
Revising the Draft Articles on State Responsibility

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Abstract

This article reviews some major issues involved in revising Part 1 of the 1980 draft on state responsibility and responds to comments made in this symposium. In the author's view: (a) there is no single principle of fault as a basis for state responsibility in international law, nor is the possibility of no-fault responsibility a priori excluded. The debate is thus a false one. Retaining Articles 1 and 3 recognizes that the particular standard of responsibility is set by the primary rules; (b) criticisms that the articles on attribution of conduct to the state embody a 'very traditional' Western concept of the state fail to take into account the flexibility of the rules; (c) the distinction between obligations of conduct and of result lacks consequences within the framework of the secondary rules, and is of doubtful value; (d) the idea of international crimes as expressed is unnecessary and potentially destructive. But the idea that some obligations are owed to the international community as a whole and that grave breaches thereof may attract special consequences, is important. The problem is to find an acceptable formulation; (e) two different kinds of circumstances precluding wrongfulness are dealt with in Chapter V: some (e.g. self-defence) preclude wrongfulness; others (e.g. distress, necessity) preclude responsibility. This distinction should be more clearly made; (f) the balance between restitution and compensation needs further thought, but it is not clear that the Draft Articles as presently formulated are defective.

1 Introduction

Since Part 1 of the Draft Articles was adopted in 1980, it has become part of the mental landscape of international lawyers, so much so that reviewing them 20 years later conveys an unusual feeling of intangibility. The central elements of the text seem sacrosanct, whether or not they have been generally accepted. Indeed, sometimes it seems as if two decades of controversy (as, for example, with the distinction between composite and complex wrongful acts or the treatment of exhaustion of local

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remedies) is as entitled to respect as two decades of approval and application (as with the distinction between completed and continuing wrongful acts, or the principles embodied in Articles 1, 3, 4, 5 and 10). And then there is the powerful idea, imperfectly formulated in Article 19, that some questions of state responsibility concern the international community of states as a whole, an idea which has certainly been controversial, has been widely approved, but at the same time has rarely been applied and in the form proposed in the Draft Articles is hardly capable of application.¹

The first reading of the Draft Articles involved not one but four uneven periods of development, corresponding to the exigencies of the ILC's timetable as well as to the activity of successive Special Rapporteurs. The first period, under Garcia Amador, focused on the substantive rules of injury to aliens and their property. It is generally regarded now as a false start, notwithstanding the quality of much of the work and the survival of some of it (under the species of secondary rules) in the reports of his successor, Roberto Ago. Ago was appointed in 1963, but the major consideration of his reports spanned the decade of the 1970s, being completed only after Ago's election to the International Court. The Ago period established the basic conceptions underlying the project, even though only Part 1 could be completed. There were then two attempts to complete Parts 2 and 3, first by Riphagen (1981–1986), and then by Arangio-Ruiz (1987–1996), under whom much important work on Part 2 was elaborated. The second half of the first reading was completed, in some haste, in 1996, without any attempt to coordinate it with the earlier work.

The time taken for the first reading is discreditable, even if it is dated from 1963 rather than 1956. There are both justifications and excuses for it. As for excuses, for much of the time the Special Rapporteurs struggled to be heard amidst the successive demands of the law of the sea, the law of treaties, the law of state succession and later and mostly lesser projects. Little of Garcia Amador's work was debated, and Riphagen was given time only for five preliminary articles in Part 2, even though he proposed a complete version of the whole. As for justifications, the exercise involves nothing less than the formulation of the general secondary rules of the international law of obligations, concerned with the breach by states of international obligations of whatever kind, and the legal consequences of those breaches in terms of reparation. This is a major task, equal in weight to the work on the law of treaties.

The Draft Articles as adopted on first reading are a substantial basis for a completed text, despite their unevenness, and revising and completing them is undoubtedly worthwhile. The task is, nonetheless, substantial. It involves bringing into account the more recent case law of the International Court (e.g. *Diplomatic and Consular Personnel, Nicaragua, ELSI, Phosphate Lands, Gabcikovo-Nagyymaros*), relevant cases of the various tribunals (especially the Iran-United States Claims Tribunal and ICSID tribunals; more recently WTO panels and the Appellate Body) together with the

¹ As witness the fact that the notion of obligations *erga omnes* was announced by the Court in a case involving diplomatic protection of a failed company, and was avoided, unsatisfactorily, in the two cases where it might have been applied: *South West Africa Cases (Second Phase)*, ICJ Reports (1966) 6 and *Case concerning East Timor*, ICJ Reports (1995) 90.

jurisprudence of the human rights courts and committees,² and integrating them within the classical structure of the Draft Articles. If achieved, this will contribute to the unity of international law, a unity under considerable institutional and political stress. This task is essentially independent of such strategic issues as the eventual form of the Draft Articles, or whether to deal in detail with such topics as countermeasures, or what approach to take to dispute settlement, or what to do about the notion of ‘international crimes of states’.

As of April 1999, after only one of four ILC sessions planned for the second reading, the work is still in a relatively early stage,³ and many of the key strategic questions remain to be resolved. Two things have however been done at this level. First, the basic structure of the Draft Articles, and the underlying distinction between the primary and secondary rules on which it is based, have been affirmed.⁴ Indeed, it is likely to be reinforced in the process of the second reading, in order to ensure that the articles are manageable in scope and size. Secondly, a start has been made in thinking about the divisive issue of Article 19 and the distinction between ‘international crimes’ and ‘international delicts’.⁵ This is the subject of a number of essays in this symposium, and I return to it, briefly, below.

In an annex to this note is set out the texts of the Draft Articles so far provisionally adopted by the Drafting Committee (Articles 1–15 *bis*), with those provisionally recommended for Chapters III–V of Part 1 (Articles 16–35), together with some brief explanations of each provision. The reasons for retaining,⁶ dropping⁷ or changing⁸ existing articles or for recommending new ones⁹ have been set out in detail elsewhere.¹⁰ Rather than rehearsing these arguments, it seems more useful to comment on the topics which are dealt with by the other contributors to this symposium.

² This is ably reviewed in the context of the Draft Articles by H. Dipla, *La responsabilité de l'Etat pour violation des droits de l'homme. Problèmes d'imputation* (1994) and E. Wyler, *L'illicite et la condition des personnes privées* (1995).

³ For earlier progress reports on the second reading see Crawford, ‘On Re-reading the Draft Articles on State Responsibility’, 92 *Proc. ASIL* (1998) 295; Crawford and Bodeau, ‘Second Reading of the Draft Articles on State Responsibility: A Progress Report’, 1 *International Law Forum* (1999) 44.

⁴ See further Crawford, First Report, UN Doc. A/CN.4/490, Add. 4, and *ILC Report ... 1998* (UN Doc. A/53/10), at 112.

