

## Chapter V

### STATE RESPONSIBILITY

#### A. Introduction

49. 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 governing State responsibility, the Commission, at its seventh session, in 1955, decided to begin the study of State responsibility and appointed Mr. 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.<sup>153</sup>

50. At its fourteenth session in 1962, the Commission set up a subcommittee whose task was to prepare a preliminary report containing suggestions concerning the scope and approach of the future study.<sup>154</sup>

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

52. The Commission, from its twenty-first (1969) to its thirty-first sessions (1979), received eight reports from the Special Rapporteur.<sup>155</sup>

<sup>153</sup> For a detailed discussion of the historical background of the topic until 1969, see *Yearbook . . . 1969*, vol. II, pp. 229 et seq., document A/7610/Rev.1.

<sup>154</sup> *Ibid.*

<sup>155</sup> 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;

53. 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.<sup>156</sup>

54. At its thirty-first session, the Commission, in view of the election of Mr. Roberto Ago as a judge of ICJ, appointed Mr. Willem Riphagen Special Rapporteur for the topic.

55. 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".<sup>157</sup>

56. From its thirty-second to its thirty-eighth (1986) sessions, the Commission received seven reports from the Special Rapporteur,<sup>158</sup> with reference to parts two and three of the draft.<sup>159</sup>

<sup>156</sup> 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.

<sup>157</sup> *Yearbook . . . 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

<sup>158</sup> *Yearbook . . . 1980*, vol. II (Part Two), pp. 26-63.

<sup>159</sup> 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.

<sup>159</sup> At its thirty-fourth session (1982), the Commission referred draft articles 1 to 6 of part two to the Drafting Committee. At its thirty-seventh session (1985), the Commission decided to refer articles 7 to 16 of part two to the Drafting Committee. At its thirty-eighth session (1986), the Commission decided to refer to the Drafting Committee draft articles 1 to 5 of part three and the annex thereto.

57. At its thirty-ninth session, in 1987, the Commission appointed Mr. Gaetano Arangio-Ruiz as Special Rapporteur to succeed Mr. Willem Riphagen, whose term of office as a member of the Commission had expired on 31 December 1986. The Commission, from its fortieth (1988) to its forty-eighth (1996) sessions, received eight reports from the Special Rapporteur.<sup>160</sup>

58. By the conclusion of its forty-seventh session, in 1995, the Commission had provisionally adopted, for inclusion in part two, draft articles 1 to 5<sup>161</sup> and articles 6 (Cessation of wrongful conduct), 6 bis (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction), 10 bis (Assurances and guarantees of non-repetition),<sup>162</sup> 11 (Countermeasures by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures).<sup>163</sup> It had furthermore received from the Drafting Committee a text for article 12 (Conditions relating to resort to countermeasures), on which it deferred action.<sup>164</sup> At its forty-seventh session, the Commission had also provisionally adopted, for inclusion in part three, articles 1 (Negotiation), 2 (Good offices and mediation), 3 (Conciliation), 4 (Task of the Conciliation Commission), 5 (Arbitration), 6 (Terms of reference of the Arbitral Tribunal), 7 (Validity

<sup>160</sup> 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), document A/CN.4/461 and Add.1-3;

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

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

At its forty-first session (1989), the Commission referred to the Drafting Committee draft articles 6 and 7 of chapter II (Legal consequences deriving from an international delict) of part two of the draft articles. At its forty-second session (1990), the Commission referred draft articles 8 to 10 of part two to the Drafting Committee. At its forty-fourth session (1992) the Commission referred to the Drafting Committee draft articles 11 to 14 and 5 bis for inclusion in part two of the draft. At its forty-fifth session (1993), the Commission referred to the Drafting Committee draft articles 1 to 6 of part three and the annex thereto. At its forty-seventh session (1995), the Commission referred to the Drafting Committee articles 15 to 20 of part two dealing with the legal consequences of internationally wrongful acts characterized as crimes under article 19 of part one of the draft articles and new draft article 7 to be included in part three of the draft.

<sup>161</sup> For the text of articles 1 to 5 (para. 1) see *Yearbook* . . . 1985, vol. II (Part Two), pp. 24-25.

<sup>162</sup> For the text of article 1, paragraph 2, and articles 6, 6 bis, 7, 8, 10 and 10 bis, with commentaries thereto, see *Yearbook* . . . 1993, vol. II (Part Two), pp. 53 et seq., document A/48/10.

<sup>163</sup> For the text of articles 11, 13 and 14, see *Yearbook* . . . 1994, vol. II (Part Two), pp. 151-152, footnote 454. Article 11 was adopted by the Commission on the understanding that it might have to be reviewed in the light of the text that would eventually be adopted for article 12 (*ibid.*, para. 352). For the commentaries to articles 13 and 14, see *Yearbook* . . . 1995, vol. II (Part Two), pp. 64-74, document A/50/10.

<sup>164</sup> See *Yearbook* . . . 1994, vol. II (Part Two), pp. 151-152, para. 352.

of an arbitral award) and annex, articles 1 (The Conciliation Commission) and 2 (The Arbitral Tribunal).

59. At the forty-eighth session of the Commission, Mr. Arangio-Ruiz announced his resignation as Special Rapporteur. 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,<sup>165</sup> 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.

60. 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.<sup>166</sup> The Commission also appointed Mr. James Crawford as Special Rapporteur for the topic.

61. The General Assembly, by paragraph 3 of its resolution 52/156, recommended that, taking into account the comments and observations of Governments, whether in writing or expressed orally in debates in the Assembly, the Commission should continue its work on the topics in its current programme, including State responsibility, and, by paragraph 6 of that resolution, recalled the importance for the Commission of having the views of Governments on the draft articles on State responsibility adopted on first reading by the Commission at its forty-eighth session.

62. At its fiftieth session, in 1998, the Commission had before it the first report of the Special Rapporteur, Mr. Crawford.<sup>167</sup> The report dealt with general issues relating to the draft, the distinction between “crimes” and “delictual responsibility”, and articles 1 to 15 of part one of the draft. The Commission also had before it the comments and observations received from Governments on State responsibility.<sup>168</sup> After having considered articles 1 to 15 bis, the Commission referred articles 1 to 5 and 7 to 15 bis to the Drafting Committee.

63. At the same session, the Commission took note of the report of the Drafting Committee on articles 1, 3, 4, 5, 7, 8, 8 bis, 9, 10, 15, 15 bis and A. The Commission also took note of the deletion of articles 2, 6 and 11 to 14.

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

64. At its present session, the Commission had before it the comments and observations received from Govern-

<sup>165</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook* . . . 1996, vol. II (Part Two), pp. 58-65, document A/51/10, chap. III, sect. D. For the text of draft articles 42 (para. 3), 47, 48 and 51 to 53, with commentaries thereto, *ibid.*, pp. 65 et seq.

<sup>166</sup> For the guidelines on the consideration of the draft articles on second reading decided upon by the Commission on the basis of the recommendation of the Working Group, see *Yearbook* . . . 1997, vol. II (Part Two), p. 58, para. 161.

<sup>167</sup> *Yearbook* . . . 1998, vol. II (Part One), document A/CN.4/490 and Add.1-7.

<sup>168</sup> *Ibid.*, document A/CN.4/488 and Add.1-3.

ments on State responsibility (A/CN.4/488 and Add.1-3 and A/CN.4/492) and the second report of the Special Rapporteur (A/CN.4/498 and Add.1-4). That report continued the task, begun in 1998, of considering the draft articles in the light of comments of Governments and developments in State practice, judicial decisions and literature. The Commission considered the report at its 2566th to 2571st, 2573rd and 2574th, 2576th to 2578th, 2587th to 2592nd and 2599th and 2600th meetings, held from 4 to 12 May, 18 and 19 May, 25 to 28 May, 15 to 23 June and 8 and 9 July 1999.

65. The Commission decided to refer the following draft articles to the Drafting Committee: 16 to 18, paragraphs 1 and 2, and 19, paragraph 1, at its 2570th meeting, on 11 May; 18, paragraphs 3 to 5, and 20 to 26 bis, at its 2574th meeting, on 19 May; 27 to 28 bis, at its 2578th meeting, on 28 May; 29, at its 2588th meeting, on 16 June; 29 bis and 29 ter, paragraph 1, at its 2589th meeting, on 17 June; 34 bis, paragraph 1, and 35, at its 2591st meeting, on 22 June; 31 to 33, at its 2592nd meeting, on 23 June; and 30, at its 2600th meeting, on 9 July.<sup>169</sup>

66. At its 2605th and 2606th meetings, on 19 July, the Commission took note of the report of the Drafting Committee on articles 16, 18, 24, 25, 27, 27 bis, 28, 28 bis, 29, 29 bis, 29 ter, 31, 32, 33 and 35. The Commission also took note of the deletion of articles 17, 19, paragraph 1, 20, 21, 22,<sup>170</sup> 23, 26 and 34.<sup>171</sup>

#### 1. AN OVERVIEW OF THE STRUCTURE OF THE SECOND REPORT BY THE SPECIAL RAPPORTEUR

67. The Special Rapporteur referred to the response to his first report<sup>172</sup> and to the topic of State responsibility in general both within the Sixth Committee of the General Assembly during its fifty-third session and outside the United Nations.

68. He stated that the discussions in the Sixth Committee had been very constructive. With respect to some outstanding issues, particularly with regard to article 19 of part one of the draft, the Sixth Committee was awaiting the Commission's conclusions with interest and without prejudgement. He indicated that no specific criticism had been offered on draft articles 1 to 15 bis which had been provisionally adopted by the Drafting Committee and noted that the general view was that they could be approved without major alteration.

<sup>169</sup> The Commission decided to suspend consideration of proposed draft article 30 bis (Non-compliance caused by prior non-compliance by another State) pending a final decision on articles 30 and 47 to 50 dealing with countermeasures (see *Yearbook . . . 1999*, vol. I, 2591st meeting).

<sup>170</sup> Article 22, as adopted on first reading, dealt with exhaustion of local remedies. The Special Rapporteur proposed a new text for the provision as article 26 bis. The Drafting Committee decided to reserve discussion on the content of the article.

<sup>171</sup> The Drafting Committee adopted article 34 (Self-defence) as article 29 ter.

<sup>172</sup> See footnote 167 above.

69. The Special Rapporteur explained that chapter I of his second report consisted of four sections. Chapter I, section A, relating to chapter III of the draft articles, dealt with the breach of an international obligation; section B related to chapter IV and the implication of a State in the internationally wrongful act of another State; section C focused on a range of extremely important questions relating to chapter V, namely, circumstances precluding wrongfulness; section D related to certain questions of principle concerning countermeasures. The annex to the report contained a brief comparative review of the so far unexplored question of interference with contractual rights, a question that was related to chapter IV of the draft articles.

#### 2. CHAPTER III (BREACH OF AN INTERNATIONAL OBLIGATION)

##### (a) *Introduction by the Special Rapporteur of the approach to chapter III*

70. The Special Rapporteur said that chapter III of part one of the draft articles sought to elaborate on the basic principle set out in article 3, provisionally adopted by the Commission, whereby responsibility arose on the basis of two conditions: first, that the conduct in question, whether an act or an omission, was attributable to the State (attribution being dealt with in chapter II); and second, that it constituted a breach by that State of an international obligation. In marked contrast to national law systems, which often treated the subject of breach quite extensively, the international literature on State responsibility had very little to say on the matter. Consequently, the formulation of chapter III had constituted something of a pioneering effort by the then Special Rapporteur, Roberto Ago, who had had little more than the work of the Conference for the Codification of International Law, held at The Hague in 1930, on which to base himself. Thus, the fact that more than 20 years after the adoption of most of the articles on first reading<sup>173</sup> it was now possible to criticize them and to suggest alternatives, implied no special criticism of the effort itself. Much in the articles, and more in the commentaries, was of value and should be retained.

71. Nevertheless, of the chapters comprising part one, chapter III was the one most criticized by Governments and commentators, on the grounds that it was over-refined, unduly complicated, and sometimes difficult to follow. In dealing with chapter III it was necessary to penetrate its intellectual world, a world of subtle distinctions and qualifications. While his own treatment of the subject in his second report might itself appear over-refined and complex, that was necessary for a thorough treatment of the issues.

72. Before the articles were discussed individually, mention should be made of some general questions. The first was the basic distinction between primary and secondary obligations. The draft articles assumed the existence of primary obligations generated by international law processes of treaty-making, and of law-making more

<sup>173</sup> *Yearbook . . . 1980*, vol. II (Part Two), pp. 26-63.

generally, and concerned themselves with the situation that arose when a State failed to comply with them—in other words it was concerned with the secondary obligation of responsibility arising from breach. Hence, a large part of the subject of breach could be presumed to be inevitably a matter for determination by the primary obligation. More accurately, it was a question of the application of the primary obligation, which lay by definition outside the scope of the draft articles, to a particular factual situation, the result being a determination that a breach had occurred.

73. The distinction between primary and secondary obligations, or even rules, in the field of responsibility was bound to be a difficult one, because there must be some overlap between the two, an overlap that was to be found chiefly in chapter III. Drawing the distinction involved difficult issues of judgement. If a narrow view was taken, the scope of the rules of State responsibility might dwindle almost to nothing, leaving only the question of reparation and restitution. If, on the other hand, a broad view were taken of the scope of the secondary rules, they would incorporate an enormous amount of primary material. In his view, chapter III, dealing with the rules of responsibility in relation to breach, strayed too far into the field of the primary obligations.

74. The second general issue was the relationship between chapters I, III, IV and V. While the relationship between chapters II and III was clearly articulated in article 3, the question arose how chapters IV and V fitted into that framework. Chapter IV was concerned with the question to what extent a State was responsible for conduct of its own, and therefore attributable to it—which produced a breach by *another* State of an obligation of that other State—i.e. with the implication of State A in the internationally wrongful conduct of State B. To speak of the implication of State A in the internationally wrongful conduct of State B itself gave rise to a problem, at least with respect to article 28. If State B was coerced by State A into committing an act which would, in the absence of coercion, be an internationally wrongful act of State B, then chapter V might actually give State B a defence: the circumstance of force majeure would preclude the wrongfulness of the act of State B. So a problem already arose with chapter IV in its treating the conduct of the acting State (State B) as internationally wrongful. Such conduct might not be wrongful, precisely because of chapter V. Article 3 made no reference either to the issues raised by chapter IV or to those raised by chapter V.

75. The Drafting Committee could probably resolve the problem of the relationship between chapters III and IV. The relationship between chapters III and V, however, posed a more serious problem of articulation. Chapter III appeared to say that there was a breach of an international obligation whenever a State acted otherwise than in conformity with the obligation. Chapter V, on the other hand, said that a range of circumstances, e.g. distress, force majeure and necessity, precluded wrongfulness. In those circumstances, the State's conduct would therefore not be wrongful. But it was very difficult to say that the State was acting in conformity with the obligation when it was acting in a situation of distress or necessity. It would be more appropriate to say that the State was not acting in conformity with the obligation but that, in the circum-

stances, it was excused—possibly conditionally—for its failure to do so.

76. The point to be stressed at the present juncture was that chapters III, IV and V of part one were somewhat disconnected in comparison with chapters II and III, which were linked by the basic principle set forth in article 3. That problem might be resolved in the Drafting Committee, or it might prove more fundamental. His provisional view was that the most appropriate approach might be to regard chapters III, IV and V as a connected treatment of the subject of breach, with chapter III dealing with general principles; chapter IV dealing with the special cases where a State's conduct in relation to another State involved a breach even if it would not otherwise do so, in other words, even though it was not a breach under chapter III alone; and chapter V dealing with situations where, despite an apparent disconformity, the State was nonetheless justified or excused and there was no breach or, in other terms, no responsibility. The conceptual structure of part one might become clearer if such an approach were adopted. The question whether to label chapter V "Circumstances precluding wrongfulness" or "Circumstances precluding responsibility" could be discussed at a later stage.

77. In any event, the best course was to begin by dealing with the existing articles in chapter III one by one, so as to reveal the thought processes that had led him to the rather startling conclusion that the 11 articles in chapter III should be rendered down to some 5 articles with a rather different formulation, albeit broadly similar in content.

(b) *Summary of the debate concerning the approach to chapter III*

78. There was broad support for the approach adopted by the Special Rapporteur, namely, the rationalization of the draft articles in chapter III. It was noted that the Commission was dealing with a very complicated, theoretical part of the topic which nevertheless had to be accommodated to practice. Support was also expressed for the Special Rapporteur's views emphasizing the need for a holistic approach in order to identify the relationships among the different articles and parts of the draft.

79. As to the thorny problem of the relationship between primary and secondary rules, it was noted that the difficulty lay in the lack of an agreed definition of the distinction. The comment was also made that it would be counterproductive to spell out the distinction between them in the text and that it would be better referred to in the commentary. The distinction between primary and secondary rules, it was suggested, also affected the relationship between responsibility and wrongfulness.

80. A comment was also made that the tidying-up exercise undertaken by the Special Rapporteur should not be considered as calling into question all the articles adopted on first reading. The Commission must not lose sight of the fact that each of the draft articles of chapter III served a special purpose, even if that purpose formed part of the overall purpose of the chapter, whose value was not in doubt as the Special Rapporteur himself indicated in paragraph 4 of his second report. In the same context, a

view was also expressed that it was preferable for the Commission to retain as far as possible the substance of the draft articles considered on first reading and to change them only if there were very good reasons for doing so. If the Commission wished to simplify, it could, for example, by merging articles, but not by deleting their substance. That would amount to an oversimplification, which would impoverish the Commission's contribution.

### 3. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF ARTICLE 16 (EXISTENCE OF A BREACH OF AN INTERNATIONAL OBLIGATION)<sup>174</sup>

81. The Special Rapporteur said that the content of article 16 was not problematic and constituted an essential introduction to the chapter but that it concealed some underlying problems.

#### (a) *Conflicting international obligations*

82. The first was the problem of conflicting international obligations, where State A had directly conflicting obligations vis-à-vis State B and State C. It had been claimed that in a coherent legal system such conflicts could not occur. At one level that was clearly true. Thus, with respect to any *jus cogens* or *erga omnes* obligation, such inconsistencies could not arise. Where there was an apparent contradiction between two peremptory norms, then one must prevail over the other, and legal systems had ways of determining which of the two would prevail.

83. However, the draft articles covered a much wider range of obligations including those arising under bilateral treaties. Consequently, conflicts of obligation might arise that could not be resolved by general legal processes. The Commission reached such a conclusion, in drafting the Vienna Convention on the Law of Treaties (hereinafter "the 1969 Vienna Convention"), in its treatment of the problem of the relationship between different treaties. The Commission had then decided that coexisting bilateral—or even, in some circumstances, multilateral—obligations by one State to different States did not result in the invalidity of the underlying treaty, but were to be resolved within the framework of State responsibility. However, this matter and in particular the issues dealing with non-performance of treaties raised by the Special Rapporteur on the law of treaties, Sir Gerald Fitzmaurice,<sup>175</sup> did not appear to have been taken into account when drafting chapter III of part one of the draft on State responsibility.

<sup>174</sup> The text of article 16 as proposed by the Special Rapporteur reads as follows:

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

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

For the analysis of this article by the Special Rapporteur see paragraphs 5 to 34 of his second report.

<sup>175</sup> See the fourth report of the Special Rapporteur (*Yearbook* . . . 1959, vol. II, p. 37, document A/CN.4/120).

84. A number of Governments had raised the problem of conflicting obligations. In the opinion of the Special Rapporteur, two separate cases arose. In the first case, the performance of an obligation by State A to State B would produce responsibility in the relationship between State A and State C, but State A's conduct would in no respect be justified or excused by the coexistence of the obligations. If the obligations were of equal status, State A clearly could not excuse itself as against State C by its obligation to State B, by virtue of the *pacta tertiis* rule. The outcome was that State A was responsible to State C for its failure to comply. That issue plainly arose for the purposes of part two, but seemed to have no effect in the framework of part one. State A was not responsible to State B because it had complied with the obligation, but it was responsible to State C. The only question was what form, in the circumstances, restitution or reparation should take.

85. In the view of the Special Rapporteur, the position was slightly different, however, where State A sought to rely on the conflict in order to avoid responsibility arising in the first place. Normally it could do so only where the other obligation had a prior character, which was not the case under article 44 of the 1969 Vienna Convention. If State A invoked *jus cogens*, the effect would normally be to invalidate the conflicting obligation: there would no longer be a conflicting obligation and the issue of breach of the void obligation simply would not arise.

86. Thus generally speaking and subject to one qualification, either the problem of conflicting obligations was resolved at a stage prior to the issue of responsibility arising or it related to the question of reparation and restitution. The qualification concerned the possibility of an "occasional conflict" between a State's obligation under a bilateral agreement—or even under general international law—and some superior obligation, that is to say, a conflict between two obligations, intrinsically lawful in themselves, which arose only because of the circumstances of a particular case. This would be discussed in relation to chapter V.

#### (b) *Relationship between wrongfulness and responsibility*

87. The Special Rapporteur explained that article 16 said that there was a breach of an international obligation by a State when an act of that State was not in conformity with what was required of it by that obligation. But there were other circumstances—especially those in chapter V—which prevented wrongfulness from arising, notwithstanding disconformity. In his second report he analysed the way in which various tribunals faced with that problem had sought to formulate it. The Special Rapporteur's preference was for the formula used by the tribunal in the *Rainbow Warrior* arbitration, which had referred to "the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent)".<sup>176</sup>

<sup>176</sup> *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Decision of 30 April 1990 (UNRIIAA, vol. XX (Sales No. E/F.93.V.3), pp. 215 et seq.), p. 251.

That was what chapters III and V, taken together, implicitly produced. Otherwise, a situation would arise where conduct was defined as a breach and simultaneously there was a circumstance precluding wrongfulness. He also stressed that the Commission was dealing with the substantive obligation, not with the entirely separate questions of jurisdiction of tribunals or the admissibility of claims, which were excluded from the scope of the draft as a whole.

(c) *Drafting issues and merger of articles*

88. The Special Rapporteur explained that his proposed article 16 included the essential elements of articles 17, paragraph 1, and 19, paragraph 1, adopted on first reading.<sup>177</sup>

89. With regard to the drafting of article 16, the Special Rapporteur favoured replacing the wording “not in conformity with what is required” by some such formulation as “does not comply with”. But subject to points of drafting, article 16 should be retained.

