

60 At the conclusion of its forty-seventh session, the Commission had provisionally adopted for inclusion in Part Two, draft Articles 1 to 5⁹ and Articles 6 (Cessation of wrongful conduct), 6 *bis* (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction), 10 *bis* (Guarantees of non-repetition),¹⁰ 11 (Countermeasures) by an injured state), 13 (Proportionality) and 14 (Prohibited countermeasures).¹¹ It had furthermore received from the Drafting Committee a text for Article 12 (Conditions relating to resort to countermeasures), on which it deferred action.¹² At its forty-seventh session the Commission had also provisionally adopted for inclusion in Part Three, Article 1 (Negotiation), Article 2 (Good offices and mediation), Article 3 (Conciliation), Article 4 (Task of the Conciliation Commission), Article 5 (Arbitration), Article 6 (Terms of reference of the Arbitral Tribunal), Article 7 (Validity of an arbitral award) and Annex, Article 1 (The Conciliation Commission) and Article 2 (The Arbitral Tribunal).

B Consideration of the topic at the present session

61 At its present session the Commission had before it the eighth report of the Special *Rapporteur*, Mr Arangio-Ruiz.¹³ The report dealt with problems relating to the regime of internationally wrongful acts singled out as 'crimes' based on Article 19 of Part One as well as some other issues to which he deemed it necessary to call the attention of the Commission. The Commission considered the report at its 2436th meeting on 5 June 1996.

62 At the 2438th meeting of the Commission on 7 June 1996, Mr Arangio-Ruiz announced his resignation as Special *Rapporteur*.

63 The Drafting Committee completed the first reading of draft articles of Parts Two and Three on state responsibility. The Commission considered the Report of the Drafting Committee at its 2452nd to 2459th meetings from 3 to 12 July 1996.¹⁴

64 At its 2473rd meeting, on 26 July 1996 the International Law Commission decided, in accordance with Articles 16 and 21 of its Statute, to transmit the draft articles set out in Section D of the present chapter, through the Secretary General, to governments for comments and observations, with the request that such comments and observations be submitted to the Secretary General by 1 January 1998.¹⁵

8 [cont] its forty-fifth session (1993) the Commission referred to the Drafting Committee draft articles 1 to 6 of Part Three and Annex thereto. At its forty-seventh session (1995) the Commission referred to the Drafting Committee articles 15 to 20 of Part One dealing with the legal consequences of internationally wrongful acts characterised as crimes under article 19 of Part One of the draft articles and new draft article 7 to be included in Part Three of the draft.

9 For the text of Articles 1 to 5 (para 1) with commentaries see *Yearbook* 1985 Vol II (Part Two) p 24 *et seq.*

10 For the text of Article 5, para 2 and articles 6, 6 *bis*, 7, 8, 10 and 10 *bis*, with commentaries, see *Official Records of the General Assembly, Forty-eighth Session, Supplement No 10 (A/48/10)*, p 132 *et seq.*

11 For the text of articles 11, 13 and 14, see *ibid*, Forty-ninth Session, Supplement No 10 (A/49/10), footnote 362. Article 11 was adopted by the Commission on the understanding that it might have to be reviewed in the light of the text that would eventually be adopted for article 12 (see *ibid*, para 352).

12 See *ibid*, para 352.

13 A/CN.4/476 and A/CN.4/476/Add 1 and Corr 1 (English only) and Add 1.

14 For the report of the Drafting Committee see document A/CN.4/L.524.

15 *ILC Report* 1996.

DRAFT ARTICLES ON THE ORIGIN OF STATE RESPONSIBILITY

CHAPTER I

GENERAL PRINCIPLES

Article 1 Responsibility of a state for its internationally wrongful acts

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

Article 2 Possibility that every state may be held to have committed an internationally wrongful act

Every state is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

Article 3 Elements of an internationally wrongful act of a state

There is an internationally wrongful act of a state when:

- (a) conduct consisting of an action or omission is attributable to the state under international law; and
- (b) that conduct constitutes a breach of an international obligation of the state.

Article 4 Characterisation of an act of a state as internationally wrongful

An act of a state may only be characterised as internationally wrongful by international law. Such characterisation cannot be affected by the characterisation of the same act as lawful by internal law.