⁵ *Ibid.*, at 118–147.

⁶ As with Articles 1, 3, 4, 5 and 6 (merged), 9 (as to state organs), 10, 16, 28 (2), 30, 32, 33, 34 (renumbered as 29 *ter* (1)).

⁷ As with Articles 2, 7 (1), 11–14, 17, 18 (2)–(5), 23, 26, 29.

⁸ As with Articles 8, 15, 16, 18 (1), 22, 24, 25, 31, 34, 35 (now 35 (b)).

⁹ As with Articles 15 *bis*, A, 28 *bis*, 29 *bis*, 30 *bis*, 29 *ter* (2), 34 *bis*, 35(a).

¹⁰ See Crawford, First Report, *supra* note 4, and Add. 1–5; Second Report, UN Doc. A/CN.4/498 and Add. 1–2.

2 Some Key Issues

A *The Place of ‘Fault’ in the Draft Articles*

The centrepiece of the Draft Articles is Chapter I, which simply defines state responsibility as the attribution to the state of conduct which breaches its international obligations. Every such breach entails the responsibility of the state in question, subject to the Draft Articles but without any specified additional element such as ‘fault’ or ‘damage’.

Professor Gattini’s witty and wise remarks¹¹ about the place of fault in the Draft Articles do not call for extensive comment. For me, the essential point is this, that different primary rules of international law impose different standards, ranging from ‘due diligence’ to strict liability, and that all of those standards are capable of giving rise to responsibility in the event of a breach. I do not think that there is any general rule, principle or presumption about the place of fault in relation to any given primary rule, since it depends on the interpretation of that rule in the light of its object or purpose. Nor do I think there should be, since the *functions* of the many different areas of the law which are underpinned by state responsibility vary so widely.¹² The same remark goes for ‘absolute’ or ‘strict’ liability, and for exactly the same reasons. But — as Professor Gattini clearly shows — it is a serious error to think that it is possible to eliminate the significance of fault from the Draft Articles, and not only in relation to former Article 19. It is particularly significant in Chapter V of Part 1 and in Part 2, on each of which Professor Gattini makes perceptive suggestions.

Thus the decision to preserve Articles 1 and 3 unchanged should not be interpreted as affirming a single category or rule of ‘objective’ responsibility. Rather it puts the role of the secondary rules of state responsibility in their proper perspective. Responsibility is ‘objective’ in the sense that it is governed by international law, but the requirements for responsibility vary from one primary rule to another. If the primary rules require fault (of a particular character) or damage (of a particular kind) then they do; if not, then not. Seen in this light, the long-standing argument about fault might seem to be a false debate; but whether or not this is so, it is not a debate into which the ILC is compelled to enter, at a general level, in relation to this topic.

B *Attribution of Conduct to the State*

Professor Chinkin correctly points out that, despite the different appearance of Chapter II in the form provisionally adopted in 1998, the substance remains essentially unaltered.¹³ The dropping or merging of the ‘negative attribution’ articles

¹¹ See Gattini, ‘Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility’, this issue, at 397.

¹² In this approach I am comforted by the rather equivocal conclusions on the place of fault in the modern law of civil responsibility reached by André Tunc in his comparative survey: *La Responsabilité Civile* (2nd ed., 1989), at 97–131.

¹³ Chinkin, ‘A Critique of the Public/Private Dimension’, this issue, at 387.

(Articles 11–14) has little effect since those articles were circular in substance as well as expression. Article 11, for example, said only that the acts of private parties are not attributable to the state unless they are attributable to it under the other articles of Chapter II. Moreover Article 3 itself plays a sufficient role as the key ‘negative attribution’ article, since it specifies that attribution is one of the two requirements for responsibility. Article 15 *bis* deals with the special, though not uncommon, case of the subsequent acknowledgement or adoption of conduct, but this is a refinement, not a major change in direction. So too are the particular drafting changes.

It is said that these articles embody a ‘very traditional’ Western concept of the state and of the public sector, that this fails to take into account the interpenetration of public and private spheres, and that it reinforces an ideological preference for the public sphere which is discriminatory, in effect if not intent. To a large extent that is a criticism of the whole system of international law and indeed of the structure of thought and practice which sustains the state system. In the context of Chapter II of the Draft Articles, the responses to it are necessarily specific and even technical; they are also necessarily partial.

An initial response to the charge of ‘Western’ bias is to note that all of the criticisms of Chapter II, in terms of its rigidity and failure to cope with the changing function of the state, come from Western governments.¹⁴ Third world (Latin American, African and Asian) governments are amongst the strongest defenders of the notion of domestic jurisdiction and of the limited external responsibility of the state.

But there are more constructive ways of responding to the criticisms, as Professor Chinkin notes. From the perspective of Chapter II, the most important point is that the extent or impact of the law of state responsibility depends on the content and development of the primary rules, especially in the field of the obligations of the state with respect to society as a whole. There has been a transformation in the content of the primary rules since 1945, especially through the development of the international law of human rights. But it is the case, overall, that the classical rules of attribution have proved adequate to cope with this transformation.¹⁵ This is so because of their flexibility and because of the development, as part of the substantive body of human rights law, of the idea that in certain circumstances the state is required to guarantee rights, and not simply to refrain from intervening. Thus, for example, the state may be responsible if state law authorizes private action (e.g. excessive corporal punishment of children by parents or private schools¹⁶), or if it fails to provide proper safeguards against private abuse of persons in need of special care.¹⁷ It may be responsible if it maintains on the books unenforced laws which cause apprehension as to interference in individual lives.¹⁸ These results taken together may change the balance between the private and public sectors, but they do not involve any change in the general law

¹⁴ See e.g. UN Doc. A/CN.4/488, at 36 (Germany), at 40, 43 (United Kingdom).

¹⁵ See generally *Dipla*, *supra* note 2.

¹⁶ *Costello-Roberts v. the United Kingdom*, 19 EHRR (1998) 112.

¹⁷ *X and Y v. the Netherlands*, ECHR, Ser. A, vol. 91 (1985).

¹⁸ See e.g. *Norris v. United Kingdom*, ECHR, Ser A vol. 142 (1988) with reference to earlier cases. The Human Rights Committee applies the same principle.

of attribution, nor any *lex specialis* in the field of human rights. If international law is not responsive enough to problems in the private sector, the answer lies in the further development of the primary rules (for example, in the field of economic, social and cultural rights), or in exploring what may have been neglected aspects of existing obligations.

Other aspects of the flexibility of the classical law of attribution include Article 10, under which the fact that state agents or organs acted *ultra vires* does not preclude the state's being responsible. Thus if police or army officers commit outrages using official premises or facilities, the state will be responsible for their conduct. Moreover, the rules of responsibility do not, generally speaking, rest on a distinction between conduct *iure imperii* and conduct *iure gestionis*;¹⁹ if the state acts or fails to act, its responsibility is potentially engaged and remaining questions are left to be resolved by the interpretation and application of the relevant primary rules.

