court to reject the German submission, the arguments advanced in

l'appui de sa demande qu'à son avis, ladite conclusion allemande est à la fois prématurée et inadmissible et que, par conséquent, la Cour n'a pas le pouvoir de s'en occuper.

Dès lors, la question de la compétence de la Cour se trouve posée. Un accord des Parties pour soumettre à la Cour la question dite de la compensation étant exclu, il convient d'examiner avant tout si la Cour est compétente pour statuer sur la conclusion allemande n° 4 *d*) en vertu d'un autre titre qui, en l'espèce, ne saurait être que l'article 23 de la Convention de Genève.

Il est évident que la question de savoir si le droit international admet la compensation des créances, et, dans l'affirmative, quelles sont les conditions dans lesquelles la compensation est admise, est, comme telle, en dehors de la compétence que la Cour puise dans ledit article. Mais le Gouvernement allemand prétend que la question posée par lui ne concerne qu'une modalité du paiement que le Gouvernement polonais devra faire, et que, de ce chef, elle constitue une divergence d'opinions comprise dans la clause compromissoire de l'article.

La Cour croit devoir interpréter cette thèse dans le sens que l'exclusion de la compensation est demandée dans le but d'assurer, en l'espèce, l'effectivité et l'efficacité de la réparation.

On peut admettre, comme la Cour l'a dit dans son Arrêt n° 8, que la compétence pour statuer sur la réparation, due à raison de la violation d'une convention internationale, implique la compétence pour statuer sur les formes et modalités de la réparation. Si la réparation consiste dans le paiement d'une somme d'argent, la Cour peut donc fixer les modalités de ce paiement. C'est pourquoi elle peut bien déterminer à qui le paiement doit être fait, dans quel endroit, et à quel moment ; si le paiement doit être intégral ou peut avoir lieu par tranches ; qui doit en supporter les frais, etc. Il s'agit alors de l'application au cas d'espèce des règles générales relatives aux paiements, et la compétence de la Cour découle tout naturellement de sa compétence pour allouer une indemnité en argent.

Mais on étendrait d'une manière injustifiée la portée de ce principe si on l'entendait dans le sens que la Cour pourrait connaître de n'importe quelle question de droit international,

support of its claim clearly show that it considers the said German submission to be both premature and inadmissible, and that the Court has therefore no power to deal with it.

The question of the Court's jurisdiction is thus clearly raised. Since there is no agreement between the Parties to submit to the Court the so-called question of set-off, it remains first of all to be considered whether the Court has jurisdiction to pass judgment on the German submission No. 4 (*d*) in virtue of any other provision, which, in the present case, could only be Article 23 of the Geneva Convention.

It is clear that the question whether international law allows claims to be set-off against each other, and if so, under what conditions such set-off is permitted, is, in itself, outside the jurisdiction derived by the Court from the said article. But the German Government contends that the question raised by it only relates to one aspect of the payment which the Polish Government must make and that, this being so, it constitutes a difference of opinion covered by the arbitration clause contained in the article.

The Court considers that this argument must be interpreted in the sense that the prohibition of set-off is asked for in order to ensure that in the present case reparation shall be really effective.

It may be admitted, as the Court has said in Judgment No. 8, that jurisdiction as to the reparation due for the violation of an international convention involves jurisdiction as to the forms and methods of reparation. If the reparation consists in the payment of a sum of money, the Court may therefore determine the method of such payment. For this reason it may well determine to whom the payment shall be made, in what place and at what moment; in a lump sum or maybe by instalments; where payment shall be made; who shall bear the costs, etc. It is then a question of applying to a particular case the general rules regarding payment, and the Court's jurisdiction arises quite naturally out of its jurisdiction to award monetary compensation.

But this principle would be quite unjustifiably extended if it were taken as meaning that the Court might have cognizance of any question whatever of international law.

même tout à fait étrangère à la convention dont il s'agit, pour le seul motif que la manière dont cette question est résolue peut avoir une influence sur l'efficacité de la réparation demandée. Pareille thèse ne semble guère conciliable avec les principes qui sont à la base de la compétence de la Cour, compétence limitée aux cas spécialement prévus dans les traités et conventions en vigueur.

