2. RESPONSIBILITY OF STATES FOR INTERNATIONAL WRONGFUL ACTS

I. BACKGROUND: THE ILC'S WORK ON STATE RESPONSIBILITY

A. ILC work till 1996

1. The topic of "State Responsibility" was among the first topic identified for codification by the International Law Commission (ILC) and has been on its agenda of the since 1949. In response to General Assembly resolution 799(VIII) of 7 December 1953, the ILC begun the study of State responsibility and appointed F.V. Garcia Amador as Special Rapporteur for the topic. His successor Mr. Roberto Ago who took over as the Special Rapportuer in the year 1963, submitted eight reports to the ILC.

2. In the year 1975, the ILC at its 27th Session adopted a general plan for the Draft Articles on "States Responsibility" which envisaged the following structure:

Part one:	would concern the origin of international responsibility,
Part two:	concerns the content, forms and degrees of international responsibility,
Part three:	subject to a decision to be made by the ILC, could concern the question of the settlement of disputes and the implementation of international responsibility.

3. Between 1979 and 1996, the ILC received reports from Special Rapporteurs Mr. Willam Riphagen (1979-1986); Mr. Goetano Arangio Ruiz (1987-1996) and finally Special Rapporteur Mr. James Crawford since 1997.

B. ILC work since 1996

4. At the 48th Session in 1996 the Commission adopted, on first reading, an entire set of Draft Articles dealing with a range of legal issues, including the elements constituting an internationally wrongful act, the definition of an internationally wrongful act as an international crime or delict, the consequences resulting from such an act, and the defences or excuses that could preclude wrongfulness, such as distress, necessity and self-defence. The 1996 Draft Articles also defined the rights of a State that is injured, dealt with rights to reparation (by way of restitution, compensation or satisfaction), and provided for the possibility of resort to countermeasures. The Commission then transmitted the Draft Articles to Governments for comments and observations.

5. At the 49th Session (1997), the Commission established a Working Group on State Responsibility to address matters dealing with the second reading of the topic.[1] The Commission appointed a new Special Rapporteur, Professor James Crawford, and

[1] See *Official Records of the General Assembly, Fifty-First Session, Supplement No*. 10 (A/51/10).

decided to give appropriate priority to the topic in its future work, so as to complete its second reading of the Draft Articles by the end of the next quinquennium (i.e. in 2001).

6. At the 50th Session in 1998, the Special Rapporteur introduced his First Report to the Commission. This dealt with the notion of State crime and reviewed Chapters I (General Principles) and II (the "Act of the State" under International Law) of Part One of the Draft Articles. The Second Report in 1999 dealt with Chapters III (Breach of an International Obligation), IV (Implication of a State in the Internationally Wrongful Act of Another State) and V (Circumstances Precluding Wrongfulness). A provisional second reading of the Draft Articles was undertaken by the ILC Drafting Committee between 1998 and 2000. It consisted of a thorough review of the provisions adopted in 1996 on the basis of developments in State practice, jurisprudence and the comments by Governments made either to the Commission or in the Sixth Committee of the General Assembly. The Drafting Committee reported to the plenary and finally on 31 May 2001, ILC considered and adopted a second reading the Draft Articles on "Responsibility of States for international wrongful acts". Following consideration of further comments and suggestions made by Governments and others, the Draft Articles and Commentaries were adopted by the ILC in August 2001. This marks the culmination of an exercise that lasted over a span of almost five decades.

C. Action taken by the ILC

7. In accordance with Article 23 of its Statute, the ILC decided to recommend to the UN General Assembly that it take note of the draft Articles on Responsibility of States for Internationally Wrongful Acts in a resolution, and that it annex the draft Articles to the resolution. Further, it was recommended that the General Assembly consider, at a later stage, the possibility of convening an international conference of plenipotentiaries to examine the draft Articles with a view to adopting a convention on the topic.

II. ACTION TAKEN BY THE UNITED NATIONS GENERAL ASSEMBLY (UNGA)

8. At its fifty-sixth session, in 2001, the General Assembly, under the item entitled "Report of the International Law Commission on the work of its fifty-third session", considered chapter IV of the report of the Commission, which contained the Draft Articles on Responsibility of States for Internationally Wrongful Acts. At that session, the UN General Assembly adopted the resolution on this topic. By Resolution 56/83 of 12 December 2001, the General Assembly took note of the Articles and recommended them to the attention of Governments, annexing the text of the Articles to the Resolution. The resolution takes note of the Articles on Responsibility of States for Internationally Wrongful Acts, presented by the International Law Commission, and commends them to attention of government without prejudice to the question of the future adoption or other appropriate actions.

9. The General Assembly also resolved to include on its Agenda for its 59th Session in 2004-2005 an item entitled "Responsibility of States for Internationally Wrongful

Acts". At its fifty-ninth session, the General Assembly requested the Secretary-General: to invite Governments to submit their written comments on any future action regarding the Articles; to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the Articles and to invite Governments to submit information on their practice in that regard; and to submit that material well in advance of its Sixty-Second Session.[2] Futher, by a *note verbale* dated 29 December 2004, the Secretary-General invited Governments to submit, no later than 1 February 2007, their written comments on any further action regarding the State responsibility Articles and information regarding decisions of international courts, tribunals and other bodies referring to the Articles no later than 1 February 2007.