90. As to article 17, as adopted on first reading, this contained two separate propositions. The first, contained in paragraph 1, was that an act, which constituted a breach, was internationally wrongful regardless of the origin of the international obligation breached. It was the basic assumption underlying the entire draft, which covered the whole range of international obligations of States, irrespective of whether those obligations arose under general international law, treaties or other law-making processes. That principle had been referred to by ICJ in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*,<sup>178</sup> and seemed to him to be both right and essentially unchallenged. The draft articles were thus formulating a general law of obligations for the purposes of responsibility, rather than separate rules for treaties and for other sources. The common law, for example, had different rules of responsibility for contracts and for torts, as well as additional categories such as restitution. So while national legal systems could split their law of obligations into subsections, international law had not done that and should not, for a number of reasons.

91. The most important reason was one of principle: the close and complex interrelation between treaty and custom in international law. If there were different rules of obligation for custom and treaties, significant problems of articulation would arise since exactly the same substantive obligation could arise under a treaty and under customary international law. Article 17, paragraph 1, should therefore be retained. In contrast to the reasoning provided for its retention in the commentary, the Special Rapporteur’s view was that the provision was merely an explanation of article 16. He therefore proposed that article 17, paragraph 1, should be combined with article 16 as an important clarification of the latter.

92. With regard to article 17, paragraph 2 said that the origin of an international obligation breached by a State did not affect the international responsibility arising from

the internationally wrongful act of that State. He noted that this was, however, ambiguous. It could be interpreted to mean that, once international responsibility had arisen, it did not matter whether it had arisen by reason of breach of a treaty or by other means. But it could matter, because, for example, under article 40 of the draft articles, the definition of the injured State depended on whether the injury arose from a breach of a treaty or a breach of some other rule. The second interpretation was that the existence or non-existence of a breach was independent of the origin of the obligation. That was plainly wrong. The existence or non-existence of a breach could be very much affected by the way in which the obligation had come into being. The Special Rapporteur concluded that article 17, paragraph 2, created more problems than it resolved and he recommended its deletion.

93. Article 19, paragraph 1, was similar to article 17, paragraph 1, inasmuch as it clarified the basic principle set out in article 16 and could thus be combined with that article. It said that an act of a State, which constituted a breach of an international obligation, was an internationally wrongful act, regardless of the subject matter of the obligation breached. That proposition was unchallenged. The reference to subject matter in article 19, paragraph 1, was nonetheless a cause for concern as it was a general term, whereas “content”, which he favoured, focused on the specific obligation. Some subject matters that were inherently international were more likely to generate international obligations than others.

94. For the reasons explained above, the Special Rapporteur suggested the merger of articles 16, 17, paragraph 1, and 19, paragraph 1. He also proposed the deletion of article 17, paragraph 2.

4. SUMMARY OF THE DEBATE ON ARTICLE 16

(a) *Conflicting international obligations*

95. Support was expressed for the views of the Special Rapporteur on the interrelationship of the law of State responsibility and the law of treaties. The differences between them were also noted. It was said that, to solve the problem of a treaty obligation conflicting with a new peremptory norm of general international law (*jus cogens*), for example, by invoking article 62 of the 1969 Vienna Convention on a fundamental change of circumstances was to minimize the overriding importance and solemnity of *jus cogens* embodied in articles 53 and 64 of the Convention. Moreover, that Convention provided, at the procedural level, different consequences for the invalidity or termination of a treaty arising from a conflict with a norm of *jus cogens*. Furthermore, the law of treaties was concerned with the treaty as a whole and, in the event of any inconsistency with a treaty, the effect of *jus cogens* would be the invalidity of the treaty as a whole. But the most common instances of inconsistency occurred in terms of the performance of the treaty. As ICJ had rightly noted in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*,<sup>179</sup> the law of

<sup>177</sup> See footnote 165 above.

<sup>178</sup> *Judgment, I.C.J. Reports 1997*, p. 7, at pp. 38-39, para. 47.

<sup>179</sup> *Ibid.*

treaties determined whether there was a treaty, who were the parties to the treaty and in respect of what provisions and whether the treaty was in force. In that sense, the scope of the law of treaties differed from that of the law of State responsibility, even if those two branches of law were indeed closely interrelated.

96. A concern was raised that a problem of conflict of obligations immediately arose if all sources of international law were treated on the same footing. It was suggested that the draft articles should contain a provision setting out a hierarchy of different norms of international law, for example, to include in chapter V a provision referring to obligation *erga omnes* or peremptory obligations under international law. In this context, it was said that three categories of rules—obligations under Article 103 of the Charter of the United Nations, *jus cogens* rules, and rules relating to the concept of international crimes—had a hierarchically higher status than did the normal rules of international law and that international crimes were the highest norm of the international legal order because, while a rule of *jus cogens* could be amended, modified or derogated from by a new rule of *jus cogens*, there could be no derogation from the notion of international crimes.

97. The idea that international crimes constituted a third category of rules with superior force, distinct from *jus cogens*, was, however, disputed. It was said that the concept of international crimes had nothing to do with the hierarchy of norms.

98. It was further suggested that it was not necessary to attempt to tackle the issue of conflicting international obligations in the context of article 16 and that it should be tackled under chapter V instead. The view was also expressed that the question of the relationship between disconformity with an obligation, wrongfulness and responsibility might be best raised in an introductory text serving as a *chapeau* to the draft articles as a whole. In this context, it was suggested that it would be profitable to consider the distinctions existing in various national legal systems that involved three levels of analysis. The first level involved focusing on the existence of a rule. The second level involved determining if there was a reason precluding the unlawfulness. The third level involved looking to “subjective” circumstances connected with the mental state of the person or State entity that had committed the act.

(b) *Relationship between wrongfulness and responsibility*

99. There was strong opposition, albeit not unanimous, to the suggestion for the inclusion of the phrase “under international law” in article 16. There appeared to be general agreement that the inclusion of the phrase would cause problems. Referring to the fragmentation of international law, it was noted that sometimes, a particular act might be a breach under a particular mechanism, but not under another. However, the phrase “under international law” may be interpreted as requiring such mechanisms to broaden the basis of their decisions, contrary to the basic instruments which defined their jurisdiction. Furthermore, it was said that the phrase was superfluous, since

the entire set of draft articles fell within the sphere of international law.

100. It was suggested that the phrase “under international law” had two possible effects. Its use could block any involvement of domestic law because the topic was clearly one of international law, but this was already covered by article 4. Secondly, it could help to deal with the problem of conflicting international obligations. The inclusion of “under international law” could indicate that the content of obligations was a systematic question under international law. It was suggested that amending the first part of article 16 could allay concerns about the inclusion of the phrase. It was also suggested that the phrase should be incorporated in the commentary or elsewhere in the draft articles if it were not to be included in article 16.

101. There was support for the Special Rapporteur’s suggestion that the terms “subjective” and “objective” should not be applied to the elements of responsibility so as to avoid creating confusion. It was suggested that it would be appropriate to include, as a *chapeau* for the entire set of draft articles on State responsibility, an introductory text or commentary setting out the methodology and scheme of the articles as a whole and to include a reference in that text to the distinction between the terms “subjective” and “objective” and their different meanings.

(c) *Drafting issues and merger of articles*

102. Strong support was expressed for the merger of articles 17 and 19, paragraph 1, with article 16. This support was not, however, unanimous. For example, it was suggested that the proposed merger concealed the characteristics of a “breach of an international obligation”.

103. Strong support was also expressed for the Special Rapporteur’s suggestion that the irrelevance of the source of the international obligation be noted. But, it was also suggested that little would be accomplished by the addition of the words “regardless of the source . . . of the obligation” in article 16. It was suggested that the wording of the proposed new article be changed so as to avoid enumerating the various sources of an international obligation. It was also suggested, in this context, that the comments of the Special Rapporteur on the origin of international obligations appeared to mix up the substance of the obligation and the regime of responsibility. Other comments in this context were that the word “institutional” should be inserted before the words “customary” and “conventional” and that the words “or other” should also be retained to cover unilateral acts and the general principles of law. There was also support for a suggestion made that a reference to the type of obligation, of conduct or result, be added to article 16.

104. Some support was expressed for the replacement of the phrase “is not in conformity with” by “does not comply with” or some other phrase referring to non-compliance or breach.

105. A problem was also identified with the phrase “what is required of it by that obligation”. It was said that it was difficult to know who was doing the requiring and

what was required. The view was also expressed that the reference standard advocated by the Special Rapporteur, namely, “failure to conform giving rise to a breach of an international obligation” was a difficult one to apply. It was suggested that the words “by that obligation” be replaced by “under that obligation”.

106. A view was also expressed that the phrase “when an act of that State does not comply with” should be replaced with “when that State does not comply with” because it was clearer, even though the focus must be on the concept of a specific act of the State. The view was expressed that the brackets should be removed from around the phrase “whether customary, conventional or other”, as it was inappropriate to use brackets in a formal legal document.

107. There was strong support for the view that the use in article 16 of the word “origin” was to be preferred to the word “source” on the grounds that the latter term might raise complicated questions of what else could be regarded as a source of international law in addition to customary and conventional law. The same view was taken as to the Spanish version.

108. One view was that article 17 was unnecessary and misleading and said nothing that could not go in the commentary. As a solution to this perceived problem, it was suggested that noting the irrelevance of the source of the international obligation might assist. It was also mentioned that it was useful to include the phrase “or the content of the obligation” because that could solve a further issue, viz. the need to refer in the text to the different obligations—of conduct, result and so forth. Support was given for the proposal of the Special Rapporteur to use the word “content” rather than “subject matter”. In relation to article 17, paragraphs 1 and 2, it was suggested that it could be made clearer in the commentary that in the event of a breach, the respective provisions of the law of treaties and the law of State responsibility should always be interpreted and applied in concert.

109. Support was also expressed for the Special Rapporteur’s proposal on the deletion of article 17, paragraph 2, even though the text was considered, by some, as having historical and academic significance. It was noted that most systems of national law distinguished between the concept of obligations assumed by contract and the concept of tort. Yet the question was whether that distinction held good in international law. It was, however, noted that the Commission had not addressed the question whether there should be a distinction concerning responsibility arising from the different sources of an international obligation and that article 17, paragraph 2, confirmed that no such distinction existed in international law. It was thought desirable to record this point in the commentary.

110. There was strong support for the Special Rapporteur’s proposal in relation to article 19, paragraph 1. One concern was whether this would be seen as undermining the Commission’s earlier decision to defer its consideration of the whole of article 19. It was suggested that it would be preferable to address the question of the “subject matter of the obligation breached” in the context of article 19. It was also suggested that the words “regardless

of the subject matter of the obligation breached” in article 19, paragraph 1, be reconsidered.

#### 5. CONCLUDING REMARKS OF THE SPECIAL RAPporteur ON ARTICLE 16

111. Summing up the discussion on article 16, the Special Rapporteur noted that despite certain differences of opinion, there appeared to be a fairly large measure of agreement on points of principle, substantive and procedural.

112. Starting with the least controversial points, he noted that there had been no real objection to the deletion of article 17, paragraph 2. At all events, the history of article 17 and the underlying principle could be reflected in the commentary, as had been suggested. It was acknowledged that the essential provision of article 17 was that contained in paragraph 1, since the Commission had to elaborate secondary rules applicable to all international obligations, whatever their source.

113. Turning to more controversial questions, he was convinced that article 16 had both an introductory and a normative function and should therefore be retained, together with article 18, paragraph 1. He gathered that the Commission was, on the whole, in favour of amalgamating article 16, article 17, paragraph 1, and article 19, paragraph 1. It was for the Drafting Committee to come up with appropriate wording and in particular to take a decision on the phrase “is not in conformity with what is required of it”, “does not comply with what is required of it” or “is in breach of what is required of it”.

114. He noted that there had been disagreement about the phrase “under international law”, inserted in response to a proposal by France, which was concerned to address the issue of conflict of obligations, and to forge a link between chapter III and chapter V, not to draw a distinction between international law and internal law, since that already existed in article 4. Article 16, read with chapter V, seemed to state, on the one hand, that there was responsibility and, on the other, that there was no wrongfulness. That problem could be solved in different ways, primarily in chapter V. For the time being, the Drafting Committee could place the phrase in square brackets and revert to it following the debate on chapter V.

115. With regard to the use of the term “non-compliance” to refer to failure to carry out an obligation not involving a breach of international law, he agreed that it was vague because it could just as well refer to failure to carry out an obligation that might not involve a breach of international law.

116. Lastly, with regard to article 19, paragraph 1, he had preferred the word “content” to the words “subject matter” of the obligation breached because it was more precise. He was convinced that the point made in the paragraph properly belonged in article 16 in the form in which he had proposed it, and that this was entirely without prejudice to the substantive issue raised by article 19, namely, the distinction between “international crimes” and “international delicts”. The existence of obligations

to the international community was generally acknowledged, but the Commission had still to determine how it would fit that idea into the framework of State responsibility.

6. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF ARTICLE 18 (REQUIREMENT THAT THE INTERNATIONAL OBLIGATION BE IN FORCE FOR THE STATE)<sup>180</sup>

117. The Special Rapporteur noted that article 18, adopted on first reading, dealt generally with the difficult subject of temporal aspects of obligations, namely, when was a breach committed and within what period of time. Paragraph 1 set out the general principle of inter-temporal law in the field of State responsibility. Paragraph 2 then set out an exception to that principle involving peremptory norms. Paragraphs 3 to 5 dealt with the inter-temporal consequences of breaches having a continuing character or involving composite and complex acts. Since such breaches and acts were dealt with in article 24, the Special Rapporteur indicated that he would discuss paragraphs 3 to 5 in conjunction with article 24.

118. In the opinion of the Special Rapporteur, the principle outlined in article 18, paragraph 1, was correct: a State could be held responsible for a breach of an international obligation only if the obligation had been in force for the State at the time of the breach.

119. The question was raised whether there were any exceptions to the principle enunciated in article 18, paragraph 1. The 1969 Vienna Convention contained a provision on the effect of a treaty prior to its entry into force for a State: the obligation not to defeat the object and purpose of the treaty. But, he noted, that was an obligation independent of the treaty obligation and thus did not form an exception to the inter-temporal principle. It had also been suggested that human rights obligations had a progressive character and that therefore the inter-temporal principle did not apply to them. The interpretation of human rights obligations was not, however, the objective of the draft articles, for the reasons outlined in paragraphs 41 et seq. of his second report, and, subject to issues of interpretation, the inter-temporal principle applied equally to them.

120. The principle in article 18, paragraph 1, should thus be retained, but he proposed that it be reworded as a guarantee ("No act of a State shall be considered internationally wrongful unless . . ."), rather than a conditional statement ("An act of the State . . . constitutes a breach . . . only if . . .") as was the text adopted on first reading.

121. The Special Rapporteur noted that the draft articles did not enunciate the principle that, once the responsibility of a State was engaged, it did not lapse merely because

the underlying obligation had terminated.<sup>181</sup> He proposed to remedy that omission with an article, to be included in chapter II or III, that he would propose in due course.

122. The Special Rapporteur further noted that article 18, paragraph 2, dealt with the emergence, subsequent to the occurrence of a breach, of a new peremptory norm requiring that an act, which had previously constituted a breach, actually be performed. The act was thus no longer considered internationally wrongful. The commentary to the article referred to the emergence in the nineteenth century of the prohibition of slavery. If, for example, a seizure of slaves occurred at a time when slavery had not been unlawful, then the slaves would have to be returned to the proprietors. But if a peremptory norm prohibiting slavery came into effect, there could obviously be no restoration of slaves.

123. Another possibility suggested by the Special Rapporteur was the emergence of a new peremptory norm that was clearly designated as having retroactive effect. Article 64 of the 1969 Vienna Convention, however, assumed that new peremptory norms would not have retroactive effect, and there were no examples to the contrary. Article 18, paragraph 2, appeared to be inconsistent with article 64 of the Convention.

124. He noted that a third possibility was that, at the time an international obligation was performed, there was a conflict with a peremptory norm, and not necessarily one that had emerged recently. Under the 1969 Vienna Convention, in the event of a conflict between a part of a treaty and a peremptory norm, the entire treaty was invalidated. The invalidation of treaties ought to be minimized, however, and there was a need for a principle that would avert conflicts between the performance of treaty obligations and the demands of peremptory norms. He proposed to deal with that problem in the context of chapter V. Since article 18, paragraph 2, confused a number of issues without advancing the question of inter-temporal law it should be deleted. The basic principle of inter-temporal law should nevertheless be retained and he had proposed a formulation for that in the new text of article 18.

7. SUMMARY OF THE DEBATE ON ARTICLE 18

125. Broad support was expressed for the proposal of the Special Rapporteur in relation to article 18, paragraph 2. The basic principle elaborated in paragraphs 1 and 2 of article 18 was considered self-evident and did not need to be explained. Agreement was expressed with the view of the Special Rapporteur expressed in paragraph 43 of his second report, that the advisory opinion of ICJ in the *Namibia* case<sup>182</sup> did not violate the principle set forth in article 18, paragraph 1, and that the inter-temporal prin-

<sup>180</sup> The text of article 18 proposed by the Special Rapporteur reads as follows:

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

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

For the analysis of this article by the Special Rapporteur, see paragraphs 35 to 51 of his second report.

<sup>181</sup> In this context, the Special Rapporteur referred to both the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment, I.C.J. Reports, 1992*, p. 240, at p. 255, and the *Rainbow Warrior* arbitration (see footnote 176 above), pp. 265-266.

<sup>182</sup> *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 pp. 31-32, para. 53.

principle did not entail that treaty provisions were to be interpreted as if frozen in time. As article 18, paragraph 1, was not in conflict with the idea, it was not imperative to delete it; but that was not a reason for retaining it. If it was necessary to retain certain aspects of it for any reason, the new formulation proposed by the Special Rapporteur seemed to merit serious consideration by the Drafting Committee.

126. With respect to the contrast between evolutionary and static interpretations of treaty provisions, it was pointed out that certain terms of a treaty were necessarily open. For instance, if a 1920 treaty provides for a State an obligation to do everything for the “well-being” of the indigenous population of a territory, it would be illogical to say, 50 years later, that “well-being” had to be interpreted according to its 1920 meaning. A term like “well-being” had to be interpreted dynamically. But that was not an issue that had to be taken up in the context of article 18.

127. It was also said that the Special Rapporteur’s view of “progressive” or evolutionary interpretation of international human rights obligations went too far. That mode of interpretation was not generally accepted in contrast to other modes of interpretation recognized in the 1969 Vienna Convention.

128. In accordance with another view, article 18, paragraph 1, adopted on first reading, was more complete and clearer than the new article 18 proposed by the Special Rapporteur. That reworked version did not state clearly that only an act of a State, which was not in conformity with an international obligation, could be regarded as an internationally wrongful act. Furthermore, there was no need to state that the act was performed or continued; the important point was that the obligation in question must be in force with respect to the State in question.

129. The deletion of article 18, paragraph 2, was broadly supported. It dealt neither with the effect of peremptory norms of international law nor with their content and the commentary to the first version of that provision showed that it envisaged a merely hypothetical case. Furthermore, in paragraph 51 of his second report, the Special Rapporteur pointed out some of the difficulties to which it might lead. Its deletion would simplify the text, to the benefit of those who would have to apply it in future. In any case, it would be better to consider that type of situation in the context of part two.

130. Another view that was expressed was that it was necessary to retain the substance of article 18, paragraph 2, but that it was acceptable to move it to chapter V.

## 8. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR ON ARTICLE 18

131. Summing up the debate on article 18, the Special Rapporteur noted, with regard to the principle of the intertemporal of international law, that there was broad agreement on retaining article 18, paragraph 1, which stated a principle of general application. The Drafting Committee would have to choose between the initial wording and his proposal, on which he would not insist, although he firmly believed that States were entitled to

some form of guarantee against the retrospective application of the law in the field of responsibility, except in the case of a *lex specialis* arrangement. He also stated that no member of the Commission had argued for the retention of article 18, paragraph 2, in chapter III. It would perhaps be found that the provision it contained belonged more appropriately, in some form, in chapter V. In that context, it need not be limited to the hypothetical case of new peremptory rules.

## 9. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF ARTICLE 20 (OBLIGATIONS OF CONDUCT AND RESULT)<sup>183</sup>

### (a) *Distinction between obligations of conduct and obligations of result*

132. The Special Rapporteur pointed out that article 20 and article 21, paragraph 1, as adopted on first reading, set out the distinction between obligations of conduct and obligations of result, which distinction had gained currency in international law. The distinction derived from civil law systems and, more particularly, from French law, which treated the former as being in the nature of “best efforts” obligations—such as those of a doctor towards a patient—and the latter as being tantamount to guarantees of outcome. The distinction undoubtedly made some difference in terms of the burden of proof, but, on the other hand, the articles under consideration were not concerned with that issue.

133. The Special Rapporteur commented on the significance of the fact that, in borrowing the distinction from French law, the former Special Rapporteur, Roberto Ago, had reversed the consequences that were to be inferred from it. Whereas, in French law, an obligation of conduct was the less stringent of the two, under articles 20 and 21, the obligation of conduct was considered more stringent than the obligation of result. This was because of the emphasis in article 20 on the determinacy of the conduct in question, whereas the original French law distinction was concerned with risk. While, perhaps, merely an intellectual curiosity, it did imply that some uncertainty about the distinction had already arisen at an early stage.

134. A further issue, in the view of the Special Rapporteur, was that the distinction appeared to have no consequences in terms of the rest of the draft articles, and it could therefore be deleted. In that respect it was unlike the distinction between continuing and completed violations, which did have important consequences in that breaches in the former category gave rise, inter alia, to the obligation of cessation.

<sup>183</sup> The text of article 20 proposed by the Special Rapporteur reads as follows:

#### *“Article 20. Obligations of conduct and obligations of result*

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

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

For the analysis of this article by the Special Rapporteur, see paragraphs 52 to 92 of his second report.

135. In proposing the deletion of a distinction which, although familiar, was somewhat uncertain and, moreover, did not seem to entail any consequences within the framework of the draft articles, the Special Rapporteur was not proposing that the distinction should not be used at all, but rather that it should be seen as falling within the area of primary rules.

(b) *Extended obligations of result*

136. Article 21, paragraph 2, established an additional category, which the Special Rapporteur termed “extended obligations of result”. Under that paragraph, what was a breach of an international obligation at a specific moment could later yield a result equivalent to that required under the obligation by virtue of the subsequent conduct of the State, in effect annulling the breach.

137. The Special Rapporteur referred to the ambiguity in the phrase “situation not in conformity” with the result required by an international obligation in paragraph 2. That ambiguity could be illustrated by the *aut dedere aut judicare* principle in extradition law, which gave the State a choice of either extraditing or trying an individual. If, however, the individual was a national of a State that had a law or a constitutional provision precluding it from extraditing its nationals, and it accordingly refused an extradition request, no breach of the *aut dedere aut judicare* principle had at that point been committed. The breach arose only at the point when it became clear that the State was not complying with the obligation to submit the case to the proper authorities for prosecution.

