ABHANDLUNGEN

Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility

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Abbreviations: AJIL = American Journal of International Law; BYIL = British Year Book of International Law; EPIL = Encyclopedia of Public International Law, ed. by R. Bernhardt; GYIL = German Yearbook of International Law; ICLQ = International and Comparative Law Quarterly; ILM = International Legal Materials; JIR = Jahrbuch für Internationales Recht; NILR = Netherlands International Law Review; RdC = Recueil des Cours de l'Académie de Droit International; RGDIP = Revue Générale de Droit International Public; RIAA = Reports of International Arbitral Awards; Strupp-Schlochauer, Wörterbuch = Wörterbuch des Völkerrechts, begr. von Karl Strupp, 2nd ed. hrsg. von Hans-Jürgen Schlochauer (Berlin 1960–1962); YILC = Yearbook of the International Law Commission.

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I. Introduction

Among the rules governing State responsibility in international law there are grounds of justification such as "self-help", "necessity", "reprisal" or "self-defence" which exceptionally exonerate a State from international responsibility for conduct which would otherwise breach an international obligation and entail responsibility of that State[1]. There is, however, not

[1] See A. Schüle, Rechtswidrigkeit, Ausschluß der, in: Strupp-Schlochauer, Wörterbuch, vol.3, p.84 *et seq.*; I. v. Münch, Das völkerrechtliche Delikt (Frankfurt/M. 1963), p.141 *et seq.*; H.-J. Schlochauer, Die Entwicklung des völkerrechtlichen Deliktrechts, Archiv des Völkerrechts, vol.16 (1975), p.268 *et seq.*; F. Berber, Lehrbuch des Völkerrechts, vol.3 (2nd ed. Munich 1977), p.5 *et seq.*; G.M. Badr, The Exculpatory Effect of

only a lack of consistent terminology in this area, but also no substantial agreement as to the true meaning of these concepts and as to the admissibility of certain pleas under contemporary international law, in particular with view to the general prohibition of the use of force in international relations.

The following analysis studies the position taken by the International Law Commission (ILC) in its attempt to codify the rules governing State responsibility and is restricted to the problems relating to "countermeasures" (art.30) and "self-defence" (art.34). As accepted by the ILC in first reading[2], these articles have the following wording:

"*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 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".

Before examining these "circumstances precluding wrongfulness" in detail, some general remarks on the scope and the structure of the ILC's draft articles on State responsibility are appropriate.

II. The Scope and the Structure of the ILC's Draft Articles on State Responsibility

1. Scope

The Commission has decided to codify the rules governing State responsibility in general and not to restrict the draft articles to particular areas

Self-Defense in State Responsibility, Georgia Journal of International and Comparative Law, vol.10 (1980), p.8 *et seq.*; I. Brownlie, Principles of Public International Law (2nd ed. Oxford 1973), p.451 *et seq.*, who cites additional authorities.

[2] The draft articles, as accepted by the ILC in first reading, are reproduced at the end of this essay.

such as international responsibility for the treatment of aliens[3]. On the other hand, the scope of the draft articles is limited in several respects. Firstly, they are solely concerned with the responsibility of States and not with the responsibility of other possible subjects of international law such as international organizations[4]. Secondly, the question of State responsibility arising from activities not prohibited by international law is excluded from the draft articles and shall, if at all, be codified separately[5].

Thirdly, in the field of State responsibility, the ILC is focusing on the codification of "secondary rules". "Primary rules" are defined as rules imposing on States obligations the breach of which can be a source of international responsibility[6]. "Secondary rules" are concerned only with the determination of the legal consequences arising if a State fails to comply with an international obligation as established by a "primary rule". Although the Commission admits that the "primary rules" are significant for the drafting of the "secondary rules", it has declared that the first fall outside of the "actual sphere of responsibility for internationally wrongful acts and the scope of the draft"[7]. In order to avoid the problem of determining the content of international obligations the breach of which could invoke international responsibility, the ILC has stipulated:

> "Only these 'secondary' rules fall within the actual sphere of responsibility for internationally wrongful acts. A strict distinction in this respect is essential if the topic of international responsibility for internationally wrongful acts is to be placed in its proper perspective and viewed as a whole"[8].