10. The compilation of decisions of international courts, tribunals and other bodies referring to the Articles and the comments from the Governments are compiled and reproduced in documents A/62/62 and A/62/63 respectively. In preparing the compilation, the Secretariat reviewed the decisions of more than 20 international courts, tribunals and other bodies[3] and found 129 instances in which international courts, tribunals and other bodies have referred in their decisions to the State responsibility Articles and commentaries, including the draft Articles provisionally adopted from 1973 to 1996, the draft Articles adopted on first reading in 1996 and the Articles finally adopted in 2001. The following Governments submitted their written comments and information: Czech Republic, Germany, Kuwait, Norway, on behalf of the Nordic countries, Portugal and the United Kingdom of Great Britain and Northern Ireland.[4]

III. ARTICLE ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS: AN OVERVIEW

11. The following pages contained an overview and assessment of the Draft Articles as finally adopted by the ILC. The Articles are arranged under four parts and contain 59 Articles. A synoptic view of the Draft Articles' structure as presented below, would

[2] UNGA Resolution 59/35.

[3] The ICJ; the International Tribunal for the Law of the Sea; the WTO Appellate Body; international arbitral tribunals (under annex VII of the UN Convention on the Law of the Sea, the ICSID Convention, the Additional Facility Rules of ICSID, NAFTA, MERCOSUR and other international arbitral Tribunal); panels established under GATT and WTO; the Iran-US Claims Tribunal; the UN Compensation Commission; the International Tribunal for the Former Yugoslavia; the International Criminal Tribunal for Rwanda; the Special Court for Sierra Leone; the UN Administrative Tribunal; the ILO Administrative Tribunal; the World Bank Administrative Tribunal; the IMF Administrative Tribunal; the European Court of Justice; the European Court of Human Rights; the Inter-American Court of Human Rights; universal human rights and humanitarian law bodies, both United Nations Charter based and treaty-based; the European Commission of Human Rights; the Inter-American Commission of Human Rights; and the African Commission on Human and Peoples' Rights. The Secretariat reviewed the official compilations of decisions prepared by the various bodies, information provided on their websites and secondary sources. See A/62/62.

[4] These comments are reproduced below A/62/63.

enhance the appreciation and understanding of the conceptual framework that underlies the Ilk's Draft.[5]

Part One: The Internationally Wrongful Act of a State

Chapter I	-	General Principles;
Chapter II	-	Attribution of conduct to a State;
Chapter III	-	Breach of an international obligation;
Chapter IV	-	Responsibility of a State in connection with the act of another State;
Chapter V	-	Circumstances precluding wrongfulness

Part Two: Content of the International Responsibility of a State

Chapter I	-	General Principles;
Chapter II	-	Reparation for injury;
Chapter III	-	Serious breaches of obligations under peremptory norms of general international law.

Part Three: The Implementation of the International Responsibility of a State

Chapter I	-	Invocation of the responsibility of a State
Chapter II	-	Countermeasures.

Part Four: General Provisions

TITLE

12. The issue of the title of the Draft Articles has not been previously discussed at any point during the second reading. The Drafting Committee was concerned with the possibility that the title "State responsibility" was not sufficiently clear to distinguish the topic from the responsibility of the State under internal law. Therefore, it was agreed that the title to the Draft Articles should read as:

"*Responsibility of States for Internationally Wrongful Acts*"

PART ONE: THE INTERNATIONAL WRONGFUL ACTS OF A STATE

Chapter I: General Principles

13. Article 1 states the fundamental principle that "every internationally wrongful act of a State entails the international responsibility of that 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.[6]

These two criteria are a reaffirmation of the position that exists under customary international law.

[5] For the purpose of this report, it may be clarified that the following paragraphs seek only to describe the structure and content of the draft Articles.
[6] Article 2.

14. Article 3 stipulates that the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Chapter II: Attribution of conduct to a State

15. As seen earlier, an internationally wrongful act of a State exists when conduct consisting of an act or omission is attributable to the State under international law. The State, being a metaphysical entity, responsibility could arise only from the wrongful act/omission of a State's organ or individuals performing certain acts.

16. Article 4 thus states that the conduct of any State organ shall be considered an act of that State under international law. An organ includes any person or entity, which has that status in accordance with the internal law of the State. This characterization of the conduct of the organ as an act of the State is irrespective of:

- 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.

17. Articles 5 to 11 lay down the general rules as to attribution of conduct to the State, which may be enumerated as follows:

(a) *Conduct of organs of a State*: The conduct of a person/entity, *which is not an organ of the State under Article 4, but which is empowered by the law of that State to exercise elements of the governmental authority*[7] shall be considered an act of the State. This proposition is valid provided that the person/entity is acting in that capacity in the particular instance.[8]

(b) *Conduct of organs placed at the disposal of a State by another State*: The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law, if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.[9]

(c) *Conduct of an insurrectional or other movement*: The conduct of:

(i) an insurrectional movement which becomes the new government of a State;
(ii) 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 that State under international law.[10]

[7] Examples of such entities are the exercise of immigration authority by an airline or certain licensing functions.
[8] Article 5.
[9] Article 6.
[10] Article 10.