138. In such a case, the obligation could be performed in one of two ways, and the exclusion of one way did not in itself amount to a breach. In his view, it was not necessary for that to be spelled out in article 21, paragraph 2. Nor was it the case that such an obligation had to be formulated as an obligation of result: the *aut dedere aut judicare* principle was probably an obligation of conduct.

139. In this regard, a former Special Rapporteur, Roberto Ago, had articulated a position in the commentary to article 21<sup>184</sup> on when a breach of obligation was committed, which appeared to have led to the conclusion that a human rights obligation was breached only when the State failed to offer compensation or redress, not when it engaged in conduct that was inconsistent with the human rights norm. The offering of the compensation was thus seen as the second stage of the extended obligation of result.

140. However, the Special Rapporteur maintained that that was an improper analysis of most obligations in the fields of both human rights and the treatment of aliens. In assuming an obligation not to torture individuals, a State was not undertaking to offer compensation for torture. Rather, it was undertaking not to commit torture: the subsequent offer of compensation could not erase the breach, although it might affect the admissibility of a claim at the international level. He referred to the decisions of human rights courts and the Human Rights Committee in which human rights obligations were not held to be breached

only at the point when there was a failure to provide reparation.<sup>185</sup> Instead, in certain circumstances, the mere existence of a law that contradicted those rights was sufficient.

141. It was not impossible to formulate international obligations in such a way that a breach occurred *prima facie* on a given day yet was removed on the following day if reparation was offered. But that was not the normal way in which international obligations were formulated and, when they were, it was the result of a primary norm. If States wished to say that they would in no circumstances torture individuals, for example, the draft articles could not require them to reformulate that obligation in another way. In his view, article 21, paragraph 2, together with the commentary, came close to doing precisely that, and should be deleted.

(c) *Obligations of prevention*

142. Article 23, as adopted on first reading, covered the situation where the result in question was one of prevention of the occurrence of a given event. But there seemed to be no reason to treat obligations of prevention, at least *prima facie*, as anything other than negative obligations of result. In addition, the view taken in the commentary to article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations, had also been adopted by ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*.<sup>186</sup> In his view, the inference to be drawn from those conflicting interpretations seemed to be that an obligation of prevention was neither *per se* an obligation of conduct nor an obligation of result. It could be either, depending on the circumstances of the particular case and the formulation of the primary rule. The *Trail Smelter*<sup>187</sup> arbitration provided another interesting example. Attempts to force international obligations into one category or another might, in his view, lead to confusion, and he therefore maintained that there was a case for deleting article 23.

(d) *Article 20 as proposed by the Special Rapporteur*

143. There was a case for deleting all three articles. But the distinction between obligations of conduct and result was well known and could perhaps be retained. The Special Rapporteur thus proposed for discussion a new article 20 amalgamating existing articles 20 and 21, paragraph 1, into one article. Furthermore, the concept of prevention was incorporated as a form of obligation of result, while the notion of extended obligations of result, as contained in former paragraph 2 of article 21, was dropped. In expressing, however, his personal preference for the deletion of the distinction between obligations of conduct, result and prevention from the draft articles altogether, the Special Rapporteur noted that this approach had been favoured by both the French Government and French authors alike.

<sup>185</sup> For examples of these decisions, see the footnotes to paragraphs 70 and 71 of the second report of the Special Rapporteur.

<sup>186</sup> *Judgment, I.C.J. Reports 1980*, p. 3, at p. 30, para. 61.

<sup>187</sup> UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905.

<sup>184</sup> *Yearbook . . . 1977*, vol. II (Part Two), pp. 18-30.

144. The proposed single article had thus been placed in square brackets, because it might be thought to relate to the classification of primary rules and because its further consequences in terms of the rest of the draft articles remained unclear.

#### 10. SUMMARY OF THE DEBATE ON ARTICLE 20

##### (a) *Distinction between obligations of conduct and obligations of result*

145. Diverging views emerged in the Commission concerning the need to retain the distinction in the draft articles on second reading.

146. The observation was made that the distinction between obligations of result and obligations of conduct had become commonplace in international legal discourse, not only at the academic level but also at that of inter-State relations. However, the view that the concept was practically a classic in civil law systems was an overstatement, resulting from a tendency by some to identify all civil law systems with French law. In German law, for example, the distinction as such had no place, except in connection with labour contracts, as opposed to contracts relating to services.

##### (i) *Utility of the distinction in determining responsibility*

147. While the distinction was considered of some use in the interpretation of primary rules in an explanatory, didactic sense, doubts were expressed as to whether it should be included in a codification of the law of State responsibility, and if so, whether it could be made operational at the level of secondary rules.

148. It was observed that no convincing evidence had been provided to support the view that the existence of a breach was determined by reference to whether the breach was of an obligation of conduct or of result. Even if it was possible clearly to distinguish between the two obligations and the distinction helped to clarify the content of a breach or the moment of its occurrence, that classification was no substitute for the interpretation and application of the primary norms themselves. It was also noted that the distinction was of no relevance regarding the consequences when such obligations, whether of conduct or of result, were breached. Concern was also expressed for the possibility that taking the distinction too seriously could lead to tragically wrong results, as in the case of torture.

149. Furthermore, the view was expressed that while the concepts embodied in those articles might not be alien to international law, they had not attained the level of universal acceptance that would require their codification. Indeed, it was observed that international courts had, in general, rarely made use of the distinction.

150. The view expressed was that articles 20, 21 and 23 were confusing in the extreme and should be deleted, even if the distinction was sometimes found useful at the level of classification. Reference was made, as a possible source of confusion, to the reversal of the effect of the distinction which had been instituted by the Special Rapporteur,

Roberto Ago, and the Commission at its twenty-eighth session, in 1976, when transforming it from civil law into a rule of international law, and which was commented upon by the Special Rapporteur in paragraph 58 of his second report.<sup>188</sup> It was observed that the confusion that ensued from that inversion was not likely to advance the codification of the topic, all the more so as the two types of obligations constituted a continuum and the decision to place certain obligations in one compartment and not the other rested on a subjective notion of the probability of achieving the intended outcome in a particular field.

151. It was noted further that the deletion of articles 20, 21 and 23 need not be a denial of the utility of the distinction in all cases. Rather it was based on the view that, since the distinctions were not always useful and were not reflected in the categories contained in part two, they need not be articulated in part one as secondary norms.

152. Other members believed, however, that the distinction drawn between obligations of conduct and of result was a useful one and should be retained. The distinction, while cognitive rather than normative, served as a tool with which to assess the type of obligation, without predetermining its outcome or applying qualitative standards thereto. An instance of a case where the distinction was of value was the issue of reservations to human rights treaties. Thus, the articles of the 1969 Vienna Convention that dealt with the effects of reservations largely depended upon it. Another example was provided by article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, which contained a delicate mix of obligations of conduct and obligations of result.

153. Despite its drawbacks, some form of categorization or refinement was deemed essential. The fact that courts had found the distinction between obligations of conduct and obligations of result useful, even if only occasionally, was an argument against abandoning the distinction. Likewise, the distinction was of particular value to developing countries which did not all have equal means at their disposal to achieve the result required of them.

154. Support was also expressed for clarifying that obligations of conduct were legal obligations and that a failure to exercise due diligence could trigger responsibility. In this regard, it was noted that the distinction did play a significant role in facilitating the answer to at least three important questions: how the breach of an international obligation was committed in any particular instance; whether a breach could be judged to have existed; and when a breach had occurred and was completed.

155. It was queried whether the Special Rapporteur had indeed provided enough examples in positive law to enable the Commission to arrive at a conclusive decision. If the distinction had become commonplace in international law at the doctrinal level, it would be worthwhile searching for further applications of the concept, for example, by considering areas such as the law of the sea, environ-

<sup>188</sup> See the commentaries to articles 20 and 21 (*Yearbook . . . 1977*, vol. II (Part Two), pp. 11 et seq.), in particular paragraph (2) of the commentary to article 20 and paragraph (1) of the commentary to article 21.

mental law and diplomatic law. Hence, a preference was expressed for retaining the text in brackets until the Commission had completed its work on the draft, when it would be able to see whether there were other reasons for retaining the text.

156. In the latter regard, it was observed that the distinction between obligations of conduct and obligations of result could have important implications in connection with the consideration of circumstances precluding wrongfulness (chapter V of part one), as well as in connection with the definition of injured States in part two, and was of some consequence for the exhaustion of local remedies rule. In the latter regard, it was suggested that the Special Rapporteur's stance on the retention of the distinction was an anticipation of his view on the exhaustion of local remedies (art. 22).

157. Concern was also expressed that in revising the draft articles the Commission should not throw out the achievements of the past. The rules set out in articles 20 and 21 created a mechanism enabling judges to determine whether there had been a breach of a primary rule or obligation. In view of the need for a comprehensive and better structured framework for international law relating to breaches of international obligations, there were grounds for retaining the existing concepts, albeit in a simplified form.

(ii) *Legal precision of the distinction*

158. As to the question of the degree of precision inherent in the distinction, it was noted that there was no clear dividing line between the two types of obligations as they sometimes overlapped. An abstract categorization did not allow for the fact that the moment at which a breach occurred might differ, depending whether the rule was one in the field of human rights, for example, or in another domain. For example, the Inter-American Court of Human Rights, in an advisory opinion,<sup>189</sup> stated that in the case of self-executing legislation incompatible with a human right, the violation of human rights, whether individual or collective, occurred by its adoption alone.

159. The international community attaches such value to certain rights like the rights to life, to physical and moral integrity, to non-discrimination and to recognition as a person before the law that the mere enactment of legislation contrary to those rights entailed international responsibility. The findings of the International Tribunal for the Former Yugoslavia concerning torture bore out that point.<sup>190</sup> It was even possible to determine whether draft legislation was compatible with the provisions of human rights treaties.<sup>191</sup>

<sup>189</sup> Inter-American Court of Human Rights, *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 of 9 December 1994, Series A, No. 14.

<sup>190</sup> International Tribunal for the Former Yugoslavia (Judges Mumba, Cassese and May), *Prosecutor v. Anto Furundzija*, judgement of 10 December 1998, para. 150.

<sup>191</sup> That had been made clear by the Inter-American Court of Human Rights in its advisory opinion on *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83 of 8 September 1983, Series A, No. 3, para. 60.

160. While it had been contended that general international law entitled States to choose the means whereby they would fulfil their international obligations at the domestic level, it was noted on the contrary, that the growing tendency to incorporate human rights into domestic legislation, the need for international regulation of certain offences in the field of human rights (for example, forced or involuntary disappearances), the globalization of certain democratic values and the joint efforts to promote the rule of law had greatly restricted the sphere in which States were free to choose the means of fulfilling their international obligations. The Iran-United States Claims Tribunal was one of the few to have referred extensively to the distinction between obligations of conduct and obligations of result and it had acknowledged that the freedom of States to choose such means was not absolute.<sup>192</sup>

161. Others observed that obligations of both conduct and result were indeed closely connected to the temporal dimensions of responsibility. The breach was constituted at the moment it occurred and continued during the time required by the obligations of conduct and obligations of result. In this regard articles 20 and 21, as adopted on first reading, served a purpose, in that they enabled an obligation to be posited as a primary rule, prescribing certain conduct even if the outcome remained uncertain. Furthermore, the distinction might still be useful in determining when a breach took place, which could have a bearing on reparation.

162. In response, the Special Rapporteur agreed that a case could be made out in favour of retaining the distinction because it helped to clarify the time aspect. But while the occurrence of the final result often corresponded to the moment of occurrence of the breach of an international obligation, that was not always true. The "special duty" referred to in paragraph 2 of article 22 of the Vienna Convention on Diplomatic Relations provided an important example. A State which failed to take all appropriate steps to protect the premises of a diplomatic mission against any intrusion or damage might be in breach of its obligation to do so even if, in the event, the threat was never realized. In other words, the obligation was triggered at an earlier stage. In other situations, the point at which the obligation came into effect was less clear; in that connection, he again referred to the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*,<sup>193</sup> where the moment of occurrence of the Hungarian breach had not been in doubt, but the moment of the subsequent breach by Slovakia had had to be established by analysing the particular circumstances of the case.

(iii) *Consistency with the distinction between primary and secondary rules*

163. The view was expressed that the distinction clearly related to primary rules, and that its retention might to some extent lessen the separation between primary and

<sup>192</sup> *Islamic Republic of Iran v. United States of America, cases Nos. A15(IV) and A24*, Award No. 590-A15(IV)/A24-FT, 28 December 1998, at para. 95.

<sup>193</sup> See footnote 178 above.

secondary rules. In this regard, it was felt that if the Commission intended to be consistent with its own decision to focus only on secondary rules, it had to delete articles 20 and 21 as adopted on first reading. Indeed, the categorization of obligations did not fall neatly into the domain of State responsibility, which was essentially the domain of consequences, effects and results; retaining the articles would be tantamount to over-codification.

(iv) *Alternative formulations*

164. While strong support was expressed for not retaining articles 20, 21 and 23, as adopted on first reading, some members expressed a preference for having the material in the articles placed in the commentary. It was also suggested that the article could be submitted to the Sixth Committee in square brackets, but this was opposed in the Commission as unnecessarily complicating the Committee's work. Interest was also expressed in an intermediate solution of including a general reference to the distinction in article 16, or of resorting to the new article 20, as proposed by the Special Rapporteur, or a simplified version thereof as a middle course.

165. Of those members who preferred the deletion of the distinction from the draft articles, most favoured having it reflected in the commentary or even in a note to the commentary. In this regard, it was observed that the commentaries were informed by a wealth of doctrine, of which only a small portion was actually on display in the text. Article 20, if read in isolation from the commentary, simply stated something that anyone with common sense could deduce: that an international obligation requiring a certain course of conduct was breached in the event of a departure from that conduct. But in reality, there was no way to express the point in a less abstract manner, short of bringing in the full array of doctrine. Such point would be better made in the commentary, where it could be illustrated with concrete examples.

166. However, it was also cautioned that the articles under discussion had been with the Commission for more than 20 years. Over that period, many scholars had quoted them as elements of State responsibility and they had been referred to in certain judicial decisions. The Commission therefore had to explain why they were being deleted. Hence, in the present case some succinct explanatory note to justify the deletion of the articles would have to be included in the commentary to chapter III.

167. As to the question of the relationship between the distinction and article 16, the comment was made that it was necessary to determine in specific cases whether the articles in question added anything to the general provision contained in article 16. It was felt that they sometimes seemed to repeat the same idea, i.e. that the violation of an obligation entailed responsibility. Hence the view was expressed that it could be helpful to link the three draft articles under discussion to article 16 and to include in article 16 a reference to the type as well as to the origin of the obligation. In response, the comment was made that if the solution were found in a broad rule set out in article 16, all the categories entailing a particular course of action, a particular result or even the prevention of a specific event would have to be covered by the rule, so as to forestall the need for a separate classification.

168. While the Special Rapporteur agreed that the link with article 16 could be explored by the Drafting Committee, he did not feel that the Commission would be obliged, if it adopted the suggested approach, to spell out all the consequences, and certainly not in the text. Key elements of the commentary could, however, be retained.

169. In commenting on the new article 20, proposed by the Special Rapporteur, the view was expressed that while his reformulation was clearer than the existing draft articles, it still seemed to purport to make a normative distinction of general validity concerning a process which was often not applicable or the application of which would risk nothing but confusion.

170. Others maintained that while the main features of the draft were emerging, it was still impossible to foresee with certainty the impact on the rest of the draft of the removal of such an important stone from Ago's edifice. Under the circumstances, the solution proposed by the Special Rapporteur, namely, to simplify articles 20, 21 and 23 in the form of the new article 20 placed in square brackets, appeared to be the best one.

171. With regard to paragraph 1 of new article 20, it was doubted whether the proposal was an improvement on the existing language, which had the advantage of following the model of article 16 by beginning with the same words. Such uniformity was deemed desirable in a normative text when linking two closely related provisions.

172. In terms of a further view, obligations of conduct and of result, which were by their very nature different concepts, should not be combined in one article. Even though their amalgamation into one article streamlined the text, as a matter of legal technique, having two separate articles dealing with breaches of obligations of conduct and breaches of obligations of result was deemed preferable.

(b) *Extended obligations of result*

173. General support was expressed for the proposed deletion of the notion of extended obligations of result, contained in paragraph 2 of article 21. Nonetheless, it was noted that the underlying idea might be of some value and could therefore be mentioned in the commentary.

174. In terms of another view, it was not absolutely clear that the paragraph should be deleted and the point made only in the commentary. Paragraph 2 did contain something quite different, i.e. the question of the equivalence of results or the recourse by a State having an international obligation to a means other than the one assigned to it by the obligation.

175. In response, the Special Rapporteur remarked that the problem with paragraph 2 was that it equivocated between two positions, one unacceptable and one unexceptionable. It was unacceptable that there could be a breach which somehow later ceased to be a breach when something else was done, for example when compensation was paid for a violation of a human right. Such a violation was a violation, and payment of compensation did not change its status, which was what the commentary, unacceptably, said it did. The text could be accepted if it

meant merely that there was no breach in the case of an obligation of result where the time for the State to take action had not yet come and the State meanwhile corrected the breach—but there was no need for an article to say so.

176. While it was agreed that the inference to be drawn from the commentary to article 21, paragraph 2—that torture or arbitrary detention became permissible if compensation was subsequently paid—was entirely unacceptable, the remark was made that this did not mean that a concept which had stood the test of time should be jettisoned, merely because it was not all-encompassing or examples of oversimplification or over-refinement could be found. Indeed, article 21, paragraph 2, could be applied in other circumstances. For example, a State that had concluded an agreement to guarantee another State a certain quantity of water drawn from an international river might reduce that quantity but subsequently provide an equivalent supply from a different international river. No international responsibility would then arise. In such cases, article 21, paragraph 2, might be of some value, although the same point could be made in the commentary.

### (c) *Obligations of prevention*

177. Different views were expressed in response to the proposed amalgamation of the notion of an obligation of prevention, as contained in article 23, in paragraph 2 of new article 20. On the one hand, support was expressed for its deletion from the draft articles. Since the conduct prescribed was the material factor, obligations of prevention could be subsumed under the rubric of obligations of conduct.

178. Others, while not rejecting the proposed amalgamation, commented on the differences between the original version and that proposed by the Special Rapporteur. Hence, it was pointed out that, while the text adopted on first reading contained a specific reference to “conduct”, no such reference was to be found in the text of the new article 20, paragraph 2. It was also remarked that the new article 20, paragraph 2, treated obligations of prevention in the same way as obligations of result. Yet, as had been pointed out in the debate, obligations of prevention were more often obligations of conduct. Indeed, obligations of prevention were often due diligence obligations, not obligations of result, particularly in treaties on the environment.

179. In this regard, it was observed that the obligation of prevention was also being addressed under the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), albeit from a different standpoint.<sup>194</sup> Hence, it was suggested that the most prudent course would be simplification, so as not to assign the obligation of prevention to one category, thereby excluding another approach. By making no specific or implicit reference to the obligation of prevention in the draft articles, it could continue to be consid-

ered as a subcategory of either the obligation of conduct or of the obligation of result.

180. In response, the Special Rapporteur reiterated that in the original French understanding of the phrase, an obligation of prevention was an obligation of conduct—a general obligation to prevent something. Under the system set up by the draft articles, however, it was an obligation of result. Confusion resulted from the fact that most international lawyers used the phrase in the sense embodied in the French meaning, while the draft articles used it in the opposite sense. Which of the two possible distinctions between obligations was to be made in the draft articles had to be very clearly spelled out; otherwise, the case for simplifying the draft articles by removing the distinction became overwhelming.

## 11. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR ON ARTICLE 20

181. In summing up the discussion, the Special Rapporteur noted that the best case for the deletion of draft articles 20, 21 and 23 had been made, not by anglophones from the realm of the common law, but by the French Government, which considered that those articles related to the classification of primary rules and had no place in the text under consideration. Following the debate, he was more and more inclined to agree and thus his preference was for deleting the articles in question, which had never been cited in case law, even if the distinction itself was often mentioned. Nevertheless, he was attentive to the concerns about deleting the distinction, as expressed by a significant minority of members of the Commission.

182. The Special Rapporteur stated that, by and large, the Commission had agreed that article 21, paragraph 2, dealing with extended obligations of result, was an instance of over-codification. The provision confused a situation that was quite common, when the State had a choice between various modes of compliance (for example, in the case of the *aut dedere aut judicare* principle), with a situation when a *prima facie* breach was cured by subsequent conduct. The second situation was extremely rare, especially if, as was to be hoped, the Commission decided that exhaustion of local remedies did not fall into that category. To deal with it in the draft articles would only create confusion.

183. With regard to prevention of transboundary damage, he accepted that, in the light of the work it had done on the topic of transboundary damage, the Commission could not adopt a position that would make obligations of prevention into obligations of result. He remarked, however, that the general view was that, whereas most, but not all, obligations of prevention were obligations of means in the original sense of the distinction between the two types of obligations, to try to force them into a single matrix was to transgress the distinction between primary and secondary rules of responsibility on which the text as a whole was founded. By contrast, in dealing with transboundary damage, the Commission was concerned with the primary rules.

<sup>194</sup> See the first report of the Special Rapporteur on prevention of transboundary damage from hazardous activities (*Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/487 and Add.1), para. 18.

184. On the question of the utility of the distinction, he conceded that it was more than occasionally useful for the classification of obligations and might be helpful for determining when there had been a breach. He noted that there was a group of members of the Commission who thought that the distinction should be mentioned in the draft, not necessarily in separate draft articles, not necessarily in the new article 20, but possibly in article 16. However, he felt that this approach was problematic because when the distinction was actually used, it was used in the original sense, according to which obligations of means or of result did not necessarily correspond to obligations that were determinate or indeterminate. Although the tendency perhaps existed for obligations of means to be more determinate, the distinction was not one based on that criterion. The fact that the Commission had taken one conception of the distinction and turned it into another conception had given rise to enormous confusion.

185. In the Special Rapporteur's view, the idea of merely taking note of the distinction, without defining it in the draft articles, was not necessarily a way of evading that problem. He suggested that the Drafting Committee should therefore consider the possibility of articulating the distinction in a satisfactory way in the original French terms, in which most obligations of prevention were to be understood as obligations of means. If it could not, it should then try the "minimalist" solution of mentioning the distinction, possibly in the framework of article 16.

186. If neither of those solutions worked, then draft articles 20, 21 and 23 as adopted on first reading would simply have to be deleted. He was convinced that they were a case of unnecessary over-codification which explained why they were so often criticized, both within the Commission and outside it, and why even the courts that used the distinction between obligations of means and obligations of result did not refer to those articles. The majority of the members of the Commission shared that view.

12. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF ARTICLES 24 (COMPLETED AND CONTINUING WRONGFUL ACTS) AND 25 (BREACHES INVOLVING COMPOSITE ACTS OF A STATE)<sup>195</sup>

187. The Special Rapporteur proposed considering article 18, paragraphs 3 to 5, and articles 24 to 26, together

<sup>195</sup> The texts of articles 24 and 25 proposed by the Special Rapporteur read as follows:

"Article 24. *Completed and continuing wrongful acts*

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

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

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

because they all dealt with the issues of the moment and duration of the breach of an international obligation.

(a) *Terminology*

188. The Special Rapporteur noted, with regard to the question of the moment of time at which a breach occurred, that most breaches of international law were bound to be of some duration. The use of the word "moment" was therefore unnecessary.

189. He also observed that a problem arose in the case of situations where it was clear that an obligation was going to be breached but the actual moment of breach had not yet occurred. That situation, described as "anticipatory breach" in United Kingdom law and treated as a "positive breach" in German law, was subsumed under the notion of repudiation, or refusal to perform a treaty in article 60 of the 1969 Vienna Convention. Although an equivalent definition could be included in the draft articles, he did not think that such a definition was strictly necessary. Use of the word "occurs", without going into further detail, would be sufficient.

(b) *Distinction between "composite" and "complex" acts*

190. Article 25, on acts extending in time, differentiated between "composite" and "complex" acts. A composite act consisted of a series of actions relating to what article 25 called "separate cases" which, taken together, constituted a breach, regardless of whether each action individually constituted a breach, for example, the adoption of the policy of apartheid by means of a combination of laws and administrative acts. Complex acts were different from composite acts in that they occurred in relation to the same case, for example, a series of acts against an individual which, taken together, amounted to discrimination.

191. The Special Rapporteur was not convinced that the distinction was helpful in the present context. The question to be answered was whether or not a breach had occurred. Reference was made to the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*<sup>196</sup> as an example of a situation where the fine distinction between the two, as drawn in paragraphs 2 and 3 of article 25, would not seem to be relevant.

192. In his view, the distinction between a completed act and a continuing one was far more relevant and should

"Article 25. *Breaches involving composite acts of a State*

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

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

For the analysis of these articles by the Special Rapporteur, see paragraphs 93 to 135 of his second report.

<sup>196</sup> See footnote 178 above.

be retained, although, once again, its precise application would depend on the nature of the primary obligation involved and on the circumstances of the case.

(c) *Treatment of composite acts*

193. The Special Rapporteur pointed to the case when the primary obligation focused on an act that could only be defined as composite, for example, genocide as distinct from a simple act of murder. But the draft articles as they stood were not limited to obligations characterizing conduct as wrongful by reason of its composite or collective nature. The notion of a composite act in the draft could apply to any obligation breached by a series of actions relating to different cases. The obligations in international law which prohibited conduct by reference to its aggravated nature and to its effects on a human group, such as genocide, were extremely serious and the problem of treating them as a collective act raised important questions. On the other hand, it was not at all clear that there was a need to treat in that way composite acts which were composite only accidentally but related, for instance, to a rule prohibiting conduct causing serious harm by air pollution. Such conduct might well constitute a composite act, but there was no reason why that should make any particular difference. From that standpoint, there was no reason to treat composite acts any differently from other kinds of act.

194. In his view, it was thus useful to retain the notion of a composite wrongful act, but to confine it to cases where the obligations arise under primary rules defining the wrongful conduct in composite or systematic terms. A different analysis was needed in the case of obligations which singled out conduct as unlawful by reason of its composite character, and special issues of the time factor could arise.

(d) *Complex acts*

195. Similarly, the notion of a complex act did not refer to an act defined as complex in a rule but rather to an act that happened to be complex. Again, there seemed to be compelling reasons to treat this case. As to wrongs which were defined as complex acts, there were far fewer of these and they had no special significance. By contrast, composite acts were defined as wrongs in very important norms, in the Convention on the Prevention and Punishment of the Crime of Genocide for example. It was on such grounds that complex acts had been incisively criticized in the literature.<sup>197</sup>

196. It was noted that the Special Rapporteur, Roberto Ago, had needed the notion of a complex act in order to fit it in with his construction of the exhaustion of local remedies rule, contained in article 22. Where that rule applied, the failure of local remedies was the last step in the complex act constituting the wrong. That was known as the “substantialist” theory of the exhaustion of local remedies. The orthodox view of exhaustion of local rem-

edies was the procedural view, namely, that the wrong might have occurred but no international action could be taken by way of a diplomatic claim or human rights complaint prior to the exhaustion of local remedies. Under article 22, as adopted on first reading, by implication the *Phosphates in Morocco* case<sup>198</sup> had been wrongly decided. The only event after the critical date in that case had been the failure to exhaust the local remedies.

197. The problem was that, according to the normal understanding, where an obligation was breached and the exhaustion rule applied, the applicable international law was the law applicable at the time the harm was done and not at the time the local remedies were exhausted; indeed it was difficult to specify that time because of the different ways in which local remedies could be exhausted. Having treated complex acts as occurring only at the time of the last act in the series, the draft could achieve that result only by backdating the complex act to the first act in the series. Article 18, paragraph 5, thus meant that the act occurred only at the end, but that the applicable law was the law in force at the beginning of the complex act. This was indeed a “complex” construction. It was, in his view, wholly unnecessary since the *Phosphates in Morocco* case was rightly decided on the interpretation of the applicable instruments of that case.

198. The Special Rapporteur therefore recommended the deletion of the notion of complex acts entirely. Problems of breach could be resolved without it, and the extraordinarily convoluted structure of the inter-temporal law as applied to such acts could also be done away with. It followed that article 22 had to be examined on its merits in terms of the exhaustion of local remedies rule.

(e) *Question of the applicable inter-temporal law*

199. The Special Rapporteur indicated that the Commission still had to solve the problem of the inter-temporal law as it applied to completed and continuing acts and composite acts. In his view, the solutions adopted in the draft articles (art. 18, paras. 3 and 4) for the application of the inter-temporal law to continuing and composite acts were essentially right. Furthermore, he agreed with the proposal of the French Government that the applicable inter-temporal principles be tied in with the relevant draft articles.

(f) *Obligations of prevention*

200. As to obligations of prevention and the duration of a breach thereof, the Special Rapporteur pointed out that article 26 incorrectly treated breaches of such obligations as necessarily being continuing wrongful acts. Some breaches of obligations of prevention might be continuing acts but others not, depending on the context. For example, if there was an obligation to prevent the disclosure of a piece of information, the disclosure of the information marked the end of the matter. There was no reason for treating anything occurring subsequently as a wrongful act. In other cases, such as those involving an obligation

<sup>197</sup> See, for example, J. J. A. Salmon, “Le fait étatique complexe : une notion contestable”, *Annuaire français de droit international*, 1982 (Paris), vol. 28, pp. 709-738.

<sup>198</sup> *Judgment, 1938, P.C.I.J., Series A/B, No. 74, p. 10.*

to prevent intrusions into diplomatic premises, the breach would obviously be a continuing one.

(g) *Articles 24 and 25 as proposed by the Special Rapporteur*

201. For the reasons explained above, the Special Rapporteur proposed that the new article 24 draw a distinction between completed and continuing wrongful acts. Paragraph 1, dealing with completed acts, would incorporate what had previously been in article 24. Paragraph 1 had to be contrasted with continuing wrongful acts, which remained breaches for as long as the international obligation remained in force.

202. The proviso "Subject to article 18" was included in paragraph 2 to cover the situation in which a continuing wrongful act had begun prior to the entry into force of the substantive obligation and had continued thereafter. The act became wrongful only when the obligation came into force. Paragraph 2 incorporated the substance of article 25 and article 18, paragraph 3, as adopted on first reading. Paragraph 3 dealt with the question of continuing breaches of obligations of prevention, and would also have to be subject to article 18.

203. It was explained that the new article 25 dealt with the notion of composite acts albeit more narrowly defined, adopting the solution to the inter-temporal problem set out in paragraph 2, and again subject to article 18.

13. SUMMARY OF THE DEBATE ON ARTICLES 24 AND 25

204. While the Special Rapporteur's views and suggestions on articles 18 (paragraphs 3 to 5), 24 and 26 were generally supported in the Commission, the view was also expressed that all reference to the question of when a wrongful act began and whether and for how long it continued could be deleted, on the grounds that it was a matter for interpretation of the primary rules and the application of logic and common sense.

(a) *Completed and continuing wrongful acts*

205. In regard to article 24 proposed by the Special Rapporteur, it was noted that the object of the exercise was not to define, on the one hand, a wrongful act not extending in time and, on the other, a continuing wrongful act, but to determine where a wrongful act had been committed, when the breach had occurred and how long it had continued.

206. The view was expressed that article 24, paragraph 3, was subordinate to the provision in article 20, paragraph 2, concerning the obligation to prevent a particular event. The two clauses should therefore be handled in the same way, and that meant placing paragraph 3 between square brackets for the time being.

207. In response, the Special Rapporteur pointed out that an obligation of prevention might quite conceivably be breached by a single act of a State which was not itself of a continuing nature. The breach could, nevertheless,

consist in the continuation of the result and not in the continuation of the act by the State that had produced the result. That was why the article occupied a separate place in chapter III.

208. It was observed in the Commission that, as regards continuing acts, European practice provided sufficient proof of how difficult it was to establish them clearly. In particular, it was difficult to distinguish clearly between such acts and instantaneous acts with a lasting effect, as borne out by the reasoning of the European Court of Human Rights in the case of *Papamichalopoulos and Others v. Greece*.<sup>199</sup> Contrary to the traditional view that deprivations were instantaneous acts, the Court had ruled that a continuing breach had occurred because it was impossible to identify precisely the act that had led to the deprivation.

209. Recent European history had turned the issue into a highly political one, the question having arisen whether certain acts committed by different States after the Second World War and resulting in the deprivation of property were contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) by which those States were now bound. It could be argued that the absence of compensation for the deprivations, which had not been contrary to international law at the time they had occurred, would amount to a wrongful act today.

210. It was further noted that the Special Rapporteur had justified the distinction between continuing and completed acts by reference to article 41 of the draft articles, which dealt with the cessation of wrongful conduct. But that article was somewhat peculiar because it stated that the consequence of an internationally wrongful act was the obligation to comply with international law. The obligation to comply with international law did not, however, depend on the commission of an internationally wrongful act. Hence, the article was not really necessary in the context, and if it were deleted, then the distinction between continuing and instantaneous acts could also be deleted, subject to it not entailing any other legal consequences.

(b) *Complex acts*

211. The Special Rapporteur's proposal that the concept of "complex acts" be deleted was generally supported in the Commission. Reference was made to the difficulty of deriving the distinction between composite and complex acts by reference to the primary rule. The example of genocide given by the Special Rapporteur showed that the primary rule was not very helpful in that regard.

(c) *Composite acts*

212. The view was expressed that the application or non-application of the rule of the exhaustion of local remedies depended on the issue of composite acts. If the primary injured subject changed from, e.g. the individual to

<sup>199</sup> European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 260-B, *Judgment of 24 June 1993* (Council of Europe, Strasbourg, 1993), pp. 58 et seq., para. 40.

a State of which he is a national, this would affect the application of the rule of the exhaustion of local remedies insofar as it did not apply in the case of a composite wrongful act. The question, however, still remained as to whether the wrongful act would amount to a composite act.

213. As to paragraph 1 of article 25, it was further queried why the moment when a given action or omission occurred was established by reference to preceding actions or omissions. Instead, the approach could be reversed so as to refer to the moment when the first action or omission constituting the composite act occurred and then refer to the actions and omissions which occurred subsequently.

214. In response, the Special Rapporteur observed that it would take some time for the act to occur since it was composed, by definition, of a series of actions or omissions which occurred over time and were defined collectively as wrongful. Genocide was one example of a composite act. The first murder of a person belonging to a given race was not necessarily sufficient to establish that genocide had been committed, but, if it was followed by other similar murders and those murders were systematic, the genocide constituted by that series of murders would be deemed to have begun at the moment of the first murder. Indeed, the idea of taking into account the first actions or omissions whose whole series constituted the composite act was not a new one, as it had already existed in article 25, as adopted on first reading.

#### 14. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR ON ARTICLES 24 AND 25

215. The Special Rapporteur observed that the Commission clearly favoured simplifying the provisions in question, even if there were differences of opinion as to the extent of that simplification. The main issue of principle was whether the notion of a continuing wrongful act should be retained. In his view, at the very least, the Commission should leave new article 24 in square brackets pending consideration of article 41, which it had not yet decided to delete.

216. As to whether continuing wrongful acts could have other consequences within the framework of responsibility, he noted that it was not impossible that the question of extinctive prescription might be affected by whether a wrongful act was or was not continuing. He thought that an article dealing with loss of the right to invoke responsibility should be included in part three, by analogy with article 45 of the 1969 Vienna Convention. His own view was however that, although its incidence could be affected by whether the wrongful act was continuing or not, the principle of extinctive prescription remained the same, whether in respect of a continuing wrongful act or other acts.

217. He accepted that the obligation of cessation in article 41 was not a separate secondary obligation existing by reason of the primary obligation. But the idea of cessation was implicated in chapter II in the sense that it was deeply concerned with the choice between restitution and compensation, a choice that the injured State would normally

make. It was true that there was a presumption in favour of restitution and, in some cases, especially those involving peremptory norms, restitution might be the only possibility. But in many situations there was a de facto choice and the question of the identification of the injured State arose in that context. It might be that the injured State could call on the wrongdoing State for cessation of the wrongful act, but others could not. It might also be the case that there were more non-injured States with an interest in the cessation of the wrongful act than States actually injured by the breach. These possibilities still needed to be examined, and his own view was that in some form the notion of cessation of wrongful conduct should be retained in part two.

218. Hence, article 40 might need to draw a distinction between cessation, on the one hand, and compensation, on the other, with consequences for the rest of the draft articles.

219. For these and other reasons, the Special Rapporteur felt that a distinction must be drawn between completed and continuing wrongful acts. There was a difference between the effects of a completed internationally wrongful act and the continuation of the wrongful act. While the Commission could not express an opinion, for example, on whether expropriation was a continuing or a completed wrongful act, it could emphasize the primacy of article 18, so that acts that had been complete at a time when they had been lawful did not subsequently become the subject of contention because the law had changed. He supported the idea that all possible permutations must be considered within article 18; and proposed that the Commission retain the concept of a continuing wrongful act in chapter III. It could return to the issue once it had a clearer view of the overall scheme of the draft articles.

#### 15. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF ARTICLE 26 BIS (EXHAUSTION OF LOCAL REMEDIES RULE)<sup>200</sup>

220. The Special Rapporteur explained that in its original conception, the exhaustion of local remedies was the last step of the complex act constituting the breach, and the breach therefore occurred only at the time of exhaustion. But the failure of local remedies might not be an independent breach of international law at all. The national court denying a remedy might be acting fully in accordance with domestic law, and that law itself might not be contrary to international law. However, that was not always the case, and he would therefore be reluctant to treat the article 22 debate as involving an outright choice between the proceduralist and the substantialist understandings.

<sup>200</sup> The text of article 26 bis proposed by the Special Rapporteur reads as follows:

*“Article 26 bis. Exhaustion of local remedies*

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

For the analysis of this article by the Special Rapporteur, see paragraphs 136 to 148 of his second report.

221. In some cases the failure of local remedies was itself part of the breach, for example if it constituted a further or culminating instance of discrimination; in other cases it was not. The normal understanding was that the exhaustion of local remedies was a prerequisite to an international claim in certain cases, but the Commission was not required to define those cases in detail in the draft articles on State responsibility, especially since it would be called to do so in its work on diplomatic protection.

222. On the basis of the proceduralist understanding it might be argued that the rule had no place in the present draft articles, but to drop it entirely could be regarded as provocative. He thus proposed that it be kept, albeit in the form of a saving clause. No one had proposed that it should be deleted, but several Governments had argued strongly against the way in which it was presented in the original chapter III. He had therefore retained article 22 as a “without prejudice” clause, placed at the end of chapter III as article 26 bis, but it might eventually be placed elsewhere.

#### 16. SUMMARY OF THE DEBATE ON ARTICLE 26 BIS

223. The observation was made that the rule of the exhaustion of local remedies, which was well established not only in treaty law, but also in customary law, was a means of ensuring recognition of and respect for internal legislation and national systems.

224. Differing views were expressed regarding the retention of the rule in the draft articles, with some expressing a preference for its deletion, while others strongly advocated its retention as an essential component of the law of international responsibility, or at least as an element to be reflected in the form of a “without prejudice” clause.

##### (a) *Procedure versus substance*

225. It was noted that, as adopted on first reading, article 22 represented an attempt to combine two approaches. According to the first approach, the use of local remedies provided the wrongdoing State with the opportunity to remedy what appeared to be a breach of an international obligation. According to the second, exhaustion of local remedies was required in all cases and was a burden imposed on the private party before a claim could be preferred on its behalf.

226. Support was expressed for the Special Rapporteur’s view that, in most cases, the treatment itself constituted the breach and the exhaustion of local remedies was a standard procedural condition for establishing the admissibility of a claim and that, where the failure to provide an adequate local remedy might itself be a wrongful act in some cases, this reflected a primary rule or obligation, and was not the basis of the rule of the exhaustion of local remedies.

227. In terms of a further view, it was observed that if the exhaustion of local remedies was viewed as affecting the admissibility of a claim, the requirement would naturally be viewed as procedural. However, once remedies

were exhausted, the kind of legal consequences that attached to wrongful acts might not necessarily ensue. A State might use its good offices with a view to ensuring that a natural or legal person enjoyed certain treatment even before remedies were exhausted.

228. In the case of a claim arising from the breach of an obligation, however, the exhaustion requirement would have to be complied with. Moreover, a waiver of the rule was not necessarily decisive. It might follow from an agreement between the States concerned or constitute a unilateral act, altering the circumstances of a case but leaving general international law unaffected.

229. While sympathy was expressed for the view that exhaustion of local remedies affected the admissibility of a claim, it was noted that further thought should be given to the issue of whether admissibility of claims had a place in part one, or whether the article could be located in part two or three.

230. It was observed that the current Special Rapporteur’s proposal would lead to a drastic change by adopting the procedural concept, so as to maintain, in line with the *Phosphates in Morocco* case,<sup>201</sup> that responsibility was triggered at the time of the breach and not at the time when local remedies were exhausted. It was felt that this was not easy to reconcile with the idea that the rule of the exhaustion of local remedies should give the State the opportunity of remedying its wrongful act.

231. Furthermore, if the Commission accepted that new concept, it should not lose sight of other problems which it entailed. If an individual harmed by a wrongful act decided not to resort to local remedies, would the State of which he was a national nonetheless be entitled to take measures within the framework of the law of State responsibility, regardless of the fact that the State at fault offered the possibility of obtaining reparation? The Commission would have to regard the exhaustion of local remedies rule as an obstacle not only to the exercise of jurisdiction, but also to the adoption of other measures under the law of State responsibility or, in other words, to the implementation of State responsibility.

232. The Special Rapporteur noted, in response, that when the breach of an international obligation harmed only one person and if that person deliberately decided not to take any action, even if the State concerned might have an interest in protesting against the treatment of its national, it did indeed seem that the more specific elements associated with part two of the draft articles could not be applied (including countermeasures). At issue was the whole question of preclusion and not a simple procedural rule in the narrow meaning of the term.

233. In the Special Rapporteur’s view, rather than having to choose between two irreconcilable views, the Commission should indicate clearly that, in some situations, responsibility could not be implemented before the exhaustion of local remedies.

<sup>201</sup> See footnote 198 above.

(b) *Article 26 bis*(i) *General observations*

234. The view was expressed that neither article 26 bis proposed by the Special Rapporteur nor the Commission's discussion had really done justice to the matter. The commentary to the corresponding article 22 adopted on first reading<sup>202</sup> ran to some 20 pages and dealt with the legal principles underlying the rule, State practice, judicial decisions and the writings of jurists. However, by limiting his comments the Special Rapporteur seemed to assign a minor role to the rule of the exhaustion of local remedies and had even cast doubts on its inclusion, or at least its location, in the draft articles.

235. In response, the Special Rapporteur sought to dispel any misunderstanding. He viewed the rule of the exhaustion of local remedies as an established rule of general international law. However, it had to be recognized that, contrary to the provision of article 22 as adopted on first reading, an international obligation might be breached even in cases where the individuals concerned had not exhausted local remedies.

(ii) *Scope of the rule*

236. While the Special Rapporteur's approach in article 26 bis enjoyed support, it was observed that the issue of the application of the rule of the exhaustion of local remedies was dealt with only from the standpoint of diplomatic protection, and that it should also be considered in the context of human rights, since many human rights instruments referred to it.

237. In response, the Special Rapporteur admitted that he had not dealt in any detail with the scope of the exhaustion of local remedies rule because this would be a major part of the work on diplomatic protection. He had simply followed the original text. As had been noted, human rights instruments explicitly stipulated that the rule was applicable to complaints by individuals of a violation of human rights, and it would also apply to violations under customary international law. Nevertheless, the rule was not always applicable, for example, in the case of wholesale violations.

238. He stressed that it was not the purpose of article 26 bis to specify when the rule was applicable or when local remedies were exhausted. There were two reasons for that. First, the issue would be addressed in connection with the subject of diplomatic protection. Secondly, in the event of a breach of a treaty obligation, there was no need to go beyond what the treaty in question stipulated in respect of the exhaustion of local remedies.

239. In terms of another view, the wording of article 26 bis was not sufficient, since it did not state either the origin of the requirement of exhaustion or the effect of that requirement. While the need to meet the requirement depended on the particular character of the infringed primary rule, primary rules could not in fact go very far. These conditions would therefore have to be spelled out in the draft articles.

240. It was proposed that the Commission revert to the formulation of the rule adopted by the Conference for the Codification of International Law, held at The Hague in 1930.<sup>203</sup> In support of that proposal, it was observed that that language was clear and simple and left open the question of the concept underlying the provision. A further suggestion was made in the Commission to reformulate the provision as follows: "These articles are without prejudice to any question relating to the exhaustion of local remedies where such a condition is imposed by international law." It was argued that this formulation would cover diplomatic protection, breaches of human rights or even a bilateral agreement that explicitly provided for the exhaustion of local remedies as a prerequisite for any international petition.