It is not relevant here (in the context of the ILC's work on state responsibility) to defend the existing primary rules, and it is certainly not necessary to do so in order to uphold the general balance struck by the law of attribution in Chapter II. But to take the subject of torture, it must be stressed that the Torture Convention is not the only manifestation of an international law against torture. Even the special attribution rule contained in Article 1 of the Torture Convention, limiting torture to conduct of state officials, is capable of a more flexible interpretation than was envisaged by its framers.²⁰ The general prohibition of torture in the international human rights treaties is not limited in the same way. Thus, under the ICCPR and its regional equivalents, the state has a positive duty not to authorize or allow torture, and this does much to attenuate the impact of the public/private distinction in that field.²¹

C Obligations of Conduct and Obligations of Result

One of the less successful aspects of the Draft Articles is the series of distinctions made between different kinds of obligations in Chapter III. In fact there are two sets of distinctions: that drawn in Articles 20, 21 and 23 between obligations of conduct, of result and of prevention, and that drawn in Article 18(4)–(6), and developed further in Articles 24–26, between continuing, composite and complex wrongful acts. These distinctions have been much criticized both by governments and in the literature. The notion of 'complex' acts was subjected to a decisive critique by Jean Salmon in 1980.²² Professor Dupuy has contributed substantially to these critiques, most recently in his piece in this symposium, where he addresses the distinction between obligations of conduct and result.²³

¹⁹ *Young, James & Webster v. United Kingdom*, ECHR, Ser. A, vol. 44 (1981).

²⁰ It also has important consequences for jurisdiction over state officials, including former heads of state: see *R v. Bow Street Metropolitan Magistrate, ex p Pinochet Ugarte (No 3)* [1999] 2 All ER 97. So there can be unforeseen gains through narrow definitions.

²¹ See generally A Clapham, *Human Rights in the Private Sphere* (1993).

²² See Salmon, 'Le fait étatique complexe: une notion contestable', 28 *AFDI* (1982) 709.

²³ See Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation with State Responsibility', this issue, at 371.

The terms 'obligation of conduct' and 'obligations of result' have become a minor but still an accepted part of the language of international law, no doubt in part because of Ago's influence. But there are serious difficulties with them, for various reasons. First, they have no consequences in the rest of the Draft Articles (unlike the distinction between completed and continuing wrongful act, which has consequences *inter alia* in relation to cessation). Secondly, as Dupuy once again shows, Articles 20 and 21 virtually reverse the distinction as it is known to some European legal systems (especially the French). It is not unusual for domestic analogies to be modified in the course of transplantation to international law. Indeed, it is unusual for them not to be. But I know of no other example where the effect of a national law analogy has been *reversed* in the course of transplantation. In French law, obligations of result are stricter than obligations of conduct. According to Ago, obligations of result were less strict because the state had a discretion as to means which it did not have with obligations of conduct. In international life, a state's power to decide what specific action is to be taken is an aspect of its sovereignty, which on a crude view is diminished by an obligation to carry out specific, defined, conduct. In Articles 20 and 21 this question of determinacy is crucial; it is because the state retains some discretion as to what it is to do or how it is to respond that obligations of result are conceived as less onerous. Thus, the value of state sovereignty subverts a standard legal concept.²⁴

Seen from the perspective of Ago's distinction, obligations of prevention are like obligations of result, in that they leave a discretion to the state concerned as to how to act. From the perspective of the original French law distinction — as Dupuy points out — obligations of prevention are (or are presumed to be) obligations of conduct, i.e. best efforts obligations rather than guarantees.

But even if all this is true, the question is: what is to be done? Pierre Dupuy asks, rightly, whether a reversion to the original understanding of the terms would not be better, and would not shed light on the many international obligations of due diligence which are more properly seen as obligations of conduct according to its original understanding. Here again, as he points out, we get involved in the question of damage. An obligation of best efforts might be breached even though the end result was not achieved (e.g. because of the intervention of a third party or just as a matter of pure luck). Or it might be breached only by the combination of the failure to act and the consequent occurrence of the result, i.e. of damage. Which of these two interpretations is the right one? In my view, it depends entirely on the primary rule. Some obligations of conduct or means may only be breached if the ultimate event occurs (i.e. damage to the protected interest); others may be breached by a failure to act even without eventual damage. I do not think international law has, or needs to have, a presumption or rule either way. It depends on the context, and on all the factors relevant to the interpretation of treaties or the articulation of custom.

If this is right, then whether to retain Articles 20 and 21, however they may be phrased, depends on whether any consequences within the Draft Articles flow from

²⁴ Cf. what nearly happened to the analogy of the 'mandate' after the *South West Africa cases (Second Phase)*, ICJ Reports (1966), at 6.

the distinction between obligations of means and of result. In French law there are consequences in terms of the proof of responsibility, but the Draft Articles, and especially Part 1, are not concerned with proof or other adjectival issues. In the absence of any consequences within the Draft Articles, it seems that Articles 20 and 21 relate only to the classification of primary rules.²⁵ And if that is true, it is very doubtful whether they have a place in Part 1.

D Obligations to the International Community as a Whole

The existence of obligations in the field of state responsibility towards the international community as a whole was affirmed by the International Court in the *Barcelona Traction* case, and must be taken as a datum. Articles 19 and 40(3) sought to translate that idea into the Draft Articles by reference to the notion of ‘international crimes of state’, but reservations as to this terminology were reflected in a footnote to Article 40, as well as in the comments of many governments.²⁶ Others continue to support the idea, in some cases strongly,²⁷ although again without necessarily being wedded to the terminology.²⁸ One difficulty with taking the idea of ‘international crimes’ further is that even its supporters are reluctant to accept a full-scale ‘punitive’ regime, involving not merely punitive damages (deliberately omitted from Article 45) but the wide range of sanctions which might well be appropriate in the case of the ‘criminal’ state. My own view remains that the idea of international crimes as expressed in the Draft Articles is unnecessary and divisive, and has the potential to destroy the project as a whole.²⁹ On the other hand, the idea that some obligations are held to the international community as a whole and not only to individual states, and that grave breaches of those obligations may attract special consequences, is important and necessary. The problem is to translate it into the Draft Articles in a way which will be generally acceptable.