However, this somewhat artificial theoretical distinction between "primary" and "secondary" rules is not conceived as a rigid one. For example, art.19 lays down substantive obligations the breach of which is considered to constitute an "international crime" in contrast to a mere

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[3] See YILC 1963, vol.II, p.228, document A/5509, Annex I, para.5. This was the approach of the first Special Rapporteur for the topic, García Amador, who presented six reports between 1956 and 1961. For a historical account of the work of the ILC on State responsibility see YILC 1969, vol.II, p.229 *et seq.* The decision not to limit the study to the international responsibility for injuries to aliens has been welcomed by the Government of Austria in a comment on the draft articles, see YILC 1980, vol.II (Part 1), p.89 para.5.

[4] See YILC 1970, vol.II, p.306, document 8010/Rev.1, para.66(a); YILC 1973, vol.II, p.179, document A/9010/Rev.1, chapt.II, sect.B, art.2 para.(11) of the Commentary.

[5] The Commission has made the problem of liability for lawful activities the subject of a separate study which has been entrusted to Quentin-Baxter as Special Rapporteur, see YILC 1978, vol.II (Part 2), p.149 *et seq.*

[6] YILC 1980, vol.II (Part 2), p.27 para.23.

[7] *Ibid.*

[8] *Ibid.*

"delict"[9]. Furthermore, it is not clear whether draft arts.29 to 34, dealing with "circumstances precluding wrongfulness", are really only codifying secondary rules[10]. In the case of draft art.34 the view was expressed that self-defence is a "primary right" falling outside of the scope of the draft articles[11]. Finally, it remains to be seen whether the restriction to the codification of "secondary rules" can be maintained when it comes to laying down the legal consequences arising from the commission of an internationally wrongful act[12]. At any rate, one should not attach too much importance to the question whether or not the ILC is able to observe its distinction between "primary" and "secondary" rules. It only serves a pragmatic purpose.

2. Structure

a) General

The ILC has agreed to divide the draft articles on State responsibility into two Parts[13]. Part 1 is concerned with the "origin" of international responsibility and determines the grounds upon which and the conditions under which a State may be held to have committed an internationally wrongful act, which, as such, is a source of international responsibility. On the basis of the work of the former Special Rapporteur Ago, the 35 draft articles constituting Part 1 ("The origin of international responsibility") were provisionally adopted by the ILC in first reading in 1980[14]. Part 2, being

[9] The distinction between "international crimes" and "international delicts" is emphasized by the Soviet theory of international law. Socialist States criticize the approach of the new Special Rapporteur Riphagen, *inter alia,* because he would tend to blur this distinction as laid down in art.19 of the draft articles on State responsibility, see G. Görner/R. Meissner, Zur Arbeit des Rechtsausschusses auf der 37. Tagung der UN-Vollversammlung, Neue Justiz, vol.37 (1983), p.180. Western States are reluctant to accept art.19 as long as the legal consequences attached to this distinction are not clarified, see the comment by Austria (note 3), p.90. The Government of Canada, *ibid.,* p.94, correctly observed that art.19 contains a primary rule of State responsibility.

[10] The Government of the Netherlands takes the view that, with the possible exception of art.35, Chapter V is in fact dealing with primary rules, see UN Doc. A/CN. 4/351/Add.3, 6.5.1982, p.2.

[11] See Draft Report of the ILC to the General Assembly, A/CN.4/L 346, 7.7.1982, p.10.

[12] The question is whether the source, the content and the purpose of an international obligation the breach of which may entail responsibility must be taken into consideration when determining the legal consequences of State responsibility.

[13] As to the general structure of the draft see YILC 1975, vol.II, pp.55–56.

[14] See note 2.

prepared by the new Special Rapporteur Riphagen[15] has as its object the codification of the legal consequences of an internationally wrongful act in various cases by dealing with the content, forms and degrees of international responsibility and by considering such questions as reparative and punitive consequences, the relationship between both and the material forms which reparations and sanctions may take[16].

The ILC has reserved its judgment as to whether to adopt a Part 3 on the "implementation" («mise en œuvre») of international responsibility and the settlement of disputes[17]. It has also postponed a decision whether to formulate an article at the beginning of the draft giving definitions or enumerating the matters that are excluded from it.

b) Part 1

Part 1 of the draft articles is subdivided into five chapters. Chapter I defines some general principles, e.g. that every internationally wrongful act entails responsibility (art.1) and that every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility (art.2). The concept of the internationally wrongful act is of central importance for the structure of the draft as a whole[18]. Art.3 clarifies that such an act consists of a "subjective" and of an "objective element". According to this provision there is an internationally wrongful act 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".

Finally, art.4 provides that internal law is irrelevant as far as the characterization of an act of a State as internationally wrongful is concerned.