(iii) *Location of the rule*

241. The view was expressed that the question of the legal basis of the rule and of its effects could easily be resolved in article 26 bis or in part two. This solution would have the advantage of accounting for the possibility of excluding the application of that condition by treaty, as provided for in the Convention on the Settlement of Investment Disputes between States and Nationals of other States. A further possibility raised was the insertion of the rule in chapter V of part one, dealing with circumstances precluding wrongfulness.

242. The Special Rapporteur agreed that the problem could be solved in the framework of part two or part three, and expressed support for moving article 26 bis in order to solve some of these problems. While this idea enjoyed support in the Commission, it was noted that the location of the article dealing with the rule could be discussed once the overall structure of parts two and three was clearer.

## 17. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR ON ARTICLE 26 BIS

243. The Special Rapporteur remarked that it had been generally agreed that an article on the exhaustion of local remedies should be retained in the draft articles, and that the article could be reformulated in broader terms. It had also been generally agreed that the article should not prejudice the nature of the obligation of the exhaustion of local remedies, which could vary from one situation to another; and that the Commission should be careful not to bypass the obligation of the exhaustion of local remedies, for example, having regard to the question of counter-measures and, to that end, should specify the consequences of the obligation, in particular the time when the rule applied in the case of an individual breach.

<sup>203</sup> The formulation read as follows:

"The State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State"

(League of Nations, *Acts of the Conference for the Codification of International Law* (The Hague, 13 March-12 April 1930), vol. IV, *Minutes of the Third Committee* (C.351(c).M.145(c).1930.V), p. 236).

<sup>202</sup> *Yearbook . . . 1977*, vol. II (Part Two), pp. 30 et seq.

18. CHAPTER IV (IMPLICATION OF A STATE IN THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE)

(a) *Approach to chapter IV by the Special Rapporteur*

244. The Special Rapporteur explained that chapter IV of the draft articles dealt essentially with the question whether a State that had induced or assisted another State to commit an internationally wrongful act was itself also responsible for the commission of a wrongful act. Chapter I, section B, of the second report contained an introduction on the scope of chapter IV and an analysis of articles 27 and 28 and the annex to the second report presented a brief comparative analysis of the practice of certain national legal systems with regard to interference with contractual rights, in other words, the question whether inducing others to breach their contractual obligations constituted a wrongful act. The comparative analysis showed that legal practice in that field was very diverse, but also that chapter IV seemed to have been strongly influenced by the principle of liability applicable to interference with contractual rights under French law. According to that principle, anyone who knowingly assisted another in committing an act that was wrongful for that other was also responsible. In practice, however, that principle was often nuanced. German law adopted a restrictive position on that question, whereas English law adopted an intermediate position, whereby anyone who knowingly induced another person to breach a contractual obligation could be held liable for a wrongful act, but there might be grounds justifying his conduct. The analogies had their limitations, but it had been interesting to note that chapter IV transposed a general assumption of responsibility from a national legal system and that had proved a source of difficulties.

245. Some of the provisions of articles 27 and 28 dealt with primary rules of substantive law. By reconceptualizing chapter IV slightly, it was possible to bring it into the framework of secondary rules. Having regard to the explanation and examples given in the commentary, chapter IV should be seen as essentially concerned with situations in which a State induced another State to breach a rule of international law by which the inducing State was itself bound. A State could not escape responsibility for committing, through another State, an act for which it would be held responsible if it had itself committed that act. Some legal systems might resolve that problem by applying doctrines of agency. But that approach was not reflected exactly in chapter II. In any event, it seemed appropriate, in the context of chapter IV, to stress the condition that, in order for the responsibility of a State to arise, that State must itself be bound by the relevant obligation. It was that idea, and the desire not to trespass into the field of primary rules, that had inspired the revised text of article 27. It was also significant that no Government had argued for the complete deletion of chapter IV. The task now was to make chapter IV coherent with the framework of the text.

246. The draft articles were based on the proposition that each State was responsible for its own wrongful conduct, in other words, for conduct attributable to it under the articles of chapter II or for conduct in which it was implicated under the articles of chapter IV. In his view,

there was no need to go beyond that proposition. That approach might be spelled out more explicitly in the commentary, in the introduction to chapter IV or even in the introduction to chapter II.

247. He proposed replacing the current title of chapter IV, "Implication of a State in the internationally wrongful act of another State" by the title "Responsibility of a State for the acts of another State" because he did not think it possible to assume that the act committed by the other State would be internationally wrongful, as the act might be held not to be wrongful under the provisions of chapter V, especially article 31.

248. Article 28, paragraph 3, was a "without prejudice" clause that must be applied to the whole of chapter IV and he proposed that it should be drafted as a separate article 28 bis.

(b) *Summary of the debate on the approach to chapter IV*

249. There was a general view, albeit not unanimous, that chapter IV as drafted on first reading was problematic and should be reconsidered. It was noted that chapter IV, adopted on first reading, did not take account of possibilities other than the criminal law or public law approach. Consequently other norms such as *jus cogens* and *erga omnes* obligations had to be taken into account in the new formulation. Support was expressed for the Special Rapporteur's approach, which did this, albeit indirectly. However, it was noted that the proposed texts by the Special Rapporteur also contained a number of problems. It was important, it was noted, to review the Commission's theoretical premises and the positioning of the various articles of the draft, which was based on a new, more "objective", paradigm in which the commission of a wrongful act entailed responsibility even when there was no damage.

250. Some members were of the view that even though the Special Rapporteur's redraft of the articles of chapter IV was a vast improvement on the text adopted on first reading, the articles of this chapter would rarely be applied in practice and that the matters dealt with in these articles should be left to primary rules and the rules on attribution. Also in taking on coercion, the Commission was entering difficult terrain of defining coercion. The deletion of the chapter would allow the "purity" of the draft articles as an exercise in secondary rules to be retained.

251. It was also said that the original articles 27 and 28 were much influenced by the concept of crime dealt with in article 19. The Special Rapporteur was right to raise the question whether there should be a general rule applicable equally to bilateral treaties and peremptory norms.

(c) *Concluding remarks of the Special Rapporteur on the approach to chapter IV*

252. The Special Rapporteur said that in his view the Commission must remain faithful to the fundamental principles of the draft articles, while being conscious that in some situations the draft articles unavoidably touched

on the area of primary rules. He agreed that some elements of the text in chapter IV must be appreciated having regard to the economy of the draft articles and to the legal tradition. What must certainly be excluded was the adoption of secondary rules which depended for their content on a judgement as to the content of particular primary rules. He pointed out that by definition, the rules in the draft articles were of a general character applicable to all primary rules or at least to certain general categories of primary rules. He agreed that chapter IV did not contain only secondary rules in the strict sense of the term. However, in his view, articles 27 and 28 had a place in the draft articles, first because they dealt with questions analogous to problems of attribution, and secondly, at least in respect to coercion, because of the relationship with the excuse provided for in article 31. So, in his view, it was important, as a matter of principle, not to adopt too rigid a position and not to push the analysis of the scope of chapter IV too far.

(d) *Introduction by the Special Rapporteur of article 27 (Assistance or direction to another State to commit an internationally wrongful act)*<sup>204</sup>

253. The Special Rapporteur stated that international law based itself on the general rule that a treaty created neither obligations nor rights for a third State without its consent (art. 34 of the 1969 Vienna Convention), a principle also expressed in the Latin maxim *pacta tertiis nec nocent nec prosunt*. Yet, in its original form, article 27, adopted on first reading, seemed to violate that principle, for it raised the problem of the responsibility of a third State not bound by the obligation in question if it had deliberately caused a breach of that obligation. That provision seemed, first, to be a substantive rule and not a secondary rule; and secondly, to be unjustified. Its scope was much too broad, for, while there might well be situations in which a State that induced another State to breach a bilateral treaty ought to be considered as having committed a wrongful act, such cases were rare.

254. There was an extremely wide range of situations in which States acted in some sense jointly in producing an internationally wrongful act. It had been pointed out that article 27 did not address all those cases, particularly the situation in which States acted collectively through an international organization, where the conduct producing the internationally wrongful act was that of the organs of the organization and was not as such attributable to the States. The question was to what extent the States which, collectively, procured or tolerated the conduct in question could be held responsible for doing so. It had been decided at the fiftieth session of the Commission that that

<sup>204</sup> The text of article 27 proposed by the Special Rapporteur reads as follows:

“Article 27. *Assistance or direction to another State to commit an internationally wrongful act*

“A State which aids or assists, or directs and controls, another State in the commission of an internationally wrongful act is internationally responsible for doing so if:

“(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

“(b) The act would be internationally wrongful if committed by that State.”

See paragraph 212 of his second report.

question raised the issue of the responsibility of international organizations and should not be dealt with in the framework of the draft articles, as it went beyond the realm of the responsibility of States.<sup>205</sup> However, there were other situations in which States acted collectively without acting through separate legal persons and the Commission would have to return to that question in the context of part two, when dealing with restitution and compensation.

255. Moreover, because, as he had explained, he did not think that, in the framework of secondary rules, at least in the context of article 27, it should be considered that States incurred responsibility in case of breaches of obligations other than those by which they were themselves bound, he proposed that article 27 as adopted on first reading should be amended to establish that State responsibility arose on two conditions: first, that the implicated State had acted with knowledge of the circumstances of the internationally wrongful act and, secondly, that the act in question would be internationally wrongful if it had been committed by that State. The original wording of article 27 was too vague. Furthermore, the words “rendered for the commission of an internationally wrongful act” were ambiguous and unclear, particularly if account was taken of aid programmes, for it might be that the aid provided was used for the commission of an internationally wrongful act. In order to respect the *pacta tertiis nec nocent nec prosunt* principle, it was important to make it clear that a State that had assisted another State incurred responsibility only if the act performed would have been wrongful if it had committed it itself. Thus, the new text proposed in the second report considerably limited the scope of article 27 and set forth what could properly be regarded as a secondary principle of responsibility.

(e) *Summary of the debate on article 27*

256. Support was expressed for the general purpose of article 27. However, views differed as to the utility of the retention of the article as well as some of the concepts used in the text.

257. Those members who had preferred the deletion of chapter IV as a whole, also had difficulties with article 27. It was pointed out that article 27 presupposed the existence of a general rule of international law that prohibited the rendering of aid or assistance in the commission of an internationally wrongful act. It was doubtful that any such rule existed, at least in customary international law. Even if such a rule existed, it belonged in the realm of primary rules, which did not fall within the Commission’s remit.

258. Questions were also raised with respect to the meaning of the phrase “with knowledge of the circumstances of the internationally wrongful act”. Did it mean that the assisting State must have the intention of facilitating the commission of the internationally wrongful act, or was it sufficient that it had knowledge of the fact that the assisted State would use the aid or assistance to commit an internationally wrongful act? What should be done

<sup>205</sup> See *Yearbook . . . 1998*, vol. II (Part Two), p. 87, para. 446.

about cases of uncertainty, e.g. where there was a risk that the assisted State would so act, but it was not certain?

259. The view was also expressed that by addressing in his proposed new article 27 two distinct cases, covered by article 27 and article 28, paragraph 1, the Special Rapporteur had complicated rather than simplified things. The two cases were very different. Article 27 as adopted on first reading dealt with two separate internationally wrongful acts: the act of a State which by aid or assistance facilitated the commission of an internationally wrongful act by another State, and the unlawful act of that other State, which constituted the principal breach. In contrast, article 28, paragraph 1, dealt with a single internationally wrongful act which was attributable to a State exercising the power of direction or control of another State. The *raison d'être* of responsibility differed in the two cases. In the first case (art. 27) it was intentional participation in the commission of a wrongful act, i.e. complicity; in the second case (art. 28, para. 1) it was the incapacity of the subordinate State to act freely at the international level. The criterion was therefore absolute: a State exercising direction or control was automatically responsible even if it was unaware of the commission of the wrongful act by the subordinate State. Thus, the Special Rapporteur's first condition (proposed art. 27, subpara. (a)) was fine for article 27 adopted on first reading but not for article 28, paragraph 1.

260. The comment was made that article 27 dealt with assistance by one State to another, but experience showed that States often committed a wrongful act jointly, with each bearing equal responsibility. In such cases the requirements of article 27 on awareness were irrelevant. Joint conduct of States carried out within the framework of an international organization should be addressed in the articles on the responsibility of such organizations. However, the draft articles should address as a separate issue the responsibility of States for the joint commission of wrongful acts. It was not of particular significance to the Commission whether such acts were committed under the auspices of an organization. The situation was such a topical one that the Commission could not defer a decision until it had dealt with the articles on the responsibility of international organizations.

261. It was suggested that article 27 was torn between the traditional bilateralist position and new considerations of community interest and public order. On the other hand article 27 was a case of progressive development of international law, but the provision manifested a certain hesitation about going too far. Thus, complicity was taken into account, but not incitement, although the latter weighed heavier in criminal law. Article 27 should include a reference to "material" or "essential" aid or assistance, which was important enough to appear in the text of the article itself. Furthermore, when addressing the question of "crimes", the Commission should consider whether the extent of a third State's implication in the case of a "crime" could be greater than in the case of a "delict".

262. It was pointed out that the wording proposed by the Special Rapporteur rightly assumed that the aiding or assisting State should also be under an obligation not to commit the internationally wrongful act. In the case of a human rights treaty, however, all States parties were

under an obligation to prevent a violation of human rights in any specific circumstances covered by the treaty. That was an *erga omnes* obligation. Aiding or assisting would thus be relevant to such cases. Article 27, subparagraph (b) appeared to have excluded from its scope strictly bilateral treaty obligations in which State C was not bound by any rule contained in a treaty concluded between States A and B. On the other hand, as it currently stood, article 27 covered not only the case of obligations *erga omnes* but also of obligations under other rules to which both States were subject.

263. It was also stated that subparagraph (a) was pleonastic, as the elements of knowledge were already built into the conditions of aiding, assisting, directing and controlling. It was also likely to cause misunderstanding, as it might actually set conditions of responsibility, and set them at rather a high level. The article would be much improved by deleting subparagraph (a), with subparagraph (b) retained as the sole condition.

264. A preference was also expressed for the text of article 27 adopted on first reading. That text according to this view suggested that aid or assistance was wrongful even if, taken alone, it would not constitute the breach of an international obligation. That very useful clarification did not appear in the proposed article 27.

(f) *Concluding remarks of the Special Rapporteur on article 27*

265. The Special Rapporteur said that he had joined the notion of aid or assistance to that of direction and control not because he thought they were similar but on the grounds that they were subject to the same regime. He agreed that there were three situations under chapter IV: aid and assistance, direction and control, and coercion, and that the conditions for each needed to be considered separately. He also agreed with the view that the level at which one set aid and assistance depended on whether article 27, subparagraph (a), was retained. If subparagraph (a) was deleted, aid and assistance would have to be further particularized. The reason why he had proposed that the wording should merely be "aids or assists" was that the requirements contained in subparagraph (a) alleviated any difficulties regarding the threshold.

266. He further agreed that there might be a need for an article making it clear in chapter II that where more than one State engaged in the conduct, it was attributable to each of them. Chapter IV was not concerned with joint conduct in the proper sense of the word—which would include a situation in which two States acted through a joint organ (other than an international organization). Where a joint organ acted on behalf of several States—for example, in launching a satellite—that constituted conduct of each of those States, attributable to them under chapter II. Chapter IV was concerned with a different situation in which a State did not itself carry out the conduct but assisted, directed or coerced conduct, which nevertheless remained the conduct of another State. There was absolutely no intention to exclude the case of joint action. The fact that any joint action might in some sense be coordinated by an international organization did not mean that the States concerned were not themselves

carrying out the conduct. If it was the State's agent that engaged in the act, the State was responsible for the acts of its agent or organ, even though there was some umbrella coordinating role of an international organization. That situation was not excluded by the proposed subparagraph (a). The problems of joint conduct should thus be seen within the framework of chapter II. The Drafting Committee should consider whether some clarification of that point was required in chapter II itself, or whether it could be adequately dealt with in a commentary forming part of the *chapeau* to chapter II.

267. The Special Rapporteur also agreed with the proposal that articles 27 and 28 should include a greater element of materiality, preferably in the commentary but possibly also in the articles themselves, without going too far in elaborating general rules. With regard to terminology, he noted that the definition of a "material" breach given in the 1969 Vienna Convention was more reminiscent of a fundamental or repudiatory breach striking at the core of the obligation that had been breached, and thus differed from the criterion of materiality applicable in article 27. But the term would have different meanings in different contexts; some clarification was necessary, though without incorporating whole segments of criminal law in the articles.

(g) *Introduction by the Special Rapporteur of article 28 (Responsibility of a State for coercion of another State)*<sup>206</sup>

268. The Special Rapporteur stated that he had proposed a new article 28 because the wording of article 28 as adopted on first reading had raised a number of problems. To begin with, as several Governments had pointed out, the term "coercion" as used in paragraph 2 was imprecise. He took the term in the strong sense, as something more than persuasion, encouragement or inducement, but as not necessarily limited to unlawful use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. It could be argued that the same approach should be adopted for article 28 as was now adopted in the case of article 27, namely, that the coercing State should be regarded as responsible only for an act which would have been internationally wrongful if it had committed it itself. However, that would lead to difficulties for, in certain circumstances provided for in chapter V, the acting State could be excused from responsibility by reason of force majeure. One could acknowledge that coercion itself was not unlawful, but that it was unlawful for a State to coerce another State to commit an unlawful act. The coercing State must of course have acted with knowledge of the circumstances. He thus proposed that article 28, paragraph 2, should be amended to make it clearer and also that it should be the subject of a separate article.

<sup>206</sup> The text of article 28 proposed by the Special Rapporteur reads as follows:

*"Article 28. Responsibility of a State for coercion of another State"*

"A State which, with knowledge of the circumstances, coerces another State to commit an act which, but for the coercion, would be an internationally wrongful act of the latter State is internationally responsible for the act."

See paragraph 212 of his second report.

269. As paragraph 1 of article 28 was too broad in scope, but had points in common with article 27, it would be deleted and some of its components taken up in new article 27 proposed in the second report or in a separate article. The mere fact that a State could have prevented another State from committing an internationally wrongful act by reason of some abstract power of direction or control did not seem to be a sufficient basis for saying that the passive State was internationally responsible. Of course, matters were quite different when a primary obligation imposed on a State, as it did in the case of humanitarian law, a positive obligation of prevention of breaches by others.

(h) *Summary of the debate on article 28*

270. While expressing difficulties with the text of article 28 adopted on first reading, many members raised a number of questions about the new formulation and expressed concerns about how the notion of coercion should be addressed in article 28.

271. General support was expressed for the Special Rapporteur's view that article 28 was concerned with actual direction and control and not merely power to exercise direction or control, possibly by virtue of a treaty, and that coercion must attain a certain threshold. However, coercion could be introduced as a form of implication of a third State without entering into a discussion on when coercion became illegal. In that connection the title of the article was not consistent with its content.

272. The observation was made that the exact meaning of "coercion" in the context of article 28 was unclear. It was also unclear whether all reprisals and countermeasures could be included in the meaning of that term. According to the commentary to article 28 adopted on first reading, coercion is not necessarily limited to the threat of or use of armed force, and should cover any action seriously limiting the freedom of decision of the State which suffers it—any measures making it extremely difficult for that State to act differently from what is required by the coercing State. In the Special Rapporteur's view, coercion for this purpose is nothing less than conduct which forces the will of the coerced State, giving it no effective choice but to comply with the wishes of the coercing State. Thus it is not enough that compliance with the obligation is made more difficult or onerous; the coercing State must coerce the very act which is internationally wrongful. As those criteria were essential for determining the grounds for coercion and its consequences, it would be desirable to include in the draft articles a definition of the terms used, duly defining the nature and scope of coercion and making it clear that the term was not confined to the use of armed force, but could also include economic pressure of a severe kind.

273. It was also stated that if article 28 were to include only unlawful coercion, the third State would risk not being compensated if coercion was lawful and the coerced State could claim force majeure to escape responsibility. The third State would have to pay a price, in the interest, perhaps, of international law. Thus if the condition contained in article 27, subparagraph (b), that "the act would be internationally wrongful if committed by that

State”, is also added to article 28 as an alternative condition to that of unlawful use of force, the coercing State should assume responsibility towards the third State because it would be aware of the possibility of a breach occurring.

274. The Special Rapporteur’s view that there was no reason why article 28, paragraph 2, should be limited to breaches of obligations by which the coercing State was bound was found unconvincing. In any event, the question was not whether a certain type of coercion was lawful or unlawful, but whether, if the coercing State was not under an obligation into which the coerced State had entered with other States, it should be held responsible for the breach of the obligation. The problem was raised in the new version of article 28 more acutely. In this context a question was also raised about the meaning of the phrase when a State “with knowledge of the circumstances”, coerced another State to commit a wrongful act. An example was given: State A became a party to a treaty binding several States not to sell a primary commodity below a certain fixed price. State B coerced State A into selling the product at a price below the floor set in the agreement, not through force, but through economic pressure. Such coercion was not unlawful under international law. There were serious doubts as to whether State B could be held responsible for the breach.

275. The comment was made that the terms “direction and control” were more closely related to “coercion”. One possible approach would be to draft three separate articles, the first dealing with aid and assistance, the second with direction and control, and the third with coercion. An alternative approach would be to revert to the article as adopted on first reading: aid and assistance would be covered by article 27, with the addition of the two provisos, direction and control by article 28, paragraph 1, with clarifications in the commentary, and coercion by article 28, paragraph 2.

276. On the other hand, a view was also expressed that article 28 adopted on first reading did not give rise to any particular problems. The revised text was also found acceptable, except for the phrase “but for the coercion”, which, according to this view, was superfluous.

(i) *Introduction by the Special Rapporteur of article 28 bis (Effect of this chapter)*<sup>207</sup>

277. The Special Rapporteur said that paragraph 3 of article 28 preserved the responsibility of the State which has committed the internationally wrongful act, albeit under the direction or control or subject to the coercion of another State. The same saving clause would be appro-

<sup>207</sup> The text of article 28 bis proposed by the Special Rapporteur reads as follows:

“Article 28 bis. *Effect of this chapter*

“This chapter is without prejudice to:

“(a) The international responsibility, under the other provisions of the present articles, of the State which committed the act in question;

“(b) Any other ground for establishing the responsibility of any State which is implicated in that act.”

Ibid.

priate for article 27. In addition, it should be made clear that the provisions of chapter IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State.

(j) *Summary of the debate on article 28 bis*

278. Support was expressed for the Special Rapporteur’s proposal for article 28 bis dealing with the effects of chapter IV as a whole. It was suggested, however, that the text of the article should be made clearer.

19. APPROACH TO CHAPTER V BY THE SPECIAL RAPPORTEUR

279. In introducing chapter I, section C, of his second report, dealing with part one, chapter V, of the draft, entitled “Circumstances precluding wrongfulness”, the Special Rapporteur explained that at issue were general “excuses” which were available to States in respect of conduct which would otherwise constitute a breach of an international obligation. Chapter V must therefore be seen in relation to chapter III.