18. While the above-mentioned provisions, at a general level, deal with the attribution of a conduct by an organ to the State, this chapter further contains a group of provisions that clarify the legal consequences arising from acts by official authorities in situations where they act in excess or absence of authority or in contravention of instructions.

(a) *Conduct directed or controlled by a State*: Article 8 lays down the basic postulate that the conduct of a person or group of persons shall be considered an act of a State under international law, if such person or group is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.

19. The following two provisions can be seen as a corollary to the above postulate:

(i) The conduct of an organ of a State or of a person/entity empowered to exercise elements of governmental authority shall be considered an act of the State if the organ, person or entity acts in that capacity, *even if it exceeds its authority or contravenes instruction.*

The purpose of this provision is to cover negligent acts, acts *ultra vireos* or abuse of authority in situations where the individuals in question are acting within the scope of their authority, i.e. "in that capacity". The key aspect of the provision is not that such persons or entity were acting in excess of their authority, but the emphasize is rather the capacity that they were acting in, when they committed such acts.

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

As to the terms "absence or default", the first (absence) covers the situation where the official authorities do exist, but are not physically present at that time, and the second (default) covers cases where they are incapable of taking any action. As regards the final phrase, "in circumstances such as to call for the exercise of those elements of authority," it covers the case, for example, where a group of individuals, not constituted as organs of the State, take over the running of an airport and undertake the responsibility of dealing with immigration during or in the immediate aftermath of a revolution.

20. Where a conduct is not attributable to a State under the provisions above-mentioned, then Article 11 stipulates, to the extent that the State acknowledges and adopts the conduct in question as its own, the conduct shall be considered an act of that State under international law.

Chapter III: Breach of an international obligation

21. The opening provision to this Chapter, Article 12 entitled "Existence of a breach of an international obligation," spells out the content of the breach of an international obligation in the following terms:

> There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, *regardless of its origin or character.*

22. The significance of this phrase "regardless of its origin or character" is to emphasize that international law has a single regime of responsibility, i.e. it does not matter that the "origin" of an obligation is a bilateral or multilateral treaty, a unilateral act, a rule of general international law, a local custom or a general principle of law. A breach is a breach, whatever the source of the obligation.

23. Articles 13, 14 and 15 deal with the inter-temporal elements of the breached obligation. Article 13 states that an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs, i.e. for responsibility to exist, the breach must occur at a time when the obligation is in force for the State.

24. Articles 14 and 15 seek to fine-tune the inter-temporal principles. The importance of addressing temporal questions lies in the fact that they apply both to the determination of the moment when the existence of breach of an international obligation is established and to the determination of the duration or the continuance in time, of the breach. Various consequences flow from such determinations of the time duration of an act and may thus influence questions related to the jurisdiction of tribunals, the nationality of claims, etc.

25. For purposes of such determinations, the ILC Articles distinguishes between "completed" and "continuing" wrongful acts.

26. **Completed acts:** As regards completed or instantaneous acts, Article 14, paragraph 1 stipulates:

> The breach of an international obligation by an *act of a State not having a continuing character* occurs at the moment when the act is performed, even if its effects continue.
>
> Thus in case of instantaneous or completed acts, for example, the shooting down of a civilian airliner, their effects may last for a long time (and the effects may be relevant in judging the seriousness of the act). But the continuation of those effects has no bearing on the duration of the State act that caused them - an act that will in any event remain *an act that does not extend in time.*[11]

27. **Continuing acts:** Paragraph 2 of Article 14 deals with breaches having a continuing character. Thus:

> The breach of an international obligation by an *act of a State having a continuing character* extends over the entire period during which the act continues and remains not in conformity with the international obligation.

28. A "continuing act"[12] is one which proceeds unchanged over a given period of time: in other words, an act which, after its occurrence, continues to exist as such and not merely in its effects and consequences. Thus a conduct having commenced some time in the past, and which constituted a breach at that time, can continue and give rise to a continuing wrongful act in the present.

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[11] The Drafting Committee clarified that the question as to when the breach actually occurs is intentionally not covered in the Article, as this would depend on the facts and on the content of the primary obligation.

[12] For an informative analysis of the basis and utility of this distinction, see Second report on State Responsibility (by Special Rapporteur Mr. James Crawford) A/CN.4/498 at pp. 42-49.

29. **Obligations of prevention:** Paragraph 3 of Article 14 deals with what are eventually termed as obligations of prevention.[13] It states that:

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

30. **Composite acts:** A composite act is defined as "an act of the State composed of a series of individual acts of the State committed in connection with different matters". They comprise a sequence of acts which, taken separately, may be lawful or unlawful but which are inter-related by having the same intention, content and effects, although relating to different specific cases. Examples include a series of administrative decisions adversely affecting nationals of a particular State which establishes a pattern of discrimination, or a refusal to allow those nationals to participate in economic activity, contrary to an international obligation of the host State. Collectively such acts might be unlawful, whether or not the individual decisions are.