Le point de vue du Gouvernement allemand est cependant que le pouvoir pour la Cour de statuer sur l'exclusion de la compensation découlerait du pouvoir qu'elle a d'assurer l'efficacité de la réparation. Or, il semble clair que cette thèse ne peut se référer qu'à une exception de compensation opposée au bénéficiaire par le débiteur, et qui serait de nature à dénuer la réparation de son efficacité. Tel serait notamment le cas si la créance opposée à la créance de réparation était contestée et devait donner lieu à un procès qui aurait en tout cas pour effet de retarder l'entrée en possession par l'intéressé de l'indemnité qui lui a été reconnue. Au contraire, si à la créance de réparation était opposée une créance liquide et non contestée, on ne voit pas pourquoi une exception de compensation fondée sur cette demande affecterait nécessairement l'efficacité de la réparation. Il s'ensuit que la compétence de la Cour, fondée sur l'article 23 de la Convention de Genève, ne pourrait en tout cas être invoquée qu'à l'égard d'une exception soulevée par la Partie défenderesse.

Or, il est constant que la Pologne n'a soulevé aucune exception de compensation ayant trait à telle ou telle créance déterminée qu'elle prétendrait avoir envers le Gouvernement allemand.

Il est vrai que, dans les négociations qui suivirent l'Arrêt n° 7, la Pologne avait avancé la prétention de compenser une partie de l'indemnité qu'elle se serait obligée de verser au Gouvernement allemand contre sa prétendue créance résultant des assurances sociales en Haute-Silésie. Mais la Cour a déjà eu l'occasion de constater qu'elle ne saurait faire état des déclarations, admissions ou propositions qu'ont pu faire les Parties au cours de négociations directes qui ont eu lieu entre elles. Rien, d'ailleurs, n'autorise la Cour à penser que le Gouvernement polonais voudrait faire valoir, à l'encontre d'un arrêt de la Cour, des prétentions qu'il a cru pouvoir avancer,

even quite foreign to the convention under consideration, for the sole reason that the manner in which such question is decided may have an influence on the effectiveness of the reparation asked for. Such an argument seems hardly reconcilable with the fundamental principles of the Court's jurisdiction, which is limited to cases specially provided for in treaties and conventions in force.

The German Government's standpoint however is that the power of the Court to decide on the exclusion of set-off is derived from the power which it has to provide that reparation shall be effective. Now, it seems clear that this argument can only refer to a plea of set-off raised against the beneficiary by the debtor, of such a nature as to deprive reparation of its effectiveness. Such for instance would be the case if the claim put forward against the claim on the score of reparation was in dispute and was to lead to proceedings which would in any case have resulted in delaying the entry into possession by the person concerned of the compensation awarded to him. On the contrary, if a liquid and undisputed claim is put forward against the reparation claim, it is not easy to see why a plea of set-off based on this demand should necessarily prejudice the effectiveness of the reparation. It follows that the Court's jurisdiction under Article 23 of the Geneva Convention could in any case only be relied on in regard to a plea raised by the respondent Party.

Now it is admitted that Poland has raised no plea of set-off in regard to any particular claim asserted by her against the German Government.

It is true that in the negotiations which followed Judgment No. 7 Poland had put forward a claim to set off a part of the indemnity which she would have undertaken to pay the German Government, against the claim which she put forward in regard to social insurances in Upper Silesia. But the Court has already had occasion to state that it can take no account of declarations, admissions or proposals which the Parties may have made during direct negotiations between them. Moreover, there is nothing to justify the Court in thinking that the Polish Government would wish to put forward, against a judgment of the Court, claims which it may have thought

au cours d'une négociation amiable destinée, dans l'intention des Parties, à aboutir à une transaction. La Cour doit aussi rappeler à ce propos ce qu'elle a déjà dit dans son Arrêt n° 1, savoir qu'elle ne peut ni ne doit envisager l'éventualité que l'arrêt resterait inexécuté après l'expiration du délai fixé pour son exécution.

Dans ces conditions, la Cour doit s'abstenir de statuer sur les conclusions dont il s'agit.