CHAPTER II

THE 'ACT OF THE STATE' UNDER INTERNATIONAL LAW

Article 5 Attribution to the state of the conduct of its organs

For the purposes of the present articles, conduct of any state organ having that status under the internal law of that state shall be considered as an act of that state concerned under international law, provided that organ was acting in that capacity in the case in question.

Article 6 Irrelevance of the position of the organ in the organisation of the state

The conduct of an organ of the state shall be considered as an act of that state under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organisation of the state.

Article 7 Attribution to the state of the conduct of other entities empowered to exercise elements of the government authority

- 1 The conduct of an organ of a territorial governmental entity within a state shall also be considered as an act of that state under international law, provided that organ was acting in that capacity in the case in question.
- 2 The conduct of an organ of an entity which is not part of the formal structure of the state or of a territorial governmental entity, but which is empowered by the internal law of that state to exercise elements of the governmental authority, shall also be considered as an act of the state under international law, provided that organ was acting in that capacity in the case in question.

Article 8 Attribution to the state of the conduct of persons acting in fact on behalf of the state

The conduct of a person or group of persons shall also be considered as an act of the state under international law if:

- (a) it is established that such persons or group of persons was in fact acting on behalf of that state; or
- (b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

Article 9 Attribution to the state of the conduct of organs placed at its disposal by another state or by an international organisation

The conduct of an organ which has been placed at the disposal of a state by another state or by an international organisation shall be considered as an act of the former state under international law, if that organ was acting in the exercise of elements of the governmental authority of the state at whose disposal it has been placed.

Article 10 Attribution to the state of conduct of organs acting outside their competence or contrary to instructions concerning their activity

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

Article 11 Conduct of persons not acting on behalf of the state

- 1 The conduct of a person or group of persons not acting on behalf of the state shall not be considered as an act of the state under international law.
- 2 Paragraph 1 is without prejudice to the attribution to the state of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the state by virtue of Articles 5 to 10.

Article 12 Conduct of organs of another state

- 1 The conduct of an organ of a state acting in that capacity which takes place in the territory of another state or in any other territory under its jurisdiction shall not be considered as an act of the latter state under international law.
- 2 Paragraph 1 is without prejudice to the attribution to a state of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that state by virtue of Articles 5 to 10.

Article 13 Conduct of organs of an international organisation

The conduct of an organ of an international organisation acting in that capacity shall not be considered as an act of a state under international law by reason only of the fact that such conduct has taken place in the territory of that state or in any other territory under its jurisdiction.

Article 14 Conduct of organs of an insurrectional movement

- 1 The conduct of an organ of an insurrectional movement which is established in the territory of a state or in any other territory under its administration shall not be considered as an act of that state under international law.

- 2 Paragraph 1 is without prejudice to the attribution to a state of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that state by virtue of Articles 5 to 10.
- 3 Similarly, para 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

Article 15 Attribution to the state of the act of an insurrectional movement which becomes the new government of a state or which results in the formation of a new state

- 1 The act of an insurrectional movement which becomes the new government of a state shall be considered as an act of that state. However, such attribution shall be without prejudice to the attribution to that state of conduct which would have been previously considered as an act of the state by virtue of Articles 5 to 10.
- 2 The act of an insurrectional movement whose action results in the formation of a new state in part of the territory of a pre-existing state or in a territory under its administration shall be considered as an act of the new state.

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 16 Existence of a breach of an international obligation

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

Article 17 Irrelevance of the origin of the international obligation breached

- 1 An act of a state which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of the obligation.
- 2 The origin of the international obligation breached by a state does not affect the international responsibility arising from the internationally wrongful act of that state.

Article 18 Requirement that the international obligation be in force for the state

- 1 An act of the state which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that state.
- 2 However, an act of the state which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that state, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.
- 3 If an act of the state which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that state.
- 4 If an act of the state which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that state.

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

Article 19 International crimes and international delicts

- 1 An act of state which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
- 2 An internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole constitutes an international crime.
- 3 Subject to para 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
- (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
 - (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
 - (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
 - (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or the seas.
- 4 Any internationally wrongful act which is not an international crime in accordance with para 2 constitutes an international delict.