31. Paragraph 1 of Article 15 accordingly lays down that:

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

32. It may be noted that some primary rules in terms require the repetition of conduct, e.g. systematic breaches of human rights. In such cases, the first act in the series does not suffice to establish that a wrongful act has been committed, but if it is followed by other similar acts, the wrongful conduct constituted by the series of acts will be regarded as commencing with the first. This principle finds articulation in paragraph 2 of this Article, in the following form:

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

Chapter IV: Responsibility of a State in connection with the act of another State

33. Articles 16, 17 and 18 lay down the responsibility of a State which

- aids or assists (Article 16); directs and controls (Article 17); and coerces (Article 18)

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

> "Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach. And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features."

[13] Examples of obligations of prevention include obligation to prevent transboundary damage by air pollution; obligation to prevent intrusions onto diplomatic premises.

another State in the commission of an internationally wrongful act. The responsibility of the assisting or controlling State would be attracted only if:

(a) That State does so with *knowledge* of the circumstances of the internationally wrongful act[14]; and
(b) The act would be internationally wrongful if committed by **that** State.

Chapter V: Circumstances Precluding Wrongfulness

34. This Chapter deals with general "excuses" which are available to States in respect of conduct, which would otherwise constitute a breach of an international obligation. The Chapter sets out the following as circumstances precluding wrongfulness:

- Consent
- Self defence
- Counter measures
- *Force majeure*
- Distress
- Necessity
- Compliance with a peremptory norm

35. Article 20 on '**Consent**' stipulates that valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

36. Article 22 on '**Self-defence**' precludes the wrongfulness of an act of a State, "if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations". Preclusion of wrongfulness as stated above does not extend to obligations that are intended to be obligations of 'total restraint' even for States engaged in armed conflict or acting in self-defence. This exception is aimed at preserving certain obligations relating to international humanitarian law and non-derogable human rights even in self-defence. Similarly, lawfulness implies compliance with the requirements of proportionality and of necessity.

37. Article 23 relating to "**Countermeasures in respect of an internationally wrongful act**", provides that the wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State. Countermeasures can be validly resorted to by States in accordance with the provisions as set out in Chapter II of Part Three of these Draft Articles on State Responsibility.

38. Article 24 dealing with "***force majeure***" precludes the wrongfulness of an act of a State if the act is due to *force majeure*. *Force majeure* is defined as "the occurrence of an irresistible force or an unforeseen external event beyond the control of the State making it

[14] The Drafting Committee noted in particular that the knowledge requirement was essential, as a narrow formulation of the Chapter was the only approach acceptable to many States.

materially impossible in the circumstances to perform the obligation". However, the excuse of *force majeure* does not apply if:

(a) the situation of *force majeure* results from the conduct of the State invoking it; or
(b) the State has by the obligation assumed the risk of that situation occurring.

39. Article 25 on "**Distress**" precludes the wrongfulness of an act of a State, 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. Distress concerns a situation where a person was responsible for the lives of other persons in his or her care (e.g. the Captain of a State-owned ship). Article 25 is a case of progressive development wherein the scope of distress has 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. However distress cannot be invoked as a valid ground of defence if the situation of distress is due to the conduct of the State invoking it; or the act in question is likely to create a comparable or greater peril.

40. Article 26 relating to "**Necessity**" as a ground precluding wrongfulness can be invoked only if "the act is the only means of safeguarding an essential interest of that State against a grave and imminent peril". Yet another concurrent condition for invoking necessity is that the act must not 'seriously impair an essential interest of the State towards which the obligation exists; or of the international community as a whole.' However, necessity may not be invoked if the obligation in question excludes the possibility of invoking necessity; or the invoking State has itself contributed to the situation.

41. Article 26 *bis* on "**Compliance with peremptory norms**" stipulate that the wrongfulness of an act of a State is precluded if the act is required in the circumstances by a peremptory norm of general international law.

42. Article 27 on "**Consequences of invoking a circumstance precluding wrongfulness**" deals with two issues, namely:

(a) that circumstances precluding wrongfulness do not as such affect the underlying obligation so that if the circumstances no longer exists the obligation resumes its operation;
(b) the question of compensation for any material loss caused by the act invoked as a circumstance precluding wrongfulness

43. It may be noted that this provision is largely general and expository in nature. The proposition articulated in (a) deals with an issue that had been carefully addressed by the ICJ in the *Gabcikovo-Nagymaros Project Case.* Beyond this general formulation, the Commission decided against providing substantive treatment, for example on questions of termination of the underlying obligation, and against discussing the effects of

circumstances precluding wrongfulness on the obligation in question, which relates to other areas of law such as that covered by the Vienna Convention on the Law of Treaties in the treaty context.

44. As regards (b), some States have criticized this formulation saying that where there was no element of fault, as in the case of self-defence, there was no room for compensation except as provided by the primary rules in respect of incidental injury to third parties .It was also argued that since no regime on compensation is fully established under the Draft Articles, the provision should be deleted. However, for the same reason, an alternative proposal argued for providing more detail on the regime relating to compensation. The Special Rapporteur in his report (1999 Report) had strongly argued 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. Against this backdrop, the Commission took a middle path whereby without going into more details it sought to ensure that as a matter of equity, the State invoking the circumstance precluding wrongfulness would bear the costs. Accordingly, the formulation as finally adopted in the draft Articles states that: "The invocation of a circumstance precluding wrongfulness …is without prejudice to the question of compensation for any material loss caused by the act in question".