280. In commenting on chapter V, no Government doubted the need for it. One Government proposed lumping all of chapter V into a single article, but there were important distinctions between different conditions which would be obscured by so doing. The chapter had been very extensively referred to in the literature and in judicial decisions and heavily relied on, for example in the *Rainbow Warrior* arbitration<sup>208</sup> and the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*.<sup>209</sup>

281. As to the concept of circumstances precluding wrongfulness, the Special Rapporteur observed that the initial proposition was that the draft articles were not concerned with formulating the content of primary rules, but with the framework of secondary rules of responsibility, yet it was the primary rules which determined what was wrongful. Hence, a difficulty could arise in distinguishing between the proper content of the primary rules and the notion of circumstances precluding wrongfulness.

282. The commentary on the text adopted on first reading on that point went so far as to say that the circumstances precluding wrongfulness actually brought about the temporary or even definitive setting aside of the obligation. That notion was difficult to square with the idea of secondary rules, or the distinction between an excuse in respect of the performance of an obligation and the continued existence of the obligation. In that regard, ICJ had been very clear in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*,<sup>210</sup> where it stated that although Hungary might be entitled to rely on necessity as a ground for excusing its non-performance of the Treaty on the Construction and Operation

<sup>208</sup> See footnote 176 above.

<sup>209</sup> *Judgment* (see footnote 178 above), at p. 63, see also p. 38.

<sup>210</sup> See footnote 178 above.

of the Gabčíkovo-Nagymaros Barrage System, of 1977, the Treaty nonetheless continued to exist. The plea of necessity, even if justified, had not terminated the Treaty. As soon as the state of necessity ceased, the duty to comply with the Treaty revived.

283. Consequently, in considering, for example, whether the excuse of necessity or force majeure should apply, it was important to have regard to the obligation itself. If the obligation was set aside, it might well be that the circumstances in question were conditions of the primary obligation and not circumstances precluding wrongfulness as envisaged in chapter V. There was clearly a difference between an excuse for non-performance of an obligation and a ground for its termination in the future.

284. Another important difference between the question of the continued validity of an obligation and the question of the excuse for non-performance, was that, generally speaking, the former required action by one of the parties to put an end to the obligation. In other words, the State concerned must elect to take action.

285. A third difference between circumstances precluding wrongfulness and the termination of obligations was that the circumstances precluding wrongfulness applied with regard to non-treaty obligations as well as treaty obligations, and it was very difficult for one State to terminate a non-treaty obligation, for example, an obligation under customary international law. There might be circumstances in which they could be suspended, although there was very little State practice even in that regard.

286. The Special Rapporteur observed that one Government in its comments had said that there seemed to be a difference among the circumstances precluding wrongfulness. Some appeared to make the conduct lawful, as it were, but it was not certain that others did. For example, an action taken in a state of distress or necessity might be excused, but in relation to necessity, in particular, the action was obviously being taken *faute de mieux*, the situation was undesirable and it ought to be terminated as soon as possible. This was a different situation from that in cases of consent or self-defence. The distinction seemed to be that between a justification and an excuse. The Commission need not, perhaps, go so far as to make that distinction in chapter V itself, although the matter should be discussed in the commentary.

287. In his second report, the Special Rapporteur proposed a slight change in the order in which the circumstances precluding wrongfulness were presented in chapter V. Because of its importance, the chapter began with article 29 bis, dealing with *jus cogens*—the deletion of article 29 having been proposed by the Special Rapporteur. Article 29 ter on self-defence, which might be said to be cognate with *jus cogens*, followed. Thereafter came article 30 on countermeasures, and article 30 bis, dealing with non-compliance caused by prior non-compliance, which was analogous to countermeasures. Lastly came the three special cases of force majeure, distress and state of necessity and the two procedural provisions.

288. The Special Rapporteur explained that he had tried to resolve some particular problems and to reorganize the chapter so as to make its underlying conceptual structure clearer.

## 20. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF ARTICLE 29 (CONSENT).<sup>211</sup>

289. The Special Rapporteur stated that it was evident from the commentary to article 29 that the article related exclusively to consent given in advance of the act. Consent given after the event to conduct which was unlawful but might have been lawful if the consent had been given beforehand was clearly an example of waiver, which was not a matter for part one.

290. A number of States had raised difficulties with the formulation of article 29, including the notion of consent validly given, because it implied a whole body of rules about when the consent was given, by whom, in relation to what, and so on.

291. A more fundamental problem was whether consent constituted a circumstance precluding wrongfulness at all. A serious question arose as to whether there was any room for consent as a circumstance precluding wrongfulness. He conceded that some obligations could not be dispensed with and they applied irrespective of consent, and certainly of the consent of other States. For example, one State could not dispense another State from complying with human rights obligations. The same applied to norms of *jus cogens*, although consent could sometimes be relevant in the application of such norms; for instance, consent to the use of armed force on the territory of the consenting State would normally be effective, even though the underlying norm of *jus cogens* continued to exist.

292. For the reasons explained in his second report, he believed that there were problems with the formulation of article 29. In his view, it seemed better to conceptualize consent given in advance as something which the primary rule permitted. On this view, article 29 could be deleted.

## 21. SUMMARY OF THE DEBATE ON ARTICLE 29

293. Differing views were expressed regarding the proposed deletion of consent as a circumstance precluding wrongfulness. While support was expressed for this proposal, a majority of members favoured its retention and supported the referral of article 29, as adopted on first reading, to the Drafting Committee.

294. For those members who supported the deletion, consent given in advance could be seen as a manifestation of the primary rule, while consent given after the event involved waiver. It was recognized that in doing so the Commission was taking a broad view of primary rules—an approach deemed useful.

295. It was also noted, by way of supporting the proposed deletion, that too many abuses had been committed in the name of prior consent validly given. Furthermore, whether or not consent had been freely given in advance was a crucial question of fact that was fraught with diffi-

<sup>211</sup> For the text of article 29 as adopted on first reading, see *Yearbook . . . 1996* (footnote 165 above). For the analysis of this article by the Special Rapporteur, see paragraphs 230 to 241 of his second report.

culties, for it had often been invoked by States to attempt to justify what were blatant acts of intervention.

296. Support was also expressed for the view that consent rendered an obligation non-existent and therefore the consent was not a circumstance precluding wrongfulness since the conduct in question had been legal at the time of its occurrence.

297. In favour of the retention of the article, it was said that there could be situations in which consent had retro-active effect. The Special Rapporteur agreed that cases of valid retrospective consent which did not merely constitute a waiver could indeed arise. In his view, however, such cases should properly be dealt with in part three of the draft articles.

298. It was further noted that deleting consent from the list of circumstances precluding wrongfulness could be interpreted as the abrogation of an important principle. In this regard, it was pointed out that no State had objected to the principle embodied in article 29.

299. The Special Rapporteur's argument that all primary rules provided for the possibility of valid consent to an act not in conformity with an obligation, was unconvincing. From the point of view of the victim, it may be that no wrongful act could occur where valid consent had been given; but from the point of view of third States, the act could still be wrongful unless it was established that their consent had also been given.

300. The view was expressed that the fact that there had been consent did not mean that the rule from which the obligation derived ceased to exist or even that it had been suspended. It was essential to distinguish clearly between the case in which consent given in a particular situation precluded wrongfulness and cases of the suspension of a treaty under articles 57 and 65 of the 1969 Vienna Convention or derogation from a rule of general international law (customary law) by agreement.

301. It was argued that just as article 62 of the 1969 Vienna Convention elaborated on the *rebus sic stantibus* principle, so the draft articles on State responsibility should elaborate on the principle of consent as a circumstance precluding wrongfulness.

302. As to the concern that the provision leaves some scope for abuse it was doubted that its deletion would provide States, and in particular smaller and weaker ones, with better protection. Deleting it would simply shift the problem by requiring States to consider whether consent was implied and to undertake a process of interpretation for want of clearly stated limits. It was preferable that article 29 be drafted so as to guard against possible abuse.

## 22. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR ON ARTICLE 29

303. The Special Rapporteur stated that his concern had been to situate the idea of consent within the framework of the distinction between primary and secondary rules, which had been made in chapter V. He noted that some members did not consider article 29 as relating to the issue of consent given in advance in a treaty, which they

saw not as a circumstance precluding wrongfulness within the meaning of chapter V, but as part of *lex specialis*. On the other hand, there could be cases where consent was given at the relevant time, without it being specifically envisaged by the primary rule. The maxim *volenti non fit injuria* was widely accepted and, according to this view, should be reflected in chapter V of part one.

304. There could, he agreed, be some situations in which the only excuse or justification for a conduct was consent that had remained in force at the time of the act. That was especially true in the case of the use of force. If a State consented in advance to the use of force in its territory and then withdrew its consent, recourse to force became wrongful, even if the State had withdrawn its consent ill-advisedly. It was doubtful whether a State could waive its right to withdraw its consent to the use of force in its territory by another State.

305. It was true that Governments had not criticized the inclusion of article 29 as such, but they had expressed concerns about its wording, concerns which went beyond what some of the comments suggested. On balance, he was receptive to the argument that deletion of the article could give a false impression. The question was where exactly the boundary between primary rules and secondary rules lay, and the Commission could adjust that boundary to take account of the general principle of consent.

## 23. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF ARTICLE 29 BIS (COMPLIANCE WITH A PEREMPTORY NORM (*JUS COGENS*))<sup>212</sup>

306. The Special Rapporteur observed that a circumstance that had not been covered by the draft articles was that of performance in conflict with a peremptory norm. It had been expressly proposed by Fitzmaurice, as Special Rapporteur on the law of treaties<sup>213</sup> and was referred to in the literature. The problem stemmed partly from the way in which the system established by the 1969 Vienna Convention operated in cases of *jus cogens*. The invocation of *jus cogens* invalidated the treaty as a whole. Such cases were very rare. Usually, breaches of *jus cogens* occurred through the continued performance of a perfectly normal treaty in the event of, for example, a proposed planned aggression or the supply of aid to a regime that became genocidal. Such breaches were thus to be considered as "occasional" or "incidental": they did not arise from the terms of the treaty as such but from the circumstances which had arisen.

<sup>212</sup> The text of article 29 bis proposed by the Special Rapporteur reads as follows:

"Article 29 bis. Compliance with a peremptory norm (*jus cogens*)

"The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is required in the circumstances by a peremptory norm of general international law."

For the analysis of this article by the Special Rapporteur, see paragraphs 306 to 313 and 356 of his second report.

<sup>213</sup> See his fourth report (footnote 175 above), p. 46.

307. Under the 1969 Vienna Convention only parties to a treaty are entitled to invoke inconsistency of the treaty with *jus cogens*, the implication apparently being that the parties might have the choice of electing in favour of the treaty and against the norm. The problem of inconsistency could also arise in connection with other obligations under general international law. For example, the obligation to allow transit passage through a strait might in certain exceptional circumstances be incompatible with a norm of *jus cogens*. Unless such cases of occasional inconsistency were recognized, the potential invalidating effects of *jus cogens* on the underlying obligation seemed excessive. He thus proposed a provision to that effect.

308. The Special Rapporteur noted that the Commission had agreed, when addressing the issue in the context of article 18, paragraph 2, in chapter III, that it would be necessary to revert to the question of the supervening norm of *jus cogens* if it was not satisfactorily resolved in chapter V. Nevertheless, article 18, paragraph 2, was concerned only with the unusual case of a new norm of *jus cogens*. A new and unforeseen conflict was more likely to arise than a new peremptory norm. Chapter V was the natural place for the article and had the additional advantage of resolving the problem raised in article 18, paragraph 2.

#### 24. SUMMARY OF THE DEBATE ON ARTICLE 29 BIS

309. Differing views were expressed regarding the necessity of including proposed article 29 bis. In the view of some, the provision was absolutely essential because chapter V would be incomplete without it. The need to establish a circumstance precluding wrongfulness in order to exonerate States which lived up to their obligations arising from *jus cogens* was undeniable. Others indicated that, while article 29 bis was perhaps not absolutely necessary, its inclusion could do no harm.

310. A further view was expressed that it was difficult to imagine a situation in which the rule provided for in article 29 bis would be applicable, since the peremptory norm would always determine the content of the obligation.

311. Reference was further made to the strong doubts about *jus cogens* expressed by a number of Governments, which could not be overlooked. It was noted in this regard that the doubts related not so much to the substantive values embodied in *jus cogens* norms, such as those prohibiting genocide, slavery, war crimes, crimes against humanity and others, but rather to the uncertainty surrounding peremptory norms and to the risk of destabilizing treaty relations. It was observed that ICJ had up to now not used the term *jus cogens* in any judgment or advisory opinion, while endorsing the concept of “intransgressible principles” in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.<sup>214</sup> Hence caution was advised in deciding whether compliance with peremptory norms should be included in chapter V.

312. There was a further difficulty with article 29 bis in that it did not make clear who was to implement the peremptory norm. The provision could be read as implying that any State could, with very serious consequences, arrogate to itself the right to act as an international policeman by invoking, for example, human rights. This view was disputed by others, however, and the example was given of a State which in selling arms to another State discovered that the purchasing State intended to use those arms to commit genocide. In that scenario, the danger to the international order resided in the potential genocide rather than in the seller’s decision to refuse to proceed with the sale for the time being.

313. It was also suggested that a reference to obligations under Article 103 of the Charter of the United Nations could be included in the proposed article 29 bis.

314. As to the necessity of including a definition of a “peremptory norm”, it was noted that while the Special Rapporteur had stated that it was not necessary to do so, that had already been done in article 29, paragraph 2, adopted on first reading. The view was expressed that the definition, which continued to be disputed, had to appear somewhere in the draft, but not necessarily in the place where it was located at present. The draft also did not necessarily have to reproduce the definition given in article 53 of the 1969 Vienna Convention, which had been drafted for the purposes of treaty law. Others said, however, that to involve the Commission in the task of elaborating a new definition of *jus cogens* would be unrealistic and inappropriate.

315. The suggestion was made in the Commission that a more general provision on the subject of *jus cogens*, which might or might not reproduce the definition contained in article 53 of the 1969 Vienna Convention, be included in chapter I. Such a provision establishing a general link between the doctrine of *jus cogens* and the subject of State responsibility could obviate the need for article 29 bis and other provisions dealing with peremptory norms.

#### 25. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR ON ARTICLE 29 BIS

316. The Special Rapporteur recalled that the debate on article 29 had not revealed any disagreement on the basic proposition that consent validly given could have the effect of precluding State responsibility. Rather, the point at issue had been whether that proposition should be dealt with in chapter V. Except for the suggestion to formulate a general provision on peremptory norms to be included in chapter I, no equivalent conceptual concern had been expressed about the placing of article 29 bis. The doubts had been about the existence of any practical examples because, by reason of their operation, norms of *jus cogens* would eliminate the obligation itself rather than simply its consequences.

317. In fact the examples adduced had tended to relate to the use of force, which entailed the operation of Article 103 of the Charter of the United Nations, and this would be covered by article 39 of the draft on the assumption that that article would apply to the draft as a whole.

<sup>214</sup> I.C.J. Reports 1996, p. 226, at p. 257, para. 79.

Yet situations were more likely to arise in consequence of other criminal activities, such as genocide, which all States were required to prevent. He saw no reason why, in the case of genocide, the obligation of prevention did not have the same status as the obligation not to commit genocide.

318. The debate had also revealed a strongly-held conviction that the law of State responsibility was affected by the notion of obligation to the international community at large, even if some members of the Commission had more difficulty than others in identifying those effects.

26. INTRODUCTION BY THE SPECIAL RAPPOREUR OF ARTICLE 29 TER (SELF-DEFENCE)<sup>215</sup>

319. The Special Rapporteur remarked that self-defence had never been omitted from any list of the circumstances precluding wrongfulness. The only minor argument against article 34 as adopted on first reading, so far as Government comments were concerned, involved the exact formulation by reference to the principles of the Charter of the United Nations. In his view, the notion of self-defence in international law was that which was referred to, but not comprehensively defined, in Article 51 of the Charter.

320. However, the provision (art. 34) as adopted on first reading failed to recall that certain obligations, such as international humanitarian law or non-derogable human rights, were unbreachable even in self-defence. That point should be made in an additional paragraph. Fortunately, ICJ had dealt with the problem in the context of its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.<sup>216</sup> It had been argued that nuclear weapons could not be used if their effect was to violate environmental obligations. The Court had drawn a distinction between general environmental obligations and environmental obligations specifically intended as a condition of total restraint in time of armed conflict. It was only in the latter case that self-defence could not be invoked as a justification. He had therefore proposed a paragraph 2 embodying that idea.

321. One question was whether the article should deal specifically with injury to third States. The assumption underlying the article was that it was concerned with cir-

cumstances precluding wrongfulness as between States acting in self-defence and aggressor States. However, a State acting in self-defence might be entitled to take action against third States. However, there was no need to make an explicit reference to that circumstance, which was adequately covered by the relevant primary rules.

27. SUMMARY OF THE DEBATE ON ARTICLE 29 TER

322. The view was expressed that the article on self-defence should be confined to the provisions of the Charter of the United Nations. Any broader application would create more controversy on an already complex issue of international law. Hence, only the inherent right of individual or collective self-defence set out in Article 51 of the Charter should be envisaged. It was noted that the wording of paragraph 1, which was identical to that proposed in article 34 adopted on first reading, did in fact refer the notion of self-defence to that in Article 51 of the Charter.

323. The view was expressed that there was a right of self-defence that had the contours and limitations of the right recognized in Article 51 of the Charter of the United Nations and no other broader right. It was also noted that although the Charter might not actually confer a right of self-defence, it set forth regulations and limitations relating to the role of the Security Council and the circumstances necessitating armed action.

324. Doubts were expressed regarding the distinction the Special Rapporteur had introduced between the obligation of total restraint and one of lesser restraint.

325. It was also queried where the limit of the applicability of paragraph 2 should be drawn. The view was expressed that it would suffice to explain in the commentary that the word “lawful” in paragraph 1 was to be understood in a way so as to cover the substance of paragraph 2.

326. One possible reading was that paragraph 1 dealt with the issue of *jus ad bellum*. The right existed to use military force in self-defence, and from that point of view, the word “lawful” in the phrase “if the act constitutes a lawful measure of self-defence” would describe the circumstances—the preconditions—for acting in self-defence, in the event of an armed attack for example.

327. In terms of this approach, it was not obvious that the word “lawful” would cover all limitations applicable once a State acted in self-defence, limitations which, in doctrinal terms, were subsumed under the heading of *jus in bello* and should be spelled out. It was argued that these should be retained in paragraph 2 because paragraph 1 could convey the false impression that everything was permissible in self-defence.

328. In this regard, a further view was expressed that the term “lawful”, in particular, if connected with the word “measures”, was indeed a reference to *jus in bello* and deleting it would have no effect whatsoever on the statement regarding *jus ad bellum*. As such, it covered the subject matter of paragraph 2, and therefore it was preferable to leave the provision unchanged.

<sup>215</sup> The text of article 29 ter proposed by the Special Rapporteur reads as follows:

“Article 29 ter. Self-defence

“1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

“2. Paragraph 1 does not apply to international obligations which are expressed or intended to be obligations of total restraint even for States engaged in armed conflict or acting in self-defence, and in particular to obligations of a humanitarian character relating to the protection of the human person in time of armed conflict or national emergency.”

For the analysis of this article by the Special Rapporteur, see paragraphs 292 to 302 of his second report.

<sup>216</sup> *I.C.J. Reports 1996*, p. 226, at p. 242, para. 30.

28. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR ON ARTICLE 29 TER

329. The Special Rapporteur reiterated the fact that there had been a decision by ICJ (see paragraph 320 above) expressly directed to the issue in the framework of environmental obligations, not humanitarian law, and the formulation of paragraph 2 reflected the language employed by the Court, which had been asked to find that environmental obligations overrode self-defence. The Court had ruled that they did so only when they were expressed in such a way as to apply as obligations of total restraint in armed conflict. In his view, paragraph 2 was right; it was not a case of progressive development, but of current law, and the only question was how to enunciate it.

330. He observed that the commentary to article 34, adopted on first reading, had failed to interpret the word “lawful” in the sense that had emerged during the discussion, relating it exclusively to the requirements of proportionality, necessity and an armed attack.

331. Moreover, self-defence in the context of chapter V was not taken as a circumstance precluding wrongfulness only in relation to the use of force. The position was that self-defence was a justification or an excuse, as ICJ had ruled in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in relation to breaches of other obligations, e.g. the obligation not to cause substantial harm to the environment of a neighbouring State. In response to the argument that such obligations prevented the use of nuclear weapons, the Court had stated that, where a State was acting in self-defence, they did not. But there was another category of obligations that had to be complied with even in self-defence. If the Commission wished to take the position that the word “lawful” covered not only *jus ad bellum* but also *jus in bello*, and authorized him to produce a commentary to that effect, paragraph 2 might not be necessary.

29. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF ARTICLE 30 (COUNTERMEASURES IN RESPECT OF AN INTERNATIONALLY WRONGFUL ACT)<sup>217</sup>

332. A preliminary debate on article 30 was held during the Commission’s consideration of chapter V, at which time the Special Rapporteur noted that the fate of the provision was linked to the outcome of the Commission’s consideration of the regime of countermeasures in chapter III of part two. While general agreement was expressed for including an article on countermeasures in chapter V as a circumstance precluding wrongfulness, the Special Rapporteur proposed retaining the text of the provision, as adopted on first reading, in square brackets.

333. Following the completion of its consideration of chapter V, the Commission had the opportunity to consider the question of article 30 further on the basis of chapter I, section D, of the second report (see paragraphs 426-452 below).

<sup>217</sup> For the analysis of this article by the Special Rapporteur, see paragraphs 242 to 249 of his second report.

30. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF ARTICLE 30 BIS (NON-COMPLIANCE CAUSED BY PRIOR NON-COMPLIANCE BY ANOTHER STATE)<sup>218</sup>

334. The Special Rapporteur proposed a second new provision relating to the maxim *exceptio inadimpleti contractus*, which he referred to as “the *exceptio*”. He observed that it was well established in the traditional sources of international law. PCIJ had ruled in the case concerning the *Factory at Chorzów (Jurisdiction)* that “one Party cannot avail himself of the fact that the other has not fulfilled some obligation . . . , if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question”.<sup>219</sup> That principle had been applied in a variety of contexts. The Court had avoided applying it in the case concerning the *Diversion of Water from the Meuse*,<sup>220</sup> but its very avoidance was a tribute to the principle involved since it was incorporated as a principle of interpretation. ICJ had applied it in the context of loss of the right to invoke a ground for terminating a treaty in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*.<sup>221</sup>

335. The Special Rapporteur also referred to the *Klöckner v. Cameroon* case<sup>222</sup> decided by ICSID. An ICSID tribunal had applied the *exceptio* in favour of the respondent State. Citing the *Diversion of Waters from the Meuse* case, it had referred to the fact that the *exceptio* was recognized in international law, but had gone on to treat the *exceptio* as a ground for the termination of the obligation. The decision was subsequently annulled by a review body, which had indicated its understanding that the *exceptio* was a basis not for the termination, but for the suspension, of an obligation. The point on which the decision had been annulled had thus been that a circumstance precluding wrongfulness had been involved, not a ground for the termination of a contract. That decision had, however, involved the law of one State, and not, directly, international law.

336. The *exceptio* had substantial comparative law underpinnings and had been broadly accepted by the Special Rapporteur on the law of treaties, Sir Gerald Fitzmaurice, as a ground for excusing non-performance of treaties.<sup>223</sup> The Special Rapporteur, Willem Riphagen,

<sup>218</sup> The text of article 30 bis proposed by the Special Rapporteur reads as follows:

“Article 30 bis. Non-compliance caused by prior non-compliance by another State

“The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the State has been prevented from acting in conformity with the obligation as a direct result of a prior breach of the same or a related international obligation by another State.”

For the analysis of this article by the Special Rapporteur, see paragraphs 314 to 329 of his second report.

<sup>219</sup> *Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 31.*

<sup>220</sup> *Judgment, 1937, P.C.I.J., Series A/B, No. 70, p. 4.*

<sup>221</sup> See footnote 178 above.

<sup>222</sup> *Klöckner Industrie-Anlagen GmbH and others v. Republic of Cameroon*, Award on the Merits (ICSID Reports (Cambridge University Press, Grotius, 1994), vol. 2, p. 3) at p. 4.

<sup>223</sup> See his fourth report (footnote 175 above), pp. 45-46.

had proposed to deal with it in the framework of what he called “reciprocal countermeasures”.<sup>224</sup>

337. The Special Rapporteur maintained that a clear distinction needed to be drawn between the broad and narrow forms of the *exceptio*. Fitzmaurice had formulated it broadly in respect of any synallagmatic obligation. But the formulation in the case concerning the *Factory at Chorzów* was narrower. Article 80 of the United Nations Convention on Contracts for the International Sale of Goods was an example of the narrow approach.

338. For the reasons stated in chapter I, section C, of his second report, the Special Rapporteur proposed that the narrow version of the *exceptio* should be separately recognized. In his view, it was not enough to deal with it under the law relating to the suspension of treaties because that law required a material breach, which was narrowly defined.

339. On the other hand, the broad or generic form of the *exceptio* had been sufficiently addressed by the law of suspension or termination of treaties in respect of treaty obligations and the law of countermeasures in respect of all obligations. It was thus sufficient to recognize the *Chorzów Factory* form of the *inadimplenti* doctrine as an automatic and temporary excuse for non-compliance with an obligation.

#### 31. SUMMARY OF THE DEBATE ON ARTICLE 30 BIS

340. Diverging views were expressed in regard to the inclusion of the *exceptio* in chapter V. On the one hand, it was noted that it surfaced from time to time in legal textbooks and, in practice, and was cited by States more often than might be thought, in particular in the field of international economic law. Conversely, it was noted that it would be dangerous to codify such a rule since it would give States the opportunity not to perform a synallagmatic obligation without having to go through the carefully drafted limitations on countermeasures, by reacting “tit for tat” without any formalities.

341. Concern was also expressed that the proposed new provision brought together several concepts that were only partially interrelated. A view was expressed that the maxim *inadimplenti non est adimplendum* (not being required to respect an obligation if the other party to the contract did not respect its own) and the *exceptio* that derived from it were always related to contractual obligations, in other words, to treaty obligations in the context of international law. The principle was firmly entrenched in primary rules and had been codified as such in article 60 of the 1969 Vienna Convention. It was not a principle that applied to international law in general and was not applicable in the context of customary law. This view that the *exceptio* related *solely* to *contractual obligations* was, however, contradicted by others.

342. It was suggested that the content of the provision was covered by the article on force majeure, and that it

was possible, when reading article 30 bis in conjunction with article 31, to see in article 30 bis a special case of force majeure. However, it was pointed out that linking force majeure to the situation covered in article 30 bis seemed inappropriate. Furthermore, not all the conditions spelled out in article 31 were applicable to article 30 bis.

343. Support was expressed for the Special Rapporteur’s view that draft article 30 bis was unrelated to article 60 of the 1969 Vienna Convention. Moreover, the purpose of countermeasures, as expressed in article 47, was very different from the purpose of the proposed article embodying a narrow *exceptio*.

344. Others suggested that the matter depended on the scope of the eventual provision on countermeasures, and that it was difficult to refer article 30 bis to the Drafting Committee, thereby separating it from the study of countermeasures. It was thus proposed that article 30 bis be placed in square brackets, without approval or rejection, and that it should be determined during the consideration of countermeasures whether or not it was a separate case to countermeasures.

#### 32. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR ON ARTICLE 30 BIS

345. The Special Rapporteur noted that one of the issues that had arisen during the debate was the proper scope of the codified law of treaties in relation to the draft. The Commission, when elaborating the draft that was to become the 1969 Vienna Convention, could have included a section on treaty performance. Yet, under the Special Rapporteur on the law of treaties, Sir Humphrey Waldock, it had deliberately decided not to deal with treaty performance, in the interests of limiting the Convention sufficiently to enable it to be completed.<sup>225</sup> It was clear from the debate, and the *Klöckner v. Cameroon* case, that the *exceptio* was not concerned with the termination or suspension of treaty obligations but rather with excuses for non-performance.

346. As to its relationship with existing provisions, the *exceptio* might be acknowledged to be a distinct case from force majeure, and because it was taken not with a view to forcing the other State to comply, but in response to a prior unlawful act, it might thus be deemed to fall within the same field as countermeasures. Indeed, in his view, it was odd to speak of a breach by another State as being a case of force majeure. One normally thought of force majeure as something that came from outside a relationship between two States, but the *exceptio* was an aspect of the relationship between two States. In any event, the *exceptio* was connected in some respect to both force majeure and countermeasures, and that was why he had suggested situating the proposed draft provision between articles 30 and 31.

347. He maintained that it was appropriate, in the light of the legal traditions in this field, to retain the idea of the *exceptio* as distinct from force majeure and countermeasures.

<sup>224</sup> See his fifth report (footnote 158 above), p. 3.

<sup>225</sup> See *Yearbook . . . 1966*, vol. II, p. 177, document A/6309/Rev.1, part II, para. 31.

ures, but agreed that its precise formulation and indeed the need for it in the draft could be properly assessed only when the articles on countermeasures had been formulated.

### 33. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF ARTICLE 31 (FORCE MAJEURE)<sup>226</sup>

348. The Special Rapporteur expressed the view that while article 31 brought together force majeure and fortuitous event, force majeure was not quite the same as fortuitous event, which was more like impossibility of performance. Force majeure was a case in which someone was, by external events, prevented from doing something, and that could include cases of coercion, as already discussed in the context of chapter IV. It was well established in jurisprudence that the plea of force majeure existed in international law. For example, it was referred to in passing by the arbitral tribunal in the *Rainbow Warrior* case<sup>227</sup> and again by ICJ in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*,<sup>228</sup> as well as in a number of international treaties.

349. The Special Rapporteur maintained that there was no need to mention the case of fortuitous events. If such events amounted to force majeure, they precluded wrongfulness. If not, they did not need to be mentioned as excuses. At the time of first reading, the Secretariat had produced a study<sup>229</sup> on force majeure and fortuitous event which presented no case in which a fortuitous event that should have precluded wrongfulness fell outside a proper understanding of the notion of force majeure.

350. Furthermore, he pointed to a number of drafting problems with the version adopted on first reading. The first was the reference to knowledge of wrongfulness in paragraph 1. There was no general requirement in international law for a State to know that its conduct was not in conformity with an obligation, although a State might need to be aware of a certain factual situation. He proposed a version of article 31 which dealt with the problem.

<sup>226</sup> The text of article 31 proposed by the Special Rapporteur reads as follows:

*Article 31. Force majeure*

“1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure. For the purposes of this article, force majeure is the occurrence of an irresistible force or an unforeseen external event beyond the control of the State making it materially impossible in the circumstances to perform the obligation.

“2. Paragraph 1 does not apply if:

“(a) The occurrence of force majeure results, either alone or in combination with other factors, from the wrongful conduct of the State invoking it; or

“(b) The State has by the obligation assumed the risk of that occurrence.”

For the analysis of this article by the Special Rapporteur, see paragraphs 250 to 263 of his second report.

<sup>227</sup> See footnote 176 above.

<sup>228</sup> See footnote 178 above.

<sup>229</sup> “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).

351. Furthermore, the Special Rapporteur observed that force majeure did not apply under article 31 where a State had contributed to the situation of material impossibility. The problem was that States often so contributed simply as part of a chain of events and without necessarily acting unlawfully or improperly. The exclusion was therefore unduly broad and he had formulated a narrower version of the same exception, based on article 61 of the 1969 Vienna Convention, to meet the case.

352. Likewise, article 31 made no allowance for voluntary assumption of risk although it was perfectly clear that, where a State voluntarily assumed the risk of a force majeure situation, the occurrence of such a situation did not preclude wrongfulness.

### 34. SUMMARY OF THE DEBATE ON ARTICLE 31

353. Some members expressed support for the Special Rapporteur’s proposal to delete the reference to “fortuitous event” from the title, since article 31 was not considered to have dealt with two different situations. Others stated that the legal consequences of those two distinct circumstances were the same, and the definition of force majeure contained in the version of article 31 adopted on first reading should be retained.

354. It was also suggested that paragraph 1 could benefit from a clearer definition of force majeure which would distinguish between actual or material impossibility of performance and increased difficulty of performance. Reference was made to the *Rainbow Warrior* arbitration, in which the tribunal had drawn such a distinction by stating that the excuse of force majeure was not relevant because the test of its applicability was that of absolute and material impossibility and because a circumstance which rendered performance more difficult did not constitute force majeure.

355. General support was also expressed for the deletion of the subjective requirement of knowledge of wrongfulness from article 31.

356. With regard to paragraph 2 (a), support was expressed for the proposal by the Special Rapporteur to align it with article 61 of the 1969 Vienna Convention. Conversely, some preferred to retain the principle that the State must not have contributed to the occurrence of the situation of material impossibility.

357. The reference to the assumption of risk in paragraph 2 (b) gave rise to some doubts. In view of technological progress, some States might assume obligations whose magnitude they did not fully understand. Hence, it might be wiser to leave the point to the discretion of the judge in each particular case.

358. The observation was made that the draft articles, as they currently stood, made no reference to due diligence as a standard to be applied in the performance of international law obligations. It was agreed to deal with this issue after completing the discussion on chapter V (see paragraphs 416-422 below).

359. It was also noted that the possibility of the defence of duress might arise in the context of force majeure, and

should be considered in that context also (see paragraphs 423-425 below).

### 35. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR ON ARTICLE 31

360. The Special Rapporteur reiterated his opposition to the reintroduction of the concept of “fortuitous event” in either the title or the body of the article. Not all legal systems regarded the occurrence of a fortuitous event as a circumstance precluding wrongfulness. At the international level, the term “force majeure” had achieved substantial currency, albeit, in most cases, in a commercial context. In article 31, it was sufficient by itself because it covered both “an irresistible force” and “an unforeseen external event”. Furthermore, not all unforeseen external events which made it in some sense impossible to do something precluded responsibility.

361. In defence of paragraph 2 (a), the Special Rapporteur noted that it was better than the wording adopted on first reading, which had spoken of the State having “contributed to the occurrence of the situation of material impossibility”. In English, the verb “to contribute” did not have the narrower meaning which it had in French, which apparently emphasized the element of intention.

362. In response to the suggestion that the question of the assumption of risk in paragraph 2 (b) be deleted, he argued that the qualification was important, especially as the Commission wanted to give a narrow definition to force majeure. In all legal traditions which recognized force majeure, it was impossible for someone to plead it who had actually assumed the risk of a specific event. In his view, the only question was whether the reference to risk should be included in the article itself or in the commentary.

### 36. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF ARTICLE 32 (DISTRESS)<sup>230</sup>

363. The Special Rapporteur pointed to the importance of noting the difference between distress, on the one hand, and force majeure and necessity, on the other. Distress concerned a situation where a person was responsible for the lives of other persons in his or her care. It was the kind of situation covered by many international instruments, including the United Nations Convention on the Law of the Sea, and in that context formed part of the primary rules relating to jurisdiction over ships.

364. Yet the issue of distress could also arise in the framework of the secondary rules of State responsibility, despite the argument that the primary rules covered such situations. In practice, although the primary rules might provide a defence for the individual captain of a ship or might bar the receiving State from exercising jurisdiction,

they were not applicable to the issue of State responsibility. Where the captain was a State official, his or her conduct was attributable to the State and raised the question of the responsibility of that State. Hence the need for a draft article on distress.

365. A novel feature of article 32 was that its scope had been extended beyond the narrow historical context of navigation to cover all cases in which a person responsible for the lives of others took emergency action to save life. That aspect of article 32 had been generally accepted as a case of progressive development, for example by the tribunal in the *Rainbow Warrior* arbitration, which had involved potential medical complications for the individuals concerned. The broader scope of the article should be maintained.

366. He suggested a number of changes in formulation. As situations of distress were necessarily emergency situations, distress should qualify as a circumstance precluding wrongfulness provided the person acting under distress reasonably believed that life was at risk. Even if it turned out subsequently to have been a false alarm, the agent’s reasonable assessment of the situation at the time should constitute a sufficient basis for action.

367. A Government had raised the question of whether the notion of distress should be extended to cover cases of humanitarian intervention to protect human life, even where the intervening State had no particular responsibility for the persons concerned. It had mentioned the case of police officers crossing a boundary to rescue a person from mob violence. In the Special Rapporteur’s view, that was not a situation of distress as normally conceived and ought to be covered instead by the defence of necessity.

### 37. SUMMARY OF THE DEBATE ON ARTICLE 32

368. Different views were expressed as to the scope of the excuse of distress. On the one hand, support was expressed for the Special Rapporteur’s view that it be confined to situations in which human life was at stake, since widening the scope of application of the notion of distress could open up possibilities of abuse. Alternatively, it was queried why a situation of distress should be confined to cases of saving human life, and not include honour or moral integrity.

369. It was also queried in the Commission whether restricting the provision to persons with whom the State had a special relationship was fully in accord with contemporary thinking on human rights law.

370. The view was expressed that the proposed text substantially weakened the existing version by introducing the words “reasonably believed”, which greatly broadened the scope of distress.

in a situation of distress, of saving that person’s own life or the lives of other persons entrusted to his or her care.

“2. Paragraph 1 does not apply if:

“(a) The situation of distress results, either alone or in combination with other factors, from the wrongful conduct of the State invoking it; or

“(b) The conduct in question was likely to create a comparable or greater peril.”

For the analysis of this article by the Special Rapporteur, see paragraphs 264 to 274 of his second report.

<sup>230</sup> The text of article 32 proposed by the Special Rapporteur reads as follows:

“Article 32. *Distress*

“1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question reasonably believed that there was no other way,

371. In this regard, the observation was also made that the new wording proposed by the Special Rapporteur changed the spirit of the article by shifting the emphasis from an objective test to a subjective one. Some intermediate possibilities were suggested.

### 38. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR ON ARTICLE 32

372. The Special Rapporteur, recalling the doubts expressed about the use of the words “reasonably believed”, asserted that it was necessary to introduce a more flexible criterion taking into account the conditions under which the author of the act in question had to choose from among the alternatives.

373. In his view, it was not wise to expand the concept of distress to include persons other than those entrusted to the care of the author of the act in question, as stated in article 32. If other persons were involved, the situation was no longer one of compulsion, but, rather, one of moral choice, with which article 32 did not deal.

### 39. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF ARTICLE 33 (NECESSITY)<sup>231</sup>

374. The Special Rapporteur observed that a state of necessity, as defined in article 33, could be invoked only in extreme cases and to that extent it was comparable to the notion of a “fundamental change of circumstances” in the law of treaties. He noted that there were cases in which the necessity of action was so compelling that it justified a particular form of conduct, for example in relation to the urgent conservation of a species in the case of *Fur seal fisheries off the Russian coast*.<sup>232</sup> Article 33 was referred to by both parties in the case concerning the *Gabčíkovo-*

*Nagyymaros Project (Hungary/Slovakia)*,<sup>233</sup> and the Court expressly endorsed it as a statement of general international law.

375. However, there were two important issues to be addressed in connection with necessity. The first was whether necessity as defined in article 33 was the appropriate framework within which to resolve the problem of humanitarian intervention involving the use of force, i.e. action on the territory of another State contrary to Article 2, paragraph 4, of the Charter of the United Nations. Clearly, the defence of necessity could never be invoked to excuse a breach of a *jus cogens* norm, and article 33 so provided. But it was generally agreed that the rules governing the use of force in the Charter were *jus cogens*, so that article 33, as it stood, did not cover humanitarian intervention involving the use of force on the territory of another State. Yet the commentary to article 33 argued for a refined version of *jus cogens* to allow for such intervention and was thus, in his view, inconsistent with the text. Instead, the rules on humanitarian intervention were primary rules that formed part of the regime governing the use of force, a regime referred to—though not exhaustively stated—in the Charter. They were not part of the secondary rules of State responsibility.

376. The second issue, of scientific uncertainty, arose whenever necessity was relied on to justify action for the conservation of a species or the destruction of a large structure such as a dam which was purportedly in danger of collapse. Prior to the occurrence of the catastrophe, no infallible prediction could be made. The question was whether article 33 made sufficient provision for scientific uncertainty and the precautionary principle, embodied, for example, in the Rio Declaration on Environment and Development<sup>234</sup> as principle 15 and in the Agreement on the Application of Sanitary and Phytosanitary Measures,<sup>235</sup> as article 5, paragraph 7.

377. He noted that in the case concerning the *Gabčíkovo-Nagyymaros Project (Hungary/Slovakia)*,<sup>236</sup> both parties had recognized the existence of scientific uncertainties but had disagreed about their seriousness. ICJ had stated that the mere existence of uncertainty was not sufficient to trigger necessity. The WTO Appellate Body had taken a similar view in the *Beef Hormones* case,<sup>237</sup> stating that the precautionary principle and the associated notion of uncertainty were not sufficient to trigger the relevant exception. On the other hand, in his view, article 33 should not be formulated so stringently that the party relying on it would have to prove beyond the shadow of a doubt that the apprehended event would occur.

<sup>231</sup> The text of article 33 proposed by the Special Rapporteur reads as follows:

“Article 33. Necessity

“1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless:

“(a) The act is the only means of safeguarding an essential interest of that State against a grave and imminent peril; and

“(b) The act does not seriously impair:

“(i) An essential interest of the State towards which the obligation existed; or

“(ii) If the obligation was established for the protection of some common or general interest, that interest.

“2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

“(a) The international obligation in question arises from a peremptory norm of general international law; or

“(b) The international obligation in question explicitly or implicitly excludes the possibility of invoking necessity; or

“(c) The State invoking necessity has materially contributed to the situation of necessity occurring.”

For the analysis of this article by the Special Rapporteur, see paragraphs 275 to 291 of his second report.

<sup>232</sup> See the award rendered by the Tribunal of Arbitration at Paris, under the treaty between the United States and Great Britain, concluded at Washington, February 29, 1892; text in H. La Fontaine, *Pasicrisie internationale, 1794-1900* (The Hague, Martinus Nijhoff, 1997), p. 426.

<sup>233</sup> See footnote 178 above.

<sup>234</sup> *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 I, annex I.

<sup>235</sup> See *Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on 15 April 1994* (GATT secretariat publication, Sales No. GATT/1994-7).

<sup>236</sup> See footnote 178 above.

<sup>237</sup> WTO, *EC measures concerning Meat and Meat Products (Hormones)*, report of the Appellate Body, 16 January 1998 (WT/DS26/AB/R-WT/DS48/AB/R), para. 194.

378. He had reluctantly decided against including the precautionary principle in his proposed text for the article, first because ICJ had endorsed article 33 and secondly because necessity stood at the outer edge of the tolerance of international law for otherwise wrongful conduct.

379. He had, however, also proposed an alteration to article 33 to cope with situations in which the balance of interests was not merely bilateral but concerned compliance with an *erga omnes* obligation. For example, in the *South West Africa* cases,<sup>238</sup> the implicit argument for South Africa was that the policy of apartheid in South West Africa was necessary for good governance of the territory. However, the question did not affect the individual interests of Ethiopia or Liberia but the interests of the people of South West Africa.

#### 40. SUMMARY OF THE DEBATE ON ARTICLE 33

380. It was queried in the Commission whether article 33 was necessary. Doubts were expressed regarding its implementation in practice. In terms of this view, the need to avoid any abuse which might be based on the provision justified its deletion.

381. However, it was conceded that as necessity was generally recognized in customary international law as a circumstance precluding the wrongfulness of an act not in conformity with an international obligation, article 33 could not be entirely deleted. Yet, in order to prevent abuse, it should be formulated with very strict conditions and limitations on its application.

382. Support was expressed for the view that the criterion was not, in all cases, the individual interest of the complaining State but the general interest protected by the obligation.

383. Likewise, in supporting the reference to “the protection of some common or general interest” in paragraph 1 (b) (ii), it was queried whether it would not be desirable to indicate that necessity could be invoked not only as a factor in balancing the interests of the invoking State with those of the victim State but also as between the interests of the invoking State and those of the international community as a whole, for example in the case of a ship polluting the high seas by dumping dangerous chemicals.

384. The Commission’s attention was drawn to the danger of abusive reliance on the concept of humanitarian intervention. It was also observed that in view of the controversy over that concept, the Commission should, as in the past, refrain from taking a position on it when formulating secondary rules of State responsibility. It was also suggested that while humanitarian intervention was not really regulated in article 33, it would nevertheless be better to make that point in the commentary to ensure that state of necessity was not improperly invoked.

385. In response, the Special Rapporteur pointed out that the question of humanitarian intervention was governed by substantive international law and above all by the Charter of the United Nations. As such, it was not governed by article 33 of the draft and hence there was no difficulty attaching to the exclusion of peremptory norms from the scope of that article. In his view, therefore, it would not be useful for the Commission to take a position on the extremely controversial issue of humanitarian intervention involving the use of force.