The current position of the debate in the Commission is reflected in the following passage in the 1998 Report, which was adopted by consensus:

it was noted that no consensus existed on the issue of the treatment of ‘crimes’ and ‘delicts’ in the draft articles, and that more work needed to be done on possible ways of dealing with the substantial questions raised. It was accordingly agreed that: (a) without prejudice to the views of any member of the Commission, draft article 19 would be put to one side for the time being while the Commission proceeded to consider other aspects of Part One; (b) consideration should be given to whether the systematic development in the draft articles of key notions such as obligations (*erga omnes*), peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by

²⁵ As Combacau has shown: Combacau, ‘Obligations de résultat et obligations de comportement: quelques questions et pas de réponse’, in *Mélanges offerts à P. Reuter* (1981) 181.

²⁶ See UN Doc. A/CN.4/488, at 51 (Austria), at 54–55 (France), at 55–59 (Ireland), at 60–61 (Switzerland), at 61 (United Kingdom), at 61–63 (United States), at 137–138 (Germany), UN Doc. A/CN.4/492 (Japan).

²⁷ See UN Doc. A/CN.4/488, at 53–54 (Denmark on behalf of the Nordic countries), at 59 (Mongolia); UN Doc. A/CN.4/488/Add.2, at 4–5 (Italy); UN Doc. A/CN.4/492 (Greece).

²⁸ See the careful and balanced remarks of the Czech Republic: UN Doc. A/CN.4/488, at 52.

²⁹ See Crawford, First Report, *supra* note 4, at Adds. 1–3.

article 19; (c) this consideration would occur, in the first instance, in the Working Group established on this topic and also in the Special Rapporteur's second report; and (d) in the event that no consensus was achieved through this process of further consideration and debate, the Commission would return to the questions raised in the first report as to draft article 19, with a view to taking a decision thereon.³⁰

No less than four of the contributions to this symposium address the question from different perspectives.³¹ They speak for themselves, and it is not possible (or indeed necessary) to respond in detail in the space available here. I would only say that, to the extent that the notion of 'international crime' is intended to reflect a qualitative difference between breaches of obligations owed to the international community as a whole and obligations owed to one or a few states, the idea is acceptable but the language of 'crime' and 'delict' is unnecessary. On the other hand, to the extent it is intended to reflect a 'criminalization' of the state (akin to the international criminalization of individuals before the Yugoslav or Rwanda Tribunals, or to the *de facto* criminalization of Iraq, Libya and Yugoslavia in recent practice), then issues of structure and organization, of due process and dispute settlement clearly must be addressed.³² Otherwise the language of 'crime' degenerates into name-calling, and will tend only to accentuate the power of the powerful, and especially of the Permanent Members of the Security Council, acting as such or in their considerable individual capacities. To put it at the level of technique, a general code of obligations does not need to embody the penal consequences of criminal acts,³³ and if the term 'criminal' is being used in some mysterious new sense (divorced from adequate procedures for the determination of criminal responsibility), why use the term at all?

E *Circumstances Precluding Wrongfulness*

Chapter V of Part 1 enumerates six 'circumstances precluding wrongfulness', and reserves the possibility of compensation for actual loss or damage incurred with respect to four of them. In this symposium, Professor Lowe argues, first, that Chapter V adopts the approach of exculpation rather than excuse, and secondly, that (rather than releasing the state from the obligation) it would be preferable to 'maintain the obligation in force but excuse the breach of it by the state in the various special circumstances'.³⁴

Actually it is not clear precisely what approach is adopted in the Draft Articles. Circumstances precluding wrongfulness certainly do not release the state from its

³⁰ *ILC Report 1998* (UN Doc. A/53/10), at 147 (para. 331), cited by Rosenstock, 'The Fiftieth Session of the International Law Commission', 93 *AJIL* (1999) 236, at 240.

³¹ See the contributions by Professors Gaja (this issue, at 365); Dominicé (this issue, at 353); Pellet (this issue, at 425) and Abi-Saab (this issue, at 339).

³² It must be stressed that no decision has yet been taken on the form of the Draft Articles, and that they may very well not be embodied in a draft treaty. But the problem of crime is not a purely normative one; it raises institutional and other issues not suited to a declaration or similar instrument.

³³ See Tunc, *supra* note 12, at 48–50, who notes that '[d]ans les sociétés primitives, les responsabilités civile et pénale ont probablement été deux aspects d'un concept unitaire', but that '[a]ujourd'hui, la distinction des responsabilités civile et pénale ne donne lieu à aucune difficulté pratique'.

³⁴ See Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses', this issue, at 405.

obligations, in the way that termination or even suspension of a treaty would do. Whether they entirely exonerate a state acting otherwise than in conformity with its obligations is uncertain, at least as a matter of drafting. Article 1 says that ‘every internationally wrongful act of a State entails the international responsibility of that State’, which implies that acts which are not wrongful do not entail responsibility. Article 3 says that there is an internationally wrongful act when two (and only two) conditions are met: (1) attribution of conduct to the state which (2) is a breach of its international obligations. Article 16 defines a ‘breach’ as conduct ‘not in conformity’ with what is required by the obligation in question. Yet it is not the case that, where wrongfulness is precluded, the conduct in question ‘conforms’ with the obligation. It does not. The obligation requires the state not to do x, but it does x; or it requires the state to do x, which it fails to do. Nonetheless, the responsibility that would otherwise flow from that fact under Article 3 is precluded under Chapter V.³⁵

The impression is thereby given of a sort of ‘wrongfulness in the abstract’ — that is to say, of conduct which is wrongful in itself but where the responsibility of the state is precluded in the particular circumstances.³⁶ It is as if responsibility is precluded rather than wrongfulness. But this is not equally the case for each of the six circumstances in Chapter V. For example, conduct which satisfies the conditions for self-defence is lawful; indeed, under Article 51 of the Charter it is an expression of an ‘inherent right’. Conduct taken in circumstances of necessity is different, since it is performed deliberately (i.e. not under force majeure) in order to preserve the overriding interests of the state concerned. As Lowe argues, such conduct is in some sense wrongful, although there may be an excuse for it.

This suggests that at least two categories of circumstances are covered by Chapter V, and this is implicitly confirmed by Article 35, which allows the possibility of compensation to an ‘injured’ state in four of the cases covered by Chapter V but not in two others (self-defence and countermeasures). This is plainly right for self-defence, and it is equally right to allow for the possibility of compensation in cases of necessity. Why should an ‘injured’ state be required to meet the burden of action taken in the interests of the state relying on necessity? This is not the place to discuss where within this classification the other circumstances dealt with in Chapter V should fit. But there is a case for a more explicit distinction between justifications (such as self-defence) and excuses (such as necessity). That distinction may also give a better conceptual foundation to Article 35.

But to speak of justification suggests a further distinction, between what we might term the intrinsic conditions for wrongful conduct, which are part of the primary rule, and extrinsic general justifications for what would otherwise be wrongful conduct,

³⁵ There is a similar lack of precision in the formulation of Article 28, which treats that conduct of a state that has been coerced as nonetheless wrongful, despite the fact that under Article 31, at least in clear cases, coercion would amount to force majeure and preclude wrongfulness.