PART TWO: CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I – General Principles

45. **Legal consequences of an internationally wrongful act**: The international responsibility of a State which arises from an internationally wrongful act in accordance entails legal consequences as set out in this Part i.e. Part Two of the draft Articles."

46. *Duty of continued performance*: Article 29 stipulates that the legal consequences of an internationally wrongful act under Part Two do not affect the continued duty of the responsible State to perform the obligation breached.

47. *Cessation*: The two fold consequences of an internationally wrongful act relate to:

(a) the future-oriented consequences of cessation and assurances and guarantees; and
(b) the past-oriented consequence of reparation.

48. This chapter thus addresses these two aspects. Article 30 on 'cessation and non-repetition' obliges the State responsible for the internationally wrongful act: (a) to cease the act, if it is continuing; and (b) if circumstances so require, to offer appropriate assurances and guarantees of non-repetition. This provision takes into account the fact that the question of cessation could arise only if the primary obligation continued to be in force and formulated the obligation by reference to the concept of the continuing wrongful act as reflected in Part One of the draft.

49. *Reparation*: Article 31 on "Reparation" states the general principle thus: "the responsible State is under an obligation to make *full reparation* for the injury caused by

the internationally wrongful act". The term 'injury' is defined as "any damage, whether material or moral, arising in consequences of the international wrongful act of a State."[15]

50. It may be noted that the reference to 'full reparation" was questioned by some members of the Commission, because full reparation was possible only in the case of straight forward commercial contracts where damages were quantifiable; and the requirement to make reparation could be continuously modified by the circumstances of the case and by the failure of the affected party to take appropriate measures to mitigate damages. The responsible State's ability to pay, it was pointed out, must also be taken into account and a State must not be beggared. However, owing to the fact that the States did not criticize the concept of full reparation, it was felt that the ILC should focus less on the situation of the wrong doing State than on the injury suffered by a State. Therefore it was decided to retain the reference to full reparation.

Chapter II: Forms of Reparation

51. Chapter II opens with an introductory Article 35 which simply describes all forms of reparation, viz. restitution, compensation and satisfaction. In the view of the Drafting Committee, this Article serves the function of pointing out all of the forms of reparation, which combined amount to "full reparation" as required by Article 31. The commentary to this Article explains that full reparation is not always necessary or possible by means of one form of reparation. It might require all or some of them, depending on the type and extent of the injury that has been caused.

Restitution

52. Article 36 provides that a State responsible for an internationally wrongful act is under obligation to make restitution. Restitution, in this context, is the "*re-establishment of the situation which existed before the wrongful act was committed*". Thus a State responsible for a wrongful act is exempted from the obligation to make restitution, to the extent that: (a) where restitution is not materially possible; and (b) where restitution would involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.[16]

53. The Special Rapporteur Mr. James Crawford had characterized restitution as the primary form of reparation, with compensation available where restitution did not fully make good the injury. Some members however criticized the priority accorded to restitution as being too rigid and inconsistent with the flexibility displayed by tribunals. In response, the Special Rapporteur said that there was no requirement that all attempts to secure restitution be first exhausted. In cases, where the injured State had the choice to

[15] Secondly, the Drafting Committee at its last session (2000) discussed the distinction between the terms "injury" and "damage". Some members of the Committee held the view that there was a difference between the two terms, but did not agree about what was that difference. The Drafting Committee finally decided to define injury as consisting of any damage. The reference to "moral" damage in addition to "material" damage was meant to give the possibility for a broad interpretation of the word injury. "Moral" damage may be taken to include not only pain and suffering but also the broader notion of injury which some call "legal injury" to the States. Therefore, the definition of injury in this paragraph encompasses not only those types of injury giving rise to obligations of restitution and compensation, but also the types of injury which may entail an obligation of satisfaction.

[16] While the provision as adopted at first reading contained four exceptions to this obligation of restitution, in its present form the provision contains only two exceptions.

prefer compensation, the election to seek compensation rather than restitution would be legally effective.

Compensation

54. Article 37 comprises two paragraphs. Paragraph 1 sets out the general principle of compensation, whereby the State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, *insofar as such damage is not made good by restitution*. Paragraph 2 provides more detail as to what should be compensated.[17]

Satisfaction

55. Article 38 contains three paragraphs. As a general principle, paragraph 1 stipulates that the State responsible for a wrongful act is under an obligation to give satisfaction for the injury caused by that act *insofar as it cannot be made good by restitution or compensation*. The Committee characterized 'satisfaction' as a remedy for those injuries not financially assessable. They are frequently of a symbolic character. Paragraph 2 describes the modalities of satisfaction. Thus satisfaction may consist in:

- an acknowledgement of the breach
- an expression of regret
- a formal apology
- or another appropriate modality.