386. Support was expressed for the Special Rapporteur’s position on the precautionary principle.

387. Support was expressed for the position in paragraph 2 (a) that necessity could not be invoked if the international obligation arose from a peremptory norm of general international law. It was recommended that this exception be extended to all circumstances precluding wrongfulness in a general article.

#### 41. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR ON ARTICLE 33

388. The Special Rapporteur pointed to a clear consensus in the Commission in favour of providing the narrowest possible definition of necessity in terms of precluding wrongfulness and also in favour of maintaining the article adopted on first reading.

389. He observed further that the Commission also seemed to take the view that article 33 did not cover the use of force because paragraph 2 excluded the violation of a peremptory norm of general international law. Similarly, the article could not be used as the vehicle for a debate on the question of humanitarian intervention involving use of force in the territory of another State.

390. He did not fully support the view that responsibility should be precluded in the event of a violation of a peremptory rule of law within the framework of chapter V. While it was relevant to consent as well as necessity, he could not see how such a situation could arise in connection with distress. In his view, it would be better to prepare a more general provision and try to find an appropriate place for it in the draft. He thus favoured maintaining article 33, paragraph 2, in the form adopted on first reading.

391. The Special Rapporteur noted further that the discussion had shown that the inclusion of a clause on the precautionary principle in article 33 would be difficult.

#### 42. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF ARTICLE 34 BIS (PROCEDURE FOR INVOKING A CIRCUMSTANCE PRECLUDING WRONGFULNESS)<sup>239</sup>

392. The Special Rapporteur observed that it was clear that where a State relied on a circumstance precluding

<sup>238</sup> *Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319 and *Second Phase, Judgment, I.C.J. Reports 1966*, p. 6.

<sup>239</sup> The text of article 34 bis proposed by the Special Rapporteur reads as follows:

wrongfulness, that reliance had a temporary effect only. On balance, this was sufficiently clear in the draft articles. However, he proposed a new article 34 bis dealing with the procedure for invoking a circumstance precluding wrongfulness. The key point to note was that by and large circumstances precluding wrongfulness operated automatically: a situation of distress or force majeure arose in relation to performance due at that time. So it was not necessarily a case of giving advance notice of the circumstance, although notice should be given if possible.

393. Paragraph 1 proposed an information and consultation procedure whereby the State invoking circumstances precluding wrongfulness was required, as a minimum, to inform the other State that it was doing so.

394. The article also contained, in paragraph 2, a basic dispute settlement provision, serving merely as a reminder and enclosed within square brackets. He explained that it was not necessary for the Commission to enter into the detail of paragraph 2, until it turned to the question of dispute settlement generally and decided on the status it would propose for the draft as a whole.

#### 43. SUMMARY OF THE DEBATE ON ARTICLE 34 BIS

395. As to paragraph 1, the view was expressed that it was a sound contribution to the progressive development of international law that would help to temper the occasional enthusiasm of States for the invocation of circumstances precluding wrongfulness.

396. As to the provision's formulation, doubts were expressed regarding the use of the word "should" in paragraph 1. It was queried whether it would apply in all cases or only in circumstances in which such action could contribute to the mitigation of damages. The view was also expressed that the words "in writing" also suggested a rigour and formality that was out of place. Furthermore, doubts were expressed concerning the use of the words "as soon as possible", which was thought to considerably weaken the provision's impact.

397. General support was expressed in the Commission for the deletion of paragraph 2 since it pertained to a different issue, namely dispute settlement. Furthermore, it prejudged the form of the future articles—only a convention could provide for binding means of settlement of disputes.

(Footnote 239 continued.)

*"Article 34 bis. Procedure for invoking a circumstance precluding wrongfulness"*

"1. A State invoking a circumstance precluding wrongfulness under this chapter should, as soon as possible after it has notice of the circumstance, inform the other State or States concerned in writing of it and of its consequences for the performance of the obligation.

"[2. If a dispute arises as to the existence of the circumstance or its consequences for the performance of the obligation, the parties should seek to resolve that dispute:

"(a) In a case involving article 29 bis, by the procedures available under the Charter of the United Nations;

"(b) In any other case, in accordance with part three.]"

For the analysis of this article by the Special Rapporteur, see paragraphs 335 to 352 of his second report.

#### 44. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR ON ARTICLE 34 BIS

398. The Special Rapporteur explained that he had deliberately used the word "should" in paragraph 1 because, while he supported the progressive development of international law that it entailed, he did not wish to give the impression of creating a new primary obligation to inform.

399. With regard to the words "in writing", the problem with unwritten communications was that they were difficult to prove. He cited the example of the invocation in writing of a state of necessity in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*<sup>240</sup> as support for his view that State practice revealed that the formal invocation of circumstances precluding wrongfulness was taken seriously.

400. Furthermore, article 34 bis, paragraph 2, did not prejudice the form of the draft articles or the question of dispute settlement. However, he would be willing to omit it on the understanding that the issue would be addressed in the framework of part three.

401. Similarly, it was only after consideration of the important elements of part three to be presented at the next session that the Commission would be able to take a final decision as to where article 34 bis belonged. In the meantime, he agreed with the view that the existing placement of article 34 bis was appropriate.

#### 45. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF ARTICLE 35 (CONSEQUENCES OF INVOKING A CIRCUMSTANCE PRECLUDING WRONGFULNESS)<sup>241</sup>

402. The Special Rapporteur pointed out that some States had criticized article 35 as adopted on first reading for envisaging no-fault liability. In fact, it would have done so only if it had stated that there was no element of fault in a situation in which a State was excused from performance, something which was, a priori, unlikely. With no element of fault, as in the case of self-defence, there was no room for compensation save as provided by the primary rules in respect of incidental injury to third parties. In some cases, however, it seemed desirable to envisage compensation.

403. He therefore argued strongly that, at least in cases where circumstances precluding wrongfulness were an excuse rather than a justification, i.e. that might be classified as cases of circumstances precluding responsibility as opposed to wrongfulness, the draft articles should expressly envisage the possibility of compensation.

<sup>240</sup> See footnote 178 above.

<sup>241</sup> The text of article 35 proposed by the Special Rapporteur reads as follows:

*"Article 35. Consequences of invoking a circumstance precluding wrongfulness"*

"The invocation of a circumstance precluding wrongfulness under this chapter is without prejudice:

"(a) To the cessation of any act not in conformity with the obligation in question, and subsequent compliance with that

404. In article 35, in addition to financial compensation in cases of distress and necessity, he had also included a provision expressly dealing with cessation, reflecting the ICJ findings on that subject in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*.<sup>242</sup> He had not, however, envisaged compensation in cases of force majeure, still less in cases of consent. It had seemed rather anomalous to say that consent made the act lawful but that nonetheless compensation must be paid.

#### 46. SUMMARY OF THE DEBATE ON ARTICLE 35

405. Support was expressed for subparagraph (a), dealing with an issue that had been carefully addressed by ICJ in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*.

406. With regard to subparagraph (b), it was noted that the provision raised the question of the legal basis for such compensation, since it related to acts which were not wrongful. It therefore arose either from responsibility for harm as a result of acts which were not wrongful or out of obligations stemming from the causing of harm. Neither concept had a sufficient basis in international law.

407. As to the scope of subparagraph (b), it was queried whether there were also cases of innocent third States which incurred damage arising out of self-defence or countermeasures. Similarly, it was noted that in the case of force majeure, it was not inconceivable that other States might suffer more than the State invoking it.

408. In this regard, two possible criteria were suggested for determining cases in which compensation should or should not be envisaged. The first involved the application of article 35 to cases where the circumstance precluding wrongfulness operated as an excuse rather than a justification. Alternatively, if the conduct of the “target” State had been wrongful, there was no basis to compensate it, whereas a State should pay compensation for infringing the rights and interests of an innocent State.

409. A view was expressed that article 35 addressed an issue that belonged in another part of the draft, since it concerned implementation. Furthermore, it was observed that the proposed title of the article was misleading because the main consequence of invoking a circumstance precluding wrongfulness was that no compensation was due, inasmuch as the normal consequences of a breach of obligation had been ruled out. The article thus dealt with exceptional consequences rather than consequences in general.

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obligation, if and to the extent that the circumstance precluding wrongfulness no longer exists;

“(b) In the case of articles 32 and 33, to the question of financial compensation for any actual harm or loss caused by that act.”

For the analysis of this article by the Special Rapporteur, see paragraphs 336 to 347 of his second report.

<sup>242</sup> See footnote 178 above.

#### 47. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR ON ARTICLE 35

410. The Special Rapporteur took note of the view that it was undesirable to limit article 35, subparagraph (b), to articles 32 and 33 and also deferred to the view that the Commission should not attempt to elaborate in detail the content and bases for compensation.

#### 48. FURTHER JUSTIFICATIONS OR EXCUSES

##### (a) “Clean hands” doctrine

411. In referring to the so-called “clean hands” doctrine, the Special Rapporteur noted that, in his view, if it existed at all, it corresponded to the doctrine of inadmissibility in proceedings and was not a circumstance precluding wrongfulness.<sup>243</sup>

412. The view was expressed that the clean hands rule had nothing to do with the *exceptio inadiimplenti contractus* applied to the law of State responsibility, and that it was not yet part of general international law, and hence should not be included in the draft. It was pointed out in that regard that it would be possible to revert to the idea in the discussion on diplomatic protection, but, even in that area, the principle was not generally recognized.

413. These views were disputed in the Commission where it was noted that the clean hands rule was a basic principle of equity and justice. Hence, considering it would be in line with the Commission’s purpose to promote the progressive development of international law and its codification.

414. Indeed, the view was expressed that the clean hands doctrine was a principle of positive international law. That principle came under the determination of responsibility because it had an impact on the scope of compensation; the wrongfulness nevertheless persisted and it thus was not a circumstance precluding wrongfulness. Hence, the doctrine should, instead, be taken up during the consideration of part two of the draft articles, given its importance for the scope of compensation and the existence of the obligation to compensate.

415. The Special Rapporteur observed that of those who had spoken on the subject no one had wanted the doctrine to be mentioned in chapter V of part one. That was to be welcomed, since the clean hands argument, in any of its versions, could not be advanced as an excuse for unlawfulness. In his view, the doctrine could be analysed subsequently in connection with the loss of the right to invoke State responsibility.

##### (b) Due diligence

416. Reference was made during the debate on article 31, force majeure, that in the codification of State responsibility, the degree of diligence shown by a State

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<sup>243</sup> For an analysis of the doctrine, see paragraphs 330 to 334 of his second report.

should be addressed as a matter of secondary rules in a general and comprehensive way.

417. It was noted further that by deleting any reference to fortuitous event in draft article 31, the only defence available to a State accused of a breach of international law and trying to argue that it had done everything that could have reasonably been expected of it under the circumstances would be to claim force majeure. But force majeure was particularly unfit to accommodate, for example, a claim of a breach of an obligation of prevention.

418. Two solutions were proposed. The first would be to include a reference to due diligence in the context of chapter III, which defined the breach of an international obligation, and the second would be to have such a reference in the framework of chapter V.

419. In response, it was pointed out that due diligence and the subjective element were general concepts that permeated the entire draft. As such, it would be preferable to take them up at the end of consideration of the topic in the context of other issues.

420. The Special Rapporteur stated that the issue of force majeure as formulated on first reading was a different matter from the question of due diligence. In practice, force majeure was taken to be distinct from the general principle of fault. Defining the precise nature of due diligence could not be done in the context of the draft articles without spending many more years on the topic and, even if the problem were resolved, that would in effect be based on the presumption that any primary rule, or a certain class of primary rules, contained a qualification of due diligence.

421. A suggestion was made that the Commission should confine itself to the most important and most urgent aspects of the topic, thereby indicating that it did not rule out the possibility that the regime of State responsibility also encompassed other rules. Hence, the matter could be covered by an appropriate “without prejudice” clause.

422. The Special Rapporteur pointed out that the discussion had brought to light a real problem of differentiation between primary and secondary rules. As such, the draft articles would have to include a provision comparable to article 73 of the 1969 Vienna Convention, i.e. a “without prejudice to” clause that would clarify the scope of the draft articles.

### (c) *Duress*

423. The view was expressed in the context of the debate on article 31 (force majeure and fortuitous event) that it was regrettable that duress had not been contemplated as a circumstance precluding wrongfulness. It was not clear whether it was covered by the articles on force majeure, distress or even state of necessity.

424. It was suggested that, while not necessarily drawing a parallel with articles 51 and 52 of the 1969 Vienna Convention, the Commission should at least recognize that duress as a circumstance precluding wrongfulness arose in specific cases and should be discussed at some stage. It was further noted that duress as a ground for

excluding individual criminal responsibility was specifically mentioned in article 31, paragraph 1 (*d*), of the Rome Statute of the International Criminal Court.<sup>244</sup> Hence, a case existed for including duress by way of analogy in the draft articles on State responsibility or at least mentioning it in the commentary.

425. In response, the Special Rapporteur maintained that all the circumstances which justified the termination of a treaty according to the 1969 Vienna Convention were already sufficiently covered in chapter V of the draft articles. Furthermore, the problem of coercion had already been discussed in connection with chapter IV, when it had emerged that most cases of coercion could be reduced to situations of force majeure, dealt with in article 31. Coercion as a defect in the will of the State (as distinct from a case of force majeure) was adequately dealt with in article 52 of the Convention. In this regard, it should be noted that such a defect could be cured by subsequent uncoerced consent or acquiescence. This situation did not need to be covered in chapter V.

## 49. COUNTERMEASURES<sup>245</sup>

### (a) *Introduction by the Special Rapporteur*

426. Following its preliminary debate on article 30 (Countermeasures in respect of an internationally wrongful act) in the context of chapter V of part one, the Commission had decided to retain an article on countermeasures in chapter V, but deferred finalizing the text of the article until its consideration of countermeasures in chapter III of part two (see paragraphs 332-333 above).

427. The Special Rapporteur subsequently presented chapter I, section D, of his second report, in which he posed several questions regarding the regime of countermeasures with a view to obtaining the guidance of the Commission in preparing his next report.

428. He pointed out that the Commission had accepted the view that it was very difficult to formulate a satisfactory article 30, without knowing whether the issue of countermeasures was going to be dealt with in more detail in part two. He recommended that the Commission limit itself, at its present session, to considering the prior question of whether articles 47 to 50 should be included at all, in whatever form.

429. Comments of Governments on the question had been diverse. Some had argued for the suppression of the articles on countermeasures entirely. Others, while broadly favouring the institution of countermeasures, called for extensive changes in the articles in part two, but

<sup>244</sup> A/CONF.183/9.

<sup>245</sup> The text of article 30 proposed by the Special Rapporteur reads as follows:

*“Article 30. Countermeasures in respect of an internationally wrongful act*

*“The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if and to the extent that the act constitutes a lawful countermeasure as provided for in articles [xx]-[xx].”*

See paragraph 392 of his second report.

not their suppression. A further group favoured the existing articles on countermeasures in part two.

430. Furthermore, he brought to the Commission's attention the fact that ICJ had, in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*,<sup>246</sup> for the first time in its modern history dealt with the problem of countermeasures. While the Court did not doubt that countermeasures might justify otherwise unlawful conduct, it had not relied on the exact formulation of the articles on countermeasures in part two. He viewed this as evidence of the Court's impression that the articles on countermeasures were not yet in a fully-formed state, while recognizing that they expressed an appropriate general approach.

431. The first issue requiring clarification concerned the question of dispute settlement in the draft articles, since it was difficult to take a view on the question of countermeasures without forming a view on dispute settlement. The provisions on countermeasures in part two, as adopted on first reading, assumed that the draft articles would deal with dispute settlement in the form of a convention. But that assumption could not be taken for granted.

432. The second, more specific issue, concerned the linkage between countermeasures in part two and dispute settlement. He noted that under the draft articles, if countermeasures were taken, the "target" State, i.e. the State against whom they are taken and which had been said to have committed the internationally wrongful act, was entitled to unilaterally force the State taking the countermeasures, i.e. the "injured State", to go to compulsory arbitration. This was the only compulsory third party judicial settlement of disputes procedure provided for in the draft articles.

433. He observed that, from a policy standpoint, it was undesirable to limit the right to settlement of disputes to the State which had *ex hypothesi* committed a wrongful act. It was also unusual to do so by reference to the substantive legal classification of countermeasures, which was difficult to distinguish in practice from, for example, retaliation. He cited the parallel of the International Tribunal of the Law of the Sea in the *MV Saiga* case,<sup>247</sup> where the Tribunal had been faced with an analogous difficulty in establishing jurisdiction on the basis of the substantive legal classification in question.

434. Furthermore, this arrangement gave injured States a positive incentive to take countermeasures, and even excessive countermeasures, because by doing so they could force the target State to go to arbitration.

435. He also pointed out that the draft articles adopted on first reading distinguished between interim measures of protection and countermeasures in the normal sense. The former referred to measures that could be taken immediately upon the happening of the unlawful act, without notification, and without negotiation. But full-scale countermeasures could only be taken after negotia-

tions had failed. He noted that the problem with this distinction was that it used the terminology of interim measures of protection which was inappropriate because it implied the existence of a court or tribunal. Furthermore, the definition of interim measures of protection as actually given was merely another way of defining countermeasures, in other words, there was no clear distinction in language between the two.

436. He expressed the firm view that the linkage in part two between countermeasures and dispute settlement was unworkable and could not be sustained. As such, it was best replaced with provisions that would require States to do whatever they could to resolve disputes, but which would not link the taking of countermeasures to judicial settlement.

437. The Special Rapporteur identified four options open to the Commission with regard to article 30:<sup>248</sup> option 1 was to retain article 30 in essentially its current form, but to delete the treatment of countermeasures in part two; option 2 was not to deal with countermeasures in part two, but to incorporate substantial elements of the legal regime of countermeasures into article 30; option 3 was to engage in a substantial treatment of countermeasures in part two, along the lines of the current text, including the linkage with dispute settlement; or option 4 was to deal with countermeasures in part two but avoiding any specific linkage with dispute settlement. He expressed his preference for option 4. On that basis he proposed a draft text for article 30.

#### (b) *Summary of the debate*

438. Support was expressed for the recognition that the institution of countermeasures existed in international law, as was reflected in recent judicial decisions, as well as in the Commission's own decision to include an article on countermeasures in chapter V of part one. Support was also expressed by some for the inclusion of some substantive treatment of countermeasures in part two, with a view to strictly regulating their application.

439. In this regard, it was noted that those who opposed countermeasures should by definition support strict limitations in the draft articles. The view that countermeasures should not be dealt with in the draft articles at all, was, in effect, a view in favour of few limitations on the taking of countermeasures.

440. Furthermore, it was observed that while the Commission could take the approach of only referring to "lawful" countermeasures, without defining such measures, as in the context of "lawful" self-defence, countermeasures were closely linked to State responsibility and therefore called for the inclusion in the draft articles of specific rules on their application.

441. Support was expressed for option 4 proposed by the Special Rapporteur in his second report, namely to delink the taking of countermeasures under part two from resort to international dispute settlement. Some urged avoiding prejudice to the possibility of option 2.

<sup>246</sup> See footnote 178 above.

<sup>247</sup> Application for prompt release, judgement of 4 December 1997, para. 72.

<sup>248</sup> See paragraph 389 of the second report.

442. It was noted that international dispute settlement mechanisms are too time-consuming to be linked to countermeasures, and may lead to abuse in the form of delaying tactics by the target State. Likewise, the linkage was viewed as creating an elaborate and complex system, that would rely on the willingness of States to submit to such an arrangement. Similarly, it was noted that it would be untenable to have the resort to countermeasures subject to the exhaustion of dispute settlement procedures.

443. However, the view was expressed that delinking the two would necessitate strict limitations on the taking of countermeasures, and should not prejudice a more general provision dealing with the relation between dispute settlement procedures and the taking of countermeasures.

444. A further view was expressed that delinking countermeasures and dispute settlement could be viable if the draft articles included a general regime for third-party dispute settlement.

445. On the other hand, doubts were expressed regarding the Special Rapporteur's evaluation of the linkage between countermeasures and dispute settlement as flawed. It was noted that the linkage was not envisaged as only providing the injuring State with the right to call for compulsory dispute settlement. Instead, it was expected that the original wrong would also be included as part of the settlement of the dispute as an ancillary matter to the taking of the countermeasures.

446. In this regard, some support was expressed for a linkage between countermeasures and compulsory dispute settlement. They were regarded as two sides of the same coin, and as striking a balance between the interests of the injured States and those States finding themselves at the receiving end of the countermeasures. Furthermore, it was noted that, because of their controversial nature and the possibility of abuse, countermeasures could only be acceptable when coupled with compulsory dispute settlement, since it would provide a strict limitation on their application.

447. The better solution, therefore, would be for the Commission to address the imbalance in the treatment of States inherent in the linkage, instead of opting for delinkage.

448. While general support was expressed for sending the proposed text of article 30 to the Drafting Committee, it was observed that the text assumed that the substantive and procedural requirements for the taking of countermeasures were spelled out elsewhere in the draft. As such,

it potentially prejudiced the outcome of the Commission's consideration of countermeasures in part two. It was thus proposed to refer both the text of article 30 adopted on first reading and that proposed by the Special Rapporteur to the Drafting Committee.

449. The view was also expressed that countermeasures were not necessarily to be regarded as part of the content, form or degree of responsibility in part two. The possibility of taking countermeasures could not be seen as a *consequence* of wrongful acts in the same category as reparation or cessation. Instead, countermeasures were best viewed as an instrument to *ensure* compliance with the obligation, reparation or cessation, and were related to the implementation (*mise en œuvre*) of international responsibility. It was thus proposed that countermeasures be dealt with in a new part two bis, which could include the admissibility of claims, countermeasures, and collective measures.

(c) *Concluding remarks of the Special Rapporteur on countermeasures*

450. The Special Rapporteur noted that a minority in the Commission preferred retaining the linkage between countermeasures and part three. However, even they did not defend the inequality that existed in the relationship between the taking of countermeasures and dispute settlement. Instead, a close relationship was supported out of concern for the danger of possible abuse inherent in countermeasures and the need to control them as much as possible.

451. He explained that his proposal to delink the two did not prejudice the position that issues arising out of the resort to countermeasures could be the subject of dispute settlement. Yet, it was untenable to make compulsory dispute settlement procedure in the draft articles available only to the State which had committed the internationally wrongful act.

452. He noted further that the call for equality in treatment between States within the existing arrangement, was really a call for a general system of dispute settlement in relation to the draft articles. While this would not be precluded by the debate, it implied that the draft articles would have to take the form of a draft convention, which had not yet been decided.

453. The Special Rapporteur expressed particular interest in the proposal to have a part two bis, on implementation, in the draft articles.