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

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

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

- 1 There is a breach by a state of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the state does not achieve the result required of it by that obligation.
- 2 When the conduct of the state has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the state, there is a breach of the obligation only if the state also fails by its subsequent conduct to achieve the result required of it by that obligation.

Article 22 Exhaustion of local remedies

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

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

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

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

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

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

- 1 The breach of an international obligation by an act of the state having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.
- 2 The breach of an international obligation by an act of the state, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.
- 3 The breach of an international obligation by a complex act of the state, consisting of a succession of actions or omissions by the same or different organs of the state in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

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

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

CHAPTER IV
IMPLICATION OF A STATE IN THE INTERNATIONALLY WRONGFUL
ACT OF ANOTHER STATE

Article 27 Aid or assistance by a state to another state for the commission of an internationally wrongful act

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

Article 28 Responsibility of a state for an internationally wrongful act of another state

- 1 An internationally wrongful act committed by a state in a field of activity in which that state is subject to the power of direction or control of another state entails the international responsibility of that other state.
- 2 An internationally wrongful act committed by a state as the result of coercion exerted by another state to secure the commission of that act entails the international responsibility of that other state.
- 3 Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other articles of the present draft, of the state which has committed the internationally wrongful act.

CHAPTER V
CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 29 Consent

- 1 The consent validly given by a state to the commission by another state of a specified act not in conformity with an obligation of the latter state towards the former state precludes the wrongfulness of the act in relation to that state to the extent the act remains within the limits of that consent.
- 2 Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present draft articles, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 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.

Article 31 Force majeure and fortuitous event

- 1 The wrongfulness of an act of state not in conformity with an international obligation of that state is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the state to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.
- 2 Paragraph 1 shall not apply if the state in question has contributed to the occurrence of the situation of material impossibility.

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 conduct which constitutes the act of that state had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.
- 2 Paragraph 1 shall not apply if the state in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril.

Article 33 State of necessity

- 1 A state of necessity may not be invoked by a state as a ground for precluding the wrongfulness of an act of that state not in conformity with an international obligation of the state unless:
 - (a) the act was the only means of safeguarding an essential interest of the state against a grave and imminent peril; and
 - (b) the act did not seriously impair an essential interest of the state towards which the obligation existed.
- 2 In any case, a state of necessity may not be invoked by a state as a ground for precluding wrongfulness:
 - (a) if the international obligation with which the act of the state is not in conformity arises out of a peremptory norm of general international law; or
 - (b) if the international obligation with which the act of the state is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
 - (c) if the state in question has contributed to the occurrence of the state of necessity.

Article 34 Self-defence

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.

Article 35 Reservation as to compensation for damage

Preclusion of the wrongfulness of an act of a state by virtue of the provisions of Articles 29, 31, 32 or 33 does not prejudice any question that may arise in regard to compensation for damage caused by that act.

Part Two – Content, forms and degrees of international responsibility

CHAPTER I – GENERAL PRINCIPLES

Article 36 Consequences of an internationally wrongful act

- 1 The international responsibility of a state which, in accordance with the provisions of Part One, arises from an internationally wrongful act committed by that state, entails legal consequences as set out in this Part.
- 2 The legal consequences referred to in para 1 are without prejudice to the continued duty of the state which has committed the internationally wrongful act to perform the obligation it has breached.

Article 37 *Lex specialis*

The provisions of this Part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a state have been determined by other rules of international law relating specifically to that act.

Article 38 Customary international law

The rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a state not set out in the provisions of this Part.

Article 39 Relationship to the Charter of the United Nations

The legal consequences of an internationally wrongful act of a state set out in the provisions of this Part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security.