56. Paragraph 3 stipulates that satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State. This paragraph seeks, in the light of past abuses incompatible with sovereign equality of States, to limit the potential for mischief in claims for satisfaction.

Interest

57. Article 39, paragraph 1 provides that, "Interest on any principal sum payable under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result." The debate within the ILC clarifies that 'interest' is not an autonomous or independent form of reparation, nor is it necessarily part of compensation in every case; however payment of interest may be required in order to provide full reparation. Paragraph 2 indicates the date from which the interest is to be calculated. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

58. Article 40 entitled "Contribution to the damage" states the principle of mitigation of damages whereby in the determination of reparation, account shall be taken of the contribution to the damage by willful or negligent action or omission of the injured State.

[17] Within the ILC, some members felt that a more detailed elaboration of the principle of compensation was required so as to give meaningful guidance to States and tribunals. Preference was also expressed for dealing with the question of "loss of profits" in the draft Articles and not merely in the commentary. As a result, paragraph 2 to this provision as formulated by the Drafting Committee states "the compensation shall cover any financially assessable damage including loss of profits insofar as it is established."

Chapter III: Serious Breaches of Obligations under peremptory norms of general international law

59. It may be noted that this chapter has been the subject of lengthy and difficult discussions both in the Commission and by Governments. At the end, the Commission agreed on a compromise. As part of the compromise, the references in previous text to "serious breach of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests[18]" is now replaced by a category of peremptory norms that goes to the underlying obligations. This compromise is reflected in the title of the chapter, which now reads as: "Serious breaches of obligations under peremptory norms of general international law"[19].

60. Accordingly Chapter III contains two Articles. Articles 41 entitled "Application of this Chapter" stipulates that this Chapter applies to the international responsibility of a State arising from a *"serious" breach by a State of an obligation arising under a peremptory norm of general international law*.[20] What this chapter covers are serious breach of peremptory norms and not some trivial or minor breaches. In an attempt to clarify further the notion of "serious breaches", paragraph 2 of this Articles provides that the breach of an obligation is serious if it involves "a gross or systematic" failure by the responsible State to fulfil the obligation. The word "gross" emphasizes the quality and severity of the failure of the responsible State and goes beyond simple negligence. The word "systematic" also while stressing the quality of the failure of the responsible State emphasizes the repetitiveness of the failure.

61. Article 42 in a more simplified fashion addresses the consequences of the serious breaches mentioned in the previous paragraph. Thus:

(a) States shall cooperate to bring the breach to an end through lawful means any serious breach within the meaning of Article 41. In effect, this applies in the context of cessation.

(b) No State shall recognize as lawful the situation created by the breach, nor render aid or assistance to the responsible State in maintaining the situation so created. This formulation starting with "No State" has the effect of binding not only other States but also the responsible State "not to sustain the unlawful situation". This is an obligation, which is consistent with Article 30 on cessation.

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[18] It may be recalled that the first-reading draft had under Article 19 dealt with what were called "international crimes". This issue generated a lot of controversy within the ILC and was also subject to criticism among governments. Views were divided as to the justification of distinguishing between the 'criminal' and 'delictual' breaches of international obligations. The Special Rapporteur Mr. Crawford therefore suggested moving away from this approach and instead concentrating on obligations towards the international community as a whole and on the consequences that their serious breach would entail. Under this new dispensation, the Special Rapporteur recommended the deletion of Article 19 as it stood in the first-reading and the introduction of a new Article (Article 42) which dealt with the consequences of breaches of obligation towards the international community as a whole.

[19] The earlier version of the title was: "Serious breaches of essential obligations to the international community"

[20] As compared to the earlier vague formulation of "serious breaches of an obligation owed to the international community as a whole" the notion of peremptory norms is well established in the Vienna Convention on Law of Treaties and therefore constitutes the rationale for the compromise agreed upon by the Commission.

PART THREE: THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I: Invocation of the responsibility of a State

62. Article 43 entitled "Invocation of responsibility by an injured State" distinguishes two categories of injured States. Subparagraph (a) considers the breach of an obligation in a bilateral relationship. Conceptually, this category is the simplest to identify.

63. Sub-paragraph (b) is subdivided into two and takes into account the obligations owed to a number of States or to the international community as a whole. Sub-paragraph (b) (i) addresses the situation whereby in a multilateral relationship, the wrongful act may specifically affect one or more of the States to which the obligation is owed. These States, which are the primary victim, could then be considered as having been "specially" affected by the wrongful act. Other States belonging to the same multilateral relationship may also be concerned about the performance of the obligation. To cite an example, in the case of aggression one can make a distinction between the State which was the object of aggression on the one hand and other States in terms of their interest in the maintenance of international public order.

64. Subparagraph (b) (ii) deals with the obligations in a multilateral relationship that have been called "integral" obligations, because the breach of one of these obligations would affect the enjoyment of the rights or the performance of the obligations of *all* the States belonging to the relevant group. Under this category, every State is affected because every State is complying with its obligations only on the assumption of similar performance by other States. A disarmament treaty could be cited as an example in this regard.

Rules on invocation of responsibility

65. *Notice of claim by an injured State*: Article 44 states that an injured State, which invokes the responsibility of another State, shall give notice of its claim to that State. In particular, the injured State may specify in its notice the conduct that the responsible State should take in order to cease the wrongful act and also what form reparation should take.