³⁶ A more subtle version of the same idea may arise in relation to acts which are not in conformity with what is required by an obligation, but where no state is an ‘injured state’ within the meaning of Article 40. France would resolve this by introducing the notion of ‘injured state’ into Article 1: UN Doc. A/CN.4/488, at 31–32.

such as self-defence. It is not useful to think of Article 51 of the Charter as incorporated in every primary rule. It is an external justification, applicable to some (but not all) obligations. The Draft Articles make no attempt to specify the *intrinsic* conditions for wrongfulness, since to do so would involve codifying most of international law. But it seems useful to identify the general external justifications, and subject to some particular concerns, Chapter V does so rather successfully.³⁷

This further distinction raises an issue with respect to one of the circumstances dealt with in Chapter V, *viz.*, the consent of the 'injured' state. Lack of consent is an intrinsic condition for unlawfulness in the case of many but by no means all primary rules. For example, the exercise of jurisdiction on the territory of another state with the consent of that state is perfectly lawful. Similarly, overflight over the territory of another state pursuant to an air services agreement. In such cases, to regard the consent as a circumstance precluding unlawfulness is very odd, since consent validly given in advance renders the conduct intrinsically lawful. Consent given after the event would be quite different, and would be in the nature of waiver of a responsibility which had already arisen. But Part 1 of the Draft Articles is concerned with the origin of responsibility, not with issues of waiver. This suggests that the treatment of consent in Article 30 of the Draft Articles requires further consideration. But it does not cast doubt on the distinction between external justification and excuse.

F *The Balance between Restitution and Compensation*

Dr Gray's interesting account of the relationship between restitution and compensation raises issues which clearly will have to be considered in the review of the articles in Part 2.³⁸ She stresses the priority given in Part 2 to restitution over compensation, which accords with most classical formulations, especially the famous dictum in the *Chorzow Factory* case. I agree that the matter is more difficult than it seems. In some cases (for instance, those involving the freedom of persons wrongfully detained or of state territory wrongfully occupied), restitution is indispensable; in other cases, it may not be. Whether Articles 43 and 44 strike an appropriate balance at a general level is a question to which the Commission must return, having regard to the various government comments.³⁹

But her contrast between the *Great Belt* and the *Breard* cases is perhaps overdrawn. Not only was neither case ever decided on its merits (and so one is left to speculate on where the merits lay). The two cases concerned fundamentally different questions. Finland's claim in the *Great Belt* case arose by reason of its asserted right of passage. Paraguay's claim arose from a failure of notification in relation to a procedure (the trial and punishment of Breard) which was otherwise a matter for the United States. Claims to restitution following a violation of incidental procedural rights raise very

³⁷ As indicated, e.g., by the International Court's treatment of necessity in the *Case concerning the Gabčíkovo-Nagymaros Project*, ICJ Reports (1997), at 7.

³⁸ See Gray, 'The Choice between Restitution and Compensation', this issue, at 413.

³⁹ See e.g. UN Doc. A/CN.4/488, at 107–108 (France, United States, Uzbekistan); UN Doc. A/CN.4/492 (Japan).

different issues from cases where what is denied by the respondent state is the very subject matter of the international obligation. For the issue of restitution even to arise in *Breard* it would have been necessary to show that the procedural failure had direct consequences in terms of the verdict and sentence. By contrast, the obstruction of a strait through which another state has a right of passage raises no issue of causation or directness; the question is reduced to one of breach.

No doubt there are still problems as to the choice between restitution and reparation, even in the latter type of case. For example, it might have been true that the construction of the bridge was a violation of Finland's rights of passage, and yet the social and economic advantages to Denmark of having the bridge might have far outweighed its impact on Finland, or on the environment of the Baltic. Some of these factors might well be taken into account in the application of the primary rule, but not necessarily. The question whether the injured state has an unfettered right to insist on restitution is, however, addressed in Article 43, and it is not clear that the balance struck there is flawed or defective.

Finally, I do not think that the distinction between primary and secondary rules prevents the Commission from formulating different secondary rules for different categories of primary rules. Such distinctions are drawn in Parts 1 and 2, and while they are not all equally valuable, they are not excluded in principle. What is excluded is the specification of the *content* of particular primary rules. But once it is clear that there exist rules of different types (e.g. obligations *erga omnes* as compared with obligations *erga singulis*), there is no need to specify *which* norms fall into which categories, and indeed this ought to be avoided.⁴⁰ It is sufficient that the categories exist and have consequences within the field of the Draft Articles, including consequences for the 'choice' between restitution and compensation.

3 Conclusion

It is of course too early to reach any conclusion on the second reading process, given the range of issues yet unresolved. But if the various responses made above to the contributions in this symposium have a common theme, it is the need to adhere rather closely to the distinction between primary and secondary rules. It has been suggested that this distinction is an artefact, borrowed from H. L. A. Hart's *The Concept of Law*. But there is nothing wrong with artefacts, if they are useful, and the distinction enables general principles of responsibility to be formulated without trespassing on the vast and fluctuating field of the material content of the rights and obligations of states. A principled approach to the distinction seems to be a key to developing a concise, manageable and sustainable text, one which will remain useful as the content of international law changes and develops.

⁴⁰ The only attempt to do so is Article 19(3), probably the least successful provision in the entire text.

Annex

Draft Articles of Part 1 so far provisionally adopted or proposed on second reading

(as at April 1999)

Chapter I

GENERAL PRINCIPLES⁴¹

Article 1

Responsibility of a State for its internationally wrongful acts

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

Note: Article 1 is adopted unchanged. The question of its relation to the concept of 'injured state' as defined in Article 40 will need further consideration.

Article 3

Elements of an internationally wrongful act of a State

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

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

Note: Article 3 is adopted unchanged.

Article 4

Characterization of an act of a State as internationally wrongful

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

Note: The principle of Article 4 is adopted with minor drafting amendments.

⁴¹ Parts 1 and 2 are as provisionally adopted by the Drafting Committee: see UN Doc. A/CN.4/L.569, 4 August 1998.

Chapter II

THE ACT OF THE STATE UNDER INTERNATIONAL LAW

Article 5

Attribution to the State of the conduct of its organs

1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State.

Note: 1. Article 5(1) combines into a single article the substance of former Articles 5, 6 and 7(1). The reference to a 'state organ' includes an organ of any territorial governmental entity within the state, on the same basis as the central governmental organs of that state: this is made clear by the final phrase.

2. Paragraph (2) explains the relevance of internal law in determining the status of a state organ. Characterization of an organ as such under internal law is conclusive, but on the other hand a state cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law.

Article 7

Attribution to the State of the conduct of entities exercising
elements of the governmental authority

The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question.