Article 40 Meaning of injured state

- 1 For the purposes of the present articles, 'injured state' means any state a right of which is infringed by the act of another state, if that act constitutes, in accordance with Part One, an internationally wrongful act of that state.
- 2 In particular, 'injured state' means:
 - (a) if the right infringed by the act of a state arises from a bilateral treaty, the other state party to the treaty;
 - (b) if the right infringed by the act of a state arises from a judgment or other binding dispute settlement decision of an international court or tribunal, the other state or States Parties to the dispute and entitled to the benefit of that right;
 - (c) if the right infringed by the act of a state arises from a binding decision of an international organ other than an international court or tribunal, the state or states which, in accordance with the constituent instrument of the international organisation concerned, are entitled to the benefit of that right;
 - (d) if the right infringed by the act of a state arises from a treaty provision for a third state, that third state;
 - (e) if the right infringed by the act of a state arises from a multilateral treaty or from a rule of customary international law, any other state party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:
 - (i) the right has been created or is established in its favour;
 - (ii) the infringement of the right by the act of a state necessarily affects the enjoyment of the rights or the performance of the obligations of the other States Parties to the multilateral treaty or bound by the rule of customary international law; or
 - (iii) the right has been created or is established for the protection of human rights and fundamental freedoms;
 - (f) if the right infringed by the act of a state arises from a multilateral treaty, any other state party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States Parties thereto.
- 3 In addition, 'injured state' means, if the internationally wrongful act constitutes an international crime, all other states.

CHAPTER II – RIGHTS OF THE INJURED STATE AND OBLIGATIONS OF
THE STATE WHICH HAS COMMITTED AN INTERNATIONALLY
WRONGFUL ACT

Article 41 Cessation of wrongful conduct

A state whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

Article 42 Reparation

- 1 The injured state is entitled to obtain from the state which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.
- 2 In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:
 - (a) the injured state; or
 - (b) a national of that state on whose behalf the claim is brought; which contributed to the damage.
- 3 In no case shall reparation result in depriving the population of a state of its own means of subsistence.
- 4 The state which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

Article 43 Restitution in kind

The injured state is entitled to obtain from the state which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind:

- (a) is not materially impossible;
- (b) would not involve a breach of an obligation arising from a peremptory norm of general international law;
- (c) would not involve a burden out of all proportion to the benefit which the injured state would gain from obtaining restitution in kind instead of compensation; or
- (d) would not seriously jeopardize the political independence or economic stability of the state which has committed the internationally wrongful act, whereas the injured state would not be similarly affected if it did not obtain restitution in kind.

Article 44 Compensation

- 1 The injured state is entitled to obtain from the state which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.
- 2 For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured state, and may include interest and, where appropriate, loss of profits.

Article 45 Satisfaction

- 1 The injured state is entitled to obtain from the state which has committed an internationally wrongful act satisfaction for the damage, in particular moral

- damage, caused by that act, if and to the extent necessary to provide full reparation.
- 2 Satisfaction may take the form of one or more of the following:
 - (a) an apology;
 - (b) nominal damages;
 - (c) in cases of gross infringement of the rights of the injured state, damages reflecting the gravity of the infringement;
 - (d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.
 - 3 The right of the injured state to obtain satisfaction does not justify demands which would impair the dignity of the state which has committed the internationally wrongful act.

Article 46 Assurances and guarantees of non-repetition

The injured state is entitled, where appropriate, to obtain from the state which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.

CHAPTER III – COUNTERMEASURES

Article 47 Countermeasures by an injured state

- 1 For the purposes of the present articles, the taking of countermeasures means that an injured state does not comply with one or more of its obligations towards a state which has committed an internationally wrongful act in order to induce it to comply with its obligations under Articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injured state that it do so.
- 2 The taking of countermeasures is subject to the conditions and restrictions set out in Articles 48 to 50.
- 3 Where a countermeasure against a state which has committed an internationally wrongful act involves a breach of an obligation towards a third state, such a breach cannot be justified under this chapter as against the third state.

Article 48 Conditions relating to resort to countermeasures

- 1 Prior to taking countermeasures, an injured state shall fulfil its obligation to negotiate provided for in Article 54. This obligation is without prejudice to the taking by that state of interim measures of protection which are necessary to preserve its rights and which otherwise comply with the requirements of this chapter.
- 2 An injured state taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured state and the state which has committed the internationally wrongful act.
- 3 Provided that the internationally wrongful act has ceased, the injured state shall suspend countermeasures when and to the extent that the dispute settlement procedure referred to in para 2 is being implemented in good faith by the state which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.