66. *Admissibility of claims*: Article 45 stipulates that the responsibility of a State may not be invoked if:

(a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;
(b) the claim is one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted.[21]

67. *Loss of the right to invoke responsibility*: The responsibility may not be invoked if the injured State has validly waived its claim or by reason of its conduct had validly acquiesced in the lapse of the claim. The word "validly" is intended to address the issue of procedural validity as well as the substantive validity of the waiver of the claim.

[21] See A/CN.4/498/Add.4, and for a summary of the debate, *ILC Report 1999, paras 426-453.*

Invocation of responsibility - Plurality of States

68. As regards questions of invocation of responsibility by more than one injured State Article 47 lays down the following rule:

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

69. It may be noted that the word "separately" is expressly stated to make it clear that States can invoke responsibility individually, and that it goes without saying that injured States could act together. However, in such circumstances each State would be acting on its own right, and not on that of any collectivity.

70. Article 48 on plurality of responsible States stipulates that where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. This does not, however, permit any injured State to recover, by way of compensation, more than the damage it has suffered. Also, the above rule in no way prejudices the right to recourse of an injured State as against the other responsible States. On the issue as to whether this provision recognizes the category of joint and several responsibility, the Drafting Committee noted that the general rule in international law is that of separate responsibility of a State for its own wrongful acts and that Article 48 reflects this general rule.

Invocation of responsibility by States other than the injured State

71. Article 49 entitled “Invocation of responsibility by States other than the injured State” incorporates the notion of collective interest. Paragraph 1 of this Article provides that *any State other than an injured State* is entitled to invoke the responsibility of another State if:

(a) established for the protection of a collective interest of the group;
(b) the obligation breached is owed to a group of States including that State, and is the obligation breached is owed to the international community as a whole.

72. The basic distinction between Articles 43 and 49(1) is that, while Article 43 deals with an injured State in its individual capacity, Article 49(1) deals with a State which is affected (though it may not be a directly injured State) in its capacity as a member of a group of States to which the obligation is owed or a member of the international community.

73. Paragraph 2 of this provision lays down the entitlement of States other than the injured State in response to a wrongful act. In contrast with the broad range of options available for an injured State, the scope for States other than the injured State is limited to seeking:

(a) cessation of the internationally wrongful act and assurances and guarantees of an non-repetition; and

(b) performance of the obligation of 'reparation' in accordance with the preceding Articles, in the interest of the injured State or of the beneficiaries of the obligation breached.[22]

Chapter II: Countermeasures[23]

Object and limits of countermeasures

74. Article 50 entitled "Object and limits of countermeasures" defines the scope of countermeasures. Accordingly, countermeasures may be taken against a State responsible for a wrongful act for the purpose of "inducing that State to comply with its obligations under Part Two". Consequently, countermeasures shall not have a punitive purpose. The temporary nature of countermeasures is brought out in paragraph 2, which limits countermeasures to the "non-performance for the time being of international obligations of the State taking the measures towards the responsible State[24]." Paragraph 3 is grounded in the notion of "reversibility" of countermeasures. Thus, as far as possible, countermeasures shall be taken in such a way as to permit the resumption of performance of the obligation in question.[25] The phrase "as far as possible" indicates that if the injured State had a choice of lawful and effective countermeasures, it should select the one, which does not prevent the resumption of performance of the obligations in question.

Proportionality

75. A further limitation on the exercise of countermeasures is the one on "proportionality". Article 52 prescribes that proportionality of the countermeasures is primarily linked to the injury suffered. In determining proportionality two further criteria, namely, the gravity of the wrongful act and the rights in question has to be taken into

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[22] As regards subparagraph (b), a number of Governments queried the substance of this provision. In particular, they questioned whether the States under this Article are entitled to ask for more than cessation of the wrongful act and whether the right to demand reparations by these States is recognized by international law. The Drafting Committee noted that this provision is a clear example of progressive development and its utility should be evaluated from a policy perspective. Therefore the Committee decided to include the phrase "in accordance with the preceding Articles," to the subparagraph. This makes it clear that under Article 49 States could not demand reparation on behalf of an injured State that has chosen to waive its right to do so in accordance with Article 46, on the loss of a right to invoke responsibility.

[23] The provisions on countermeasures were the subject of extensive debate in the period 1994-1996 on the basis of Mr. Arangio-Ruiz's detailed reports. As far as the second reading process is concerned, initial discussion took place in 1999 on the basis of the Second Report by the Special Rapporteur Mr. Crawford. The Special Rapporteur also drew attention to the comments by some governments calling upon the ILC not only to codify the existing customary law on countermeasures but also "develop clear rules limiting the circumstances" under which they can be resorted. As to the general nature of countermeasures, some governments asserted that it should not be punitive in nature, but should be aimed at restitution and reparation or compensation.

[24] The Drafting Committee also considered a suggestion that the text does not sufficiently protect the rights of third States. In the Committee's view; there may be situations in which the consequences of countermeasures may be felt by a third State. Unless those third States would have a right against the State that is taking the countermeasures, there was nothing that can be provided in these Articles to preclude the injured State from taking countermeasures. To do otherwise, would not be supported by State practice.