Note: Article 7 paragraph 1 as adopted on first reading is now incorporated in Article 5. The former paragraph (2) is retained with some drafting amendments.

Article 8

Attribution to the State of conduct in fact carried out on its instructions or under its direction or
control

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

Note: Article 8 deals with conduct carried out for a state by someone in fact acting on its behalf, e.g. by virtue of a specific authorization or mandate. In addition, Article 8 covers the situation where a person, group or entity is acting under the direction and control of a state in carrying out particular conduct.

Article 8 bis

Attribution to the State of certain conduct carried out
in the absence of the official authorities

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

Note: Article 8 bis was formerly Article 8(b). It deals with the special case of entities performing governmental functions on the territory of a state in circumstances of governmental collapse or vacuum. It is retained from the text as adopted on first reading with minor drafting amendments.

Article 9

Attribution to the State of the conduct of organs placed at its disposal by another State

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

Note: Article 9 as adopted on first reading dealt both with organs of other states and of international organizations placed at the disposal of a state. The reference to international organizations has been deleted and replaced by Article A, below. Article 9 is retained in its application to organs of states with minor drafting amendments.

Article 10

Attribution to the State of the conduct of organs acting outside their authority
or contrary to instructions

The conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise.

Note: This important principle is retained with minor drafting amendments.

Article 15

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 5 to 10.

Note: Article 15 maintains the substance of Articles 14 and 15 as adopted on first reading, with certain amendments. No attempt has been made to define the point at which an opposition group within a state qualifies as an ‘insurrectional movement’ for these purposes: this is a matter which can only be determined on the facts of each case. A distinction must be drawn between more or less uncoordinated conduct of the supporters of such a movement and conduct which for whatever reason is attributable to an ‘organ’ of that movement. Thus the language of Article 15 has been changed to refer to ‘the conduct of an organ of an insurrectional movement’. Paragraph 1 is proposed in negative form, to meet concerns expressed about the conduct of unsuccessful insurrectional movements, which is in general not attributable to the state.

Article 15 bis

Conduct which is acknowledged and adopted by the State as its own

Conduct which is not attributable to a State under articles 5, 7, 8, 8 bis, 9 or 15 shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Note: This is a new provision, based on authorities such as the Diplomatic and Consular Personnel case, dealing with the adoption or acknowledgement of wrongful conduct by a state. The phrase ‘if and to the extent that’ is intended to convey (a) that the conduct of, in particular, private persons, groups or entities is not attributable to the state unless under some other article of Chapter II, or unless it has been adopted or acknowledged; (b) that a state might acknowledge responsibility for conduct only to a certain extent, and (c) that the act of adoption or acknowledgement, whether it takes the form of words or conduct, must be clear and unequivocal.

Article A

Responsibility of or for conduct of an international organization

These draft articles shall not prejudice any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Note: This is a new provision, consequential upon the deletion of reference to international organizations in Article 9, and also to the deletion of Article 13.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION⁴²

Article 16

Existence of a breach of an international obligation

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

Note: Article 16 embodies the substance and most of the language of Article 16 as adopted on first reading, with the addition of elements from Articles 17 and 19(1), and with minor drafting amendments.

Article 18

Requirement that the international obligation be in force for the State

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

Note: Article 18 is a reformulated version of Article 18(1) as adopted on first reading. It states the basic principle of the intertemporal law as applied to state responsibility. It is not concerned with ancillary questions such as jurisdiction to determine a breach, but only with the substantive question whether the obligation was in force at the relevant time.

[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.]

Notes: This article would replace former Articles 20 and 21, concerned with the distinction between obligations of conduct and of result. Paragraph 2 treats obligations of prevention in the same way as obligations of result, thereby allowing the deletion of former Article 23.

⁴² As proposed in Second Report, *supra* note 10, at, para. 156. Following discussion in 1998, Article 19, dealing with the distinction between international crimes and international delicts, has been put to one side pending further discussion of alternative solutions.

Article 20 is placed in square brackets at this stage because it may be thought to relate to the classification of primary rules, and because it is unclear what further consequences the distinction has within the framework of the Draft Articles.

Article 24

Completed and continuing wrongful acts

1. The breach of an international obligation by an act of the State not having a continuing character occurs when that act is performed, even if its effects continue subsequently.
2. Subject to article 18, the breach of an international obligation by an act of the State having a continuing character extends from the time the act is first accomplished and continues over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and its continuance remains not in conformity with the international obligation.

Note: As proposed, Article 24 combines the essential elements of former Articles 24, 25(1) and 26, together with Article 18(3). The proposed articles avoid the use of the word 'moment'. So-called 'instantaneous' acts are rarely momentary, and it will usually not be necessary to date them to a precise moment. The essential distinction is between continuing wrongful acts and acts which, though their effects may continue, were completed at, or by, a particular time in the past. In accordance with paragraph (3), corresponding to former Article 26, breach of an obligation of prevention will normally be a continuing wrongful act, unless the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), or the obligation in question has terminated. Both qualifications are intended to be covered by the phrase 'and its continuance remains not in conformity with the international obligation'.

Article 25

Breaches involving composite acts of a State

1. The breach of an international obligation by a composite act of the State (that is to say, a series of actions or omissions specified collectively as wrongful in the obligation concerned) occurs when that action or omission of the series occurs which, taken with its predecessors, is sufficient to constitute the composite act.
2. Subject to article 18, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act and for so long as such actions or omissions are repeated and remain not in conformity with the international obligation.

Note: Article 25 incorporates the substance of former Articles 25(2) and 18(4), dealing with 'composite acts'. However, the notion of composite acts is limited to composite acts defined as such in the relevant primary norm. The proviso 'Subject to article 18' is intended to cover the case where the relevant obligation was not in force at the beginning of the course of

conduct involved in the composite acts but came into force thereafter. In such case the 'first' of the acts or omissions in the series, for the purposes of state responsibility, is the first occurring after the obligation came into force. But this need not prevent a court taking into account earlier acts or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches). The notion of 'complex acts', formulated in Articles 18(5) and 25(3), has been deleted.

Article 26 bis

Exhaustion of local remedies

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

Note: Article 22 as adopted on first reading dealt with the exhaustion of local remedies in the framework of the concept of 'complex acts'. In all cases where the exhaustion of local remedies applied, the wrongful act was taken to include the failure of the local remedy. Although there may be cases where the wrongful act is constituted by the failure of the local remedy, there are other cases (e.g. torture) where this is not so, and for this and other reasons the notion of a 'complex act' has been deleted. Nonetheless, it is desirable to make it clear in Chapter III that the occurrence of a breach of obligation is without prejudice to any requirement to exhaust local remedies that may exist under general international law. The more precise formulation of the local remedies rule can be left to be dealt with by the Commission under the topic of Diplomatic Protection.