* * *

PAR CES MOTIFS,

La Cour,

statuant contradictoirement,

par neuf voix contre trois,

1) décide et juge que, en raison de l'attitude prise par le Gouvernement polonais vis-à-vis des Sociétés anonymes Oberschlesische Stickstoffwerke et Bayerische Stickstoffwerke et constatée par la Cour comme n'étant pas conforme aux dispositions des articles 6 et suivants de la Convention de Genève, le Gouvernement polonais est tenu de payer, à titre de réparation, au Gouvernement allemand une indemnité correspondant au préjudice subi par lesdites Sociétés du chef de ladite attitude ;

2) rejette les exceptions du Gouvernement polonais, tendant à exclure de l'indemnité à payer tout montant correspondant à tout ou partie du dommage subi par les Oberschlesische Stickstoffwerke, et fondées soit sur le jugement rendu par le Tribunal de Katowice, le 12 novembre 1927, soit sur l'article 256 du Traité de Versailles ;

3) rejette la conclusion formulée par le Gouvernement polonais tendant à ce que le Gouvernement allemand, en premier lieu, livre au Gouvernement polonais la totalité des actions de la Société anonyme Oberschlesische Stickstoffwerke, de la valeur nominale de 110.000.000 de marks, dont le Gouverne-

fit to raise during friendly negotiations which the Parties intended should lead to a compromise. The Court must also draw attention in this connection to what it has already said in Judgment No. 1 to the effect that it neither can nor should contemplate the contingency of the judgment not being complied with at the expiration of the time fixed for compliance.

In these circumstances the Court must abstain from passing upon the submissions in question.

* * *

FOR THESE REASONS,

The Court,

having heard both Parties,

by nine votes to three,

(1) gives judgment to the effect that, by reason of the attitude adopted by the Polish Government in respect of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to pay, as reparation to the German Government, a compensation corresponding to the damage sustained by the said Companies as a result of the aforesaid attitude;

(2) dismisses the pleas of the Polish Government with a view to the exclusion from the compensation to be paid of an amount corresponding to all or a part of the damage sustained by the Oberschlesische Stickstoffwerke, which pleas are based either on the judgment given by the Tribunal of Katowice on November 12th, 1927, or on Article 256 of the Treaty of Versailles;

(3) dismisses the submission formulated by the Polish Government to the effect that the German Government should in the first place hand over to the Polish Government the whole of the shares of the Oberschlesische Stickstoffwerke Company, of the nominal value of 110,000,000

ment allemand dispose en vertu du contrat en date du 24 décembre 1919 ;

4) rejette la conclusion formulée subsidiairement par le Gouvernement polonais tendant à faire surseoir provisoirement sur la demande en indemnité pour ce qui concerne la Société Oberschlesische Stickstoffwerke ;

5) rejette les conclusions du Gouvernement allemand tendant à ce qu'il soit dit et jugé que, jusqu'au 30 juin 1931, aucune exportation de chaux azotée et de nitrate d'ammoniaque n'aura lieu en Allemagne, dans les États-Unis d'Amérique, en France et en Italie ; et, subsidiairement, que le Gouvernement polonais est obligé de cesser l'exploitation de l'usine de Chorzów, respectivement, des installations chimiques pour produire le nitrate d'ammoniaque, etc. ;

6) décide et juge qu'il n'y a pas lieu de statuer sur les conclusions formulées par le Gouvernement allemand et tendant à ce qu'il soit dit et jugé que le Gouvernement polonais n'est pas autorisé à compenser contre la créance susdite du Gouvernement allemand d'être indemnisé sa créance résultant des assurances sociales en Haute-Silésie ; qu'il ne peut se prévaloir d'aucune autre compensation contre ladite créance d'indemnité, et, subsidiairement, qu'une compensation n'est autorisée que lorsque le Gouvernement polonais invoque à cette fin une créance reconnue par le Gouvernement allemand ou constatée par un arrêt rendu entre les deux Gouvernements ;

7) décide et juge que l'indemnité à payer par le Gouvernement polonais au Gouvernement allemand sera fixée à une somme globale ;