Chapter II attempts to specify the subjective element of an internationally wrongful act and to assess the conditions under which particular conduct can be considered as an "act of State" under international law (arts.5 to 15). Chapter III deals with the objective element of an internationally wrongful act, namely the breach of an international obligation (arts.16 to 26). It is important to note that according to art.17 the breach of an

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[15] In view of the election of Ago as a Judge of the International Court of Justice, the ILC appointed Riphagen as Special Rapporteur for the topic in 1979.

[16] YILC 1980, vol. II (Part 2), p.28.

[17] Note 13, p.56, para.44.

[18] See J. Wolf, Die gegenwärtige Entwicklung der Lehre über die völkerrechtliche Verantwortlichkeit der Staaten, ZaöRV vol.43 (1983), pp.481 *et seq.*, 532 *et seq.*

international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or otherwise, of that obligation. This article, also stipulating that 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, is based upon the idea that the rules governing State responsibility form a single legal régime[19]. As far as Part 2 of the draft articles is concerned, it is interesting to note that the new Special Rapporteur Riphagen holds the contrasting view that there is not "one set of rules" governing State responsibility[20]. In his opinion art.17 does not exclude different legal régimes in the context of the legal consequences of an internationally wrongful act. Riphagen even doubts whether Part 1 can be drafted without differentiating between various legal régimes and has suggested that an appropriate revision might be necessary in second reading[21].

Chapter IV is concerned with cases in which another State participates in the commission of an internationally wrongful act by a State and with those cases in which a State other than that actually committing the offence but another State may be held responsible (arts.27 and 28).

Finally, Chapter V provides various circumstances precluding wrongfulness such as "consent" (art.29), "countermeasures in respect of an internationally wrongful act" (art.30), "*force majeure* and fortuitous event" (art.31), "distress" (art.32), "state of necessity" (art.33) and "self-defence" (art.34). The chapter ends with a reservation clause (art.35) explaining that the preclusion of the wrongfulness of an act of a State on the grounds of the provisions of arts.29, 31, 32 and 33 does not prejudice any question that may arise with regard to compensation for damage caused by that act.

3. The Purpose of Chapter V

a) The distinction of the various circumstances precluding wrongfulness in general

Conditioned by the premises set out in arts.1 to 3, the object of Chapter V is to define those cases in which, notwithstanding the apparent fulfilment of the conditions for the existence of an internationally wrongful act (sub-

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19 Riphagen, lecture given in The Hague on August 27, 1982.

20 *Ibid.*

21 *Ibid.*, in the discussion of the lecture. It is also interesting to note that, according to Riphagen, it would be unavoidable to introduce the element of damage into the definition of the internationally wrongful act in Part 2. The majority of the Commission had rejected this in Part 1.

jective and objective elements), "its existence cannot be inferred owing to the presence of a circumstance which stands in the way of such inference"[22]. Whereas arts.29 to 34 refer to seven separate circumstances precluding wrongfulness, two basic categories can be distinguished[23].

While prior conduct of the State which has suffered the act is relevant in the cases of arts.29, 30 and 34, it is irrelevant insofar as arts.31, 32 and 33 are concerned. As to art.29 the prior conduct of that State consists of its consent to the act in question. Arts.30 and 34 require the prior commission of an internationally wrongful act by the State against which action is taken – in the case of self-defence the commission of an internationally wrongful act of a specific kind. The distinction between these two articles will be examined in greater detail later.

As to arts.31, 32 and 33 it is assumed that a State is induced by an "external factor" to adopt conduct not in conformity with an international obligation. "*Force majeure* and fortuitous event" are circumstances making it materially impossible for the persons whose conduct is attributed to the State either to adopt conduct in conformity with an international obligation or to know that the conduct conflicts with that obligation. The conduct is unintentional *per se* or unintentionally in breach of the obligation. In the case of necessity the deliberate nature of the conduct is assumed with reference to an intentional aspect of failure to comply with the international obligation. The persons acting are perfectly aware of the situation and have a real choice whether or not to act. The latter criterion serves to distinguish "necessity" from "distress" where the persons acting on behalf of the State are presumed to have no real choice[24].

b) No exhaustive enumeration

Chapter V deals only with those circumstances which "generally" arise in this connection. It "does not seek to make the list of circumstances it enumerates absolutely exhaustive"[25]. The Commission emphasizes that Chapter V is not to be construed as closing the door on the possibility that new circumstances precluding wrongfulness may be recognized in the future with regard to the "evolving nature of international law".

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[22] YILC 1979, vol.II (Part 2), p.106 para.1.
[23] See YILC 1980, vol.II (Part 2), p.34 *et seq.*
[24] *Ibid.*, p