Chapter IV⁴³

RESPONSIBILITY OF A STATE FOR THE ACTS OF ANOTHER STATE

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.

Notes: 1. Article 27 as adopted on first reading covered all aid or assistance 'rendered for the commission of an internationally wrongful act carried out by' the assisted state. Such aid or assistance was internationally wrongful even if, taken alone, it would not have amounted to a breach of an international obligation. As now proposed, Article 27 would limit the scope of

⁴³ As proposed in Second Report, *supra* note 10, Add. 1, at para. 212.

responsibility for aid or assistance in three ways. First, the relevant state organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted state internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so, and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting state itself. The first two limitations correspond to the intention of Article 27 as adopted on first reading; the third is new.

2. In addition, Article 27 now covers the situation previously dealt with under Article 28 (1), viz., where one state directs and controls another to breach its international obligation to a third state. The same qualifications apply to the conduct of a state in directing and controlling wrongful conduct as apply to aid or assistance, that is to say, the directing state must be aware of the circumstances making the conduct of the assisted state internationally wrongful, and the completed act must be such that it would have been wrongful had it been committed by the directing state itself.

Article 28

Responsibility of a State for coercion of another State

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

Note: Article 28(2) as adopted on first reading dealt with coercion exercised by one state with a view to procuring conduct by another state, in breach of the latter's international obligations. It was not necessary that the coercion should have been independently unlawful, although in most cases it would be. This provision has been retained in a separate article with minor drafting amendments.

Article 28 bis

Effect of this Chapter

This chapter is without prejudice to:

- (a) the international responsibility, under the other provisions of the present articles, of the State which committed the act in question;
- (b) any other ground for establishing the responsibility of any State which is implicated in that act.

Note: Article 28(3) as adopted on first reading provided that that article was without prejudice to the responsibility of the state which has actually committed the wrongful act. This is equally true of Article 27, and the savings clause has accordingly been applied to Chapter IV as a whole. In addition, it is made clear that Chapter IV is without prejudice to the application of any other rule of international law defining particular conduct as wrongful.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS⁴⁴

Note: Article 29 dealt with consent validly given as a circumstance precluding wrongfulness. In many cases, the consent of a state, given in advance of an act, is sufficient to legalize the act in international law, for example, consent to overflight over territory, etc. In other cases consent given after the event may amount to a waiver of responsibility, but will not prevent responsibility from arising at the time of the act. Thus, either consent is part of the defining elements of a wrongful act, or it is relevant in terms of the loss of the right to invoke responsibility. In neither case is it a circumstance precluding wrongfulness, and accordingly Article 29 has been deleted.

Article 29 bis

Compliance with a peremptory norm (jus cogens)

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

Note: Just as a peremptory norm of international law invalidates an inconsistent treaty, so it must have the effect of excusing non-compliance with an obligation in those rare — but nonetheless conceivable — circumstances where an international obligation, not itself peremptory in character, is overridden by an obligation which is peremptory. For example, a right of transit or passage across territory could not be invoked if the immediate purpose of exercising the right was unlawfully to attack the territory of a third state.

Article 29 ter

Self-defence

- (1) The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.
- (2) Paragraph 1 does not apply to international obligations which are expressed or intended to be obligations of total restraint even for States engaged in armed conflict or acting in self-defence, and in particular to obligations of a humanitarian character relating to the protection of the human person in time of armed conflict or national emergency.

Note: Paragraph (1) is unchanged from that provisionally adopted on first reading. Paragraph (2) has been added, to draw a distinction between those obligations which constrain even states acting in self-defence (especially in the field of international humanitarian law) and those which, while they may be relevant considerations in applying the criteria of necessity and proportionality which are part of the law of self-defence, are not obligations of 'total restraint'. The language of paragraph (2) adopts that of the International Court in the Advisory Opinion concerning Threat or Use of Nuclear Weapons, ICJ

⁴⁴ As proposed in *ibid.*, Add. 2, at para. 356.

Reports (1996), at 242 (para. 30). The additional phrase specifying obligations of a humanitarian character draws on Article 60 of the Vienna Convention on the Law of Treaties and is intended to single out, by way of example, the most important category of these obligations of total restraint. The location of this article is changed to bring it into relation with Articles 29 bis and 30 and to emphasize the importance of the 'inherent right' of self-defence in the system of the United Nations Charter.

Article 30

Countermeasures in respect of an internationally wrongful act

[The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.]

Note: Legitimate countermeasures preclude the wrongfulness of the conduct in question, vis-à-vis the state whose wrongful conduct has prompted the countermeasures. However the drafting of Article 30 depends on decisions still to be taken on second reading in relation to the inclusion and formulation of the articles in Part 2 which deal in detail with countermeasures. Article 30 is retained in square brackets pending consideration of the issue of countermeasures as a whole.

Article 30 bis

Non-compliance caused by prior non-compliance by another State

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

Notes: 1. Article 30 bis is new (though earlier versions were proposed by Fitzmaurice and Riphagen). It reflects the principle expressed in the maxim exceptio inadimplenti non est adimplendum (or in the case of treaty obligations, exceptio inadimpleti contractus). It bears a certain relationship with countermeasures, in the sense that the later act (otherwise wrongful) of state A is conditioned upon and responds to the prior wrongful act of state B. But in the case of the exceptio, the link between the two acts is immediate and direct. As expressed by the Permanent Court in the Chorzów Factory case PCIJ Series A, No. 9 (1927), at 31, the principle only applies where one state has, by its unlawful act, actually prevented the other from complying with its side of the bargain, i.e. from complying with the same or a related obligation. In other words the link is a direct causal link, and certainly not a question of one breach provoking another by way of reprisal or retaliation.

2. Because of this direct causal link between the two acts, it is not necessary to include the various restrictions on legitimate countermeasures which apply under Part 2 of the Draft Articles as adopted on first reading. The principle is a very narrow one, with its own in-built limitations. In particular it only applies if the prior breach is established, if it is causally

linked to the later act, and if the breaches concern the same or related obligations. For this purpose an obligation may be related either textually (as part of the same instrument) or because it deals with the same subject-matter or the same particular situation.

3. Consideration was given to including in Article 30 bis the slightly wider situation of synallagmatic obligations, i.e. obligations (usually contained in a treaty) of such a character that continued compliance with the obligation by one state is conditioned upon similar compliance by the other state. In such a case there is no direct causal link between non-performance by state A and non-performance by state B. It remains possible for state B to comply, but to do so would contradict the expectations underlying the agreement. An example would be a ceasefire agreement, or an agreement for exchange of prisoners or mutual destruction of weapons. However, it is thought that this situation is adequately dealt with by a combination of other rules: treaty interpretation, the application of countermeasures, and the possibility of suspension or even termination of the treaty for breach.