[25] This paragraph is inspired by art 72 (2) of the Vienna Convention on the Law of Treaties which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force.

account. Besides these two criteria, other factors (which are to be identified in the particular context of each case) may also be relevant in determining proportionality. The phrase "rights in question" by implication, means the rights of the injured State as well as the rights of the other States that might be affected by such countermeasures. To sum up, the factors to be taken into account to assess proportionality of countermeasures are:

- the injury suffered
- the gravity of the wrongful act
- the rights in question
- any other factors relevant in the particular context of each case.

Obligations not subject to countermeasures

76. While the previous paragraph cited above dealt with the limitations on the exercise of countermeasures by an injured State, Article 51 enumerates certain specific categories of obligations from which no derogation is permitted under the guise of effecting countermeasures. Accordingly countermeasures shall not affect any:

(i) obligation to refrain from the threat or use of force as embodied in the UN Charter;
(ii) obligations for the protection of fundamental human rights;
(iii) obligations of a humanitarian character prohibiting reprisals ;
(iv) other obligations under peremptory norms of general international law; and
(v) obligations to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

77. Moreover, where there exists any dispute settlement procedure in force between the injured and the responsible State, such dispute settlement mechanisms themselves cannot be the subject of countermeasures. The Drafting Committee clarified that this proposition was to be construed narrowly and to refer only to dispute settlement procedures that were related to the dispute in question, and not to other issues between the States concerned.

Conditions relating to resort to countermeasures

78. The procedural conditions for resorting to countermeasures are laid down in Article 53. The formulation of this Article is intended to strike a delicate balance between the right of an injured State to resort to countermeasures on the one hand and protect the responsible State from the excesses and abusive effect of countermeasures by the injured State, on the other. The core aspects of this provision may be stated as follows:

- an injured State before taking any countermeasures is required to notify the responsible State to comply with its obligations under Part Two.
- Before taking any countermeasures, the injured State is also required to notify the responsible State that it intends to take countermeasures and offer to negotiate with that State.
- Notwithstanding this second requirement, the injured State may take such urgent countermeasures as are necessary to preserve its rights.

- While parties are negotiating, countermeasures may not be taken except for those urgent measures necessary to preserve the rights of the injured State.
- Should the responsible State cease the wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken. If countermeasures have already been taken, then they have to be suspended without undue delay.
- Countermeasures can be resumed (in case it is suspended) if the responsible State fails to implement dispute-settlement procedures in good faith.

Termination of countermeasures

79. Countermeasures shall, as stipulated in Article 55, be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

PART FOUR: GENERAL PROVISIONS

80. This chapter contains five general provisions in the form of 'saving' clauses. The first of these, Article 56 stipulates that the draft Articles on state responsibility do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law (*lex specialis*).

81. Article 56 *bis* titled "Questions of State responsibility not regulated by these Articles" stated that "the applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these Articles". This provision was considered necessary because the draft Articles do not, and cannot, state all the consequences of an internationally wrongful act, and because there is no intention of precluding the further development of the law on State responsibility. The Article is intended to include customary international law as well as the application of treaties. The concerns of some States as to what else was left in customary international law that is not addressed in the draft Articles are more appropriately addressed in the commentary to the Article.

82. Articles 57 and 58 are "without prejudice" clauses that exclude from the ambit of the draft Articles any question:

(a) that may arise in regard to the responsibility of an international organisation under international law, and of the responsibility of any State for the conduct of an international organisation; and

(b) of the individual responsibility under international law of any person acting on behalf of a State.

83. Article 59 on "Relation to the Charter of the United Nations" avoids specific reference to Article 103 of the UN Charter as suggested by the Special Rapporteur and decided to formulate it in general and direct terms. Accordingly, the legal consequences of an internationally wrongful act of a State under these Articles are without prejudice to the UN Charter.

IV. GENERAL COMMENTS

84. The ILC and the Special Rapporteur Mr. James Crowford have to be commended for successful completing the work on this important topic. The topic has over the past four and a half decades been worked upon by successive well-qualified and experienced Special Rapporteurs and it is imperative to recall with gratitude the intellectual contribution they have made towards developing the regime on State Responsibility.

85. In general, the final text of the Articles seeks to respond fairly to the comments made by governments and reflects an overall balance of opinion within the Commission. Given the division of opinion within the Commission as to the final form of the Articles, it was decided by consensus to recommend to the General Assembly a two-stage approach. In the first instance, it recommended the General Assembly take note of and annex the Article in a resolution, with appropriate language emphasizing the importance of the subject. The second phase would involve the further consideration of the possible conversion of the Articles into a convention at a later session, if this were thought appropriate and feasible.

86. In the view of the AALCO Secretariat there is a fairly flexible and pragmatic compromise that would allow for a continued process of legal development. While preserving the valuable work done so far on this topic, the adoption of the Articles by the General Assembly would enable international courts and tribunals to apply the rules in the text. The State practice that emerges thereafter could favorably influence the task of adopting the Articles in the form of a convention at a later date.