8) se réserve de déterminer, dans un futur arrêt, le montant de ladite indemnité, après avoir reçu le rapport des experts qu'elle nommera pour éclairer sa religion sur les questions formulées dans le présent arrêt et après avoir entendu les Parties au sujet de ce rapport ;

9) réserve également, pour ce futur arrêt, les conditions et modalités du paiement de l'indemnité en ce qui concerne les points qui ne sont pas tranchés par le présent arrêt.

marks, which are in the hands of the German Government under the contract of December 24th, 1919;

(4) dismisses the alternative submission formulated by the Polish Government to the effect that the claim for indemnity, in so far as the Oberschlesische Stickstoffwerke Company is concerned, should be provisionally suspended;

(5) dismisses the submission of the German Government asking for judgment to the effect that, until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy, or, in the alternative, that the Polish Government should be obliged to cease working the factory or the chemical equipment for the production of nitrate of ammonia, etc.;

(6) gives judgment to the effect that no decision is called for on the submissions of the German Government asking for judgment to the effect that the Polish Government is not entitled to set off, against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the said claim for indemnity, and, in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments;

(7) gives judgment to the effect that the compensation to be paid by the Polish Government to the German Government shall be fixed as a lump sum;

(8) reserves the fixing of the amount of this compensation for a future judgment, to be given after receiving the report of experts to be appointed by the Court for the purpose of enlightening it on the questions set out in the present judgment and after hearing the Parties on the subject of this report;

(9) also reserves for this future judgment the conditions and methods for the payment of the compensation in so far as concerns points not decided by the present judgment.

Le présent arrêt ayant été rédigé en français et en anglais, c'est le texte français qui fait foi.

Fait au Palais de la Paix, à La Haye, le treize septembre mil neuf cent vingt-huit, en trois exemplaires, dont l'un restera déposé aux archives de la Cour et dont les autres seront transmis aux agents des Gouvernements des Puissances requérante et défenderesse respectivement.

Le Président :

(*Signé*) D. ANZILOTTI.

Le Greffier-adjoint :

(*Signé*) PAUL RUEGGER.

M. de Bustamante, juge, déclare ne pouvoir se rallier à l'arrêt rendu par la Cour, en ce qui concerne le n° 8 du dispositif, en ce sens qu'il est d'avis que les questions indiquées sous les numéros I B et II dans l'arrêt ne devraient pas être posées aux experts.

M. Altamira, juge, déclare ne pouvoir se rallier à l'arrêt rendu par la Cour en ce qui concerne le n° 6 du dispositif.

M. Rabel, juge national, désire ajouter à l'arrêt les observations qui suivent.

Lord Finlay, juge, et M. Ehrlich, juge national, déclarant ne pouvoir se rallier à l'arrêt rendu par la Cour et se prévalant du droit que leur confère l'article 57 du Statut, ont joint audit arrêt les exposés suivants de leur opinion individuelle.

M. Nyholm, juge, ne pouvant se rallier au résultat de l'arrêt, désire y ajouter les observations suivantes.

(*Paraphé*) D. A.
(*Paraphé*) P. R.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this thirteenth day of September nineteen hundred and twenty-eight, in three copies, one of which is to be placed in the archives of the Court, and the others to be forwarded to the Agents of the applicant and respondent Parties respectively.

(*Signed*) D. ANZILOTTI,
President.

(*Signed*) PAUL RUEGGER,
Deputy-Registrar.

M. de Bustamante, Judge, declares that he is unable to concur in the judgment of the Court as regards No. 8 of the operative portion; he considers that the questions numbered I B and II in the judgment should not be put to the experts.

M. Altamira, Judge, declares that he is unable to concur in the judgment of the Court as regards No. 6 of the operative portion.

M. Rabel, National Judge, desires to add to the judgment the remarks which follow hereafter.

Lord Finlay, Judge, and M. Ehrlich, National Judge, declaring that they cannot concur in the judgment of the Court and availing themselves of the right conferred on them by Article 57 of the Statute, have delivered the separate opinions which follow hereafter.

M. Nyholm, Judge, being unable to concur in the result arrived at by the judgment, desires to add the remarks which follow hereafter.

(*Initialled*) D. A.
(*Initialled*) P. R.