Article 31

Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure. For the purposes of this article, force majeure is the occurrence of an irresistible force or an unforeseen external event beyond the control of the State making it materially impossible in the circumstances to perform the obligation.
2. Paragraph 1 does not apply if:
 - (a) the occurrence of force majeure results, either alone or in combination with other factors, from the wrongful conduct of the State invoking it; or
 - (b) the State has by the obligation assumed the risk of that occurrence.

Note: 1. Article 31 was originally entitled 'Force majeure and fortuitous event', but by no means all cases of fortuitous event qualify as excuses, whereas force majeure as defined does sufficiently cover the field. The title to Article 31 has been correspondingly simplified, without loss of content in the article itself.

2. As originally drafted, paragraph (1) also covered cases of force majeure which made it impossible for the state 'to know that its conduct was not in conformity with' the obligation. This added a confusing subjective element, and appeared to contradict the principle that ignorance of wrongfulness (i.e. ignorance of law) is not an excuse. The words were intended to cover cases such as an unforeseen failure of navigational equipment causing an aircraft to intrude on the airspace of another state. The words 'in the circumstances' are intended to cover this situation without the need to refer to knowledge of wrongfulness.

3. As adopted on first reading, paragraph 2 provided that the plea of force majeure 'shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility'. But force majeure is narrowly defined in paragraph 1, and this additional limitation seems to go too far in limiting invocation of force majeure. Under the parallel ground for termination of a treaty in Article 61 of the Vienna Convention on the Law of Treaties, material impossibility can be invoked 'if the impossibility is the result of a breach by

that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty'. By analogy with this provision, paragraph 2(a) excludes the plea of force majeure in cases where the state has produced or contributed to producing the situation through its own wrongful conduct. In addition it is conceivable that by the obligation in question the state may have assumed the risk of a particular occurrence of force majeure. Paragraph 2(b) excludes the plea of force majeure in such cases.

Article 32

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question reasonably believed that there was no other way, in a situation of distress, of saving that person's own life or the lives of other persons entrusted to his or her care.
2. Paragraph 1 does not apply if:
 - (a) the situation of distress results, either alone or in combination with other factors, from the wrongful conduct of the State invoking it; or
 - (b) the conduct in question was likely to create a comparable or greater peril.

Note: This article is substantially as proposed on first reading. Certain changes have however been made. First, the state agent whose action is in question must have reasonably believed, on the information available or which should have been available, that life was at risk. The previous standard was entirely objective, but in cases of genuine distress there will usually not be time for the medical or other investigations which would justify applying an objective standard. Secondly, in parallel with the proposed Article 31(2)(a), a new version of Article 32(2)(a) is proposed, and for substantially the same reasons. It will often be the case that the state invoking distress has 'contributed' even if indirectly to the situation, but it seems that it should only be precluded from relying on distress if that state has contributed to the situation of distress by conduct which is actually wrongful. Thirdly, the requirement that the distress be 'extreme' has been deleted. It is not clear what it adds, over and above the other requirements of Article 32.

Article 33

State of necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless:
 - (a) the act is the only means of safeguarding an essential interest of that State against a grave and imminent peril; and
 - (b) the act does not seriously impair:
 - (i) an essential interest of the State towards which the obligation existed; or
 - (ii) if the obligation was established for the protection of some common or general interest, that interest.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

- (a) the international obligation in question arises from a 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.

Note: Article 33 corresponds to the text adopted on first reading, with certain drafting amendments. For the most part these are minor in character, but three changes should be noted. First, Article (1)(b) has been reformulated to make it clear that the balance to be struck in cases where the obligation is established in the general interest (e.g. as an obligation erga omnes) is that very interest, and not the particular interest of the state which happens to complain (e.g. Ethiopia and Liberia in the South West Africa cases). Secondly, paragraph (2)(b) is no longer confined to treaty obligations. Thirdly, paragraph (2)(c) uses the phrase 'materially contributed', since in the nature of things the invoking state is likely to have contributed in some sense to the situation, and the question is whether that contribution is sufficiently material to disentitle it to invoke necessity at all.

Article 34

Self-defence

Note: See now Article 29 ter.

Article 34 bis

Procedure for invoking a circumstance precluding wrongfulness

- (1) A State invoking a circumstance precluding wrongfulness under this Chapter should, as soon as possible after it has notice of the circumstance, inform the other State or States concerned in writing of it and of its consequences for the performance of the obligation.
- [(2) If a dispute arises as to the existence of the circumstance or its consequences for the performance of the obligation, the parties should seek to resolve that dispute:
 - (a) in a case involving article 28 bis, by the procedures available under the Charter of the United Nations;
 - (b) in any other case, in accordance with Part 3.]

Note: Chapter V as adopted on first reading made no provision for the procedure for invoking circumstances precluding wrongfulness, or for settlement of disputes. The latter issue will be discussed in relation to Part 3 of the Draft Articles, and paragraph (3) of Article 34 bis is included pro memoria, pending further discussion of issues of dispute settlement. However, if a state wishes to invoke a circumstance precluding wrongfulness, it is reasonable that it should inform the other state or states concerned of that fact and of the reasons for it, and paragraph (1) so provides.

Article 35

Consequences of invoking a circumstance precluding wrongfulness

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

- (a) to the cessation of any act not in conformity with the obligation in question, and subsequent compliance with that obligation, if and to the extent that the circumstance precluding wrongfulness no longer exists;
- (b) in the case of articles 32 and 33, to the question of financial compensation for any actual harm or loss caused by that act.

Notes: 1. Article 35 as adopted on first reading contained a reservation as to compensation for damage arising from four of the circumstances precluding wrongfulness, viz. under Articles 29 (consent), 31 (force majeure), 32 (distress) and 33 (state of necessity). Article 29 is recommended for deletion (and listing it in Article 35 was questionable in any event). In the case of force majeure, the invoking state subjected to external forces making it materially impossible to perform the obligation, and it has not assumed the sole risk of non-performance. But in the case of Articles 32 and 33 there is at least a measure of choice on the part of the invoking state, whereas the state or states which would otherwise be entitled to complain of the act in question as a breach of an obligation owed to them have not contributed to, let alone caused, the situation of distress or necessity, and it is not clear why they should be required to suffer actual harm or loss in the interests of the state invoking those circumstances. Accordingly Article 35 has been retained in relation to distress and necessity. Without entering into detail on questions of compensation, its language has been modified slightly to make it less neutral and anodyne, as well as to avoid technical difficulties with the terms ‘damage’ and ‘compensation’.

2. In addition, Article 35(a) has been added to make it clear that Chapter V has a merely preclusive effect. When and to the extent that a circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming it is still in force) will again have to be complied with, and the state whose earlier non-compliance was excused must act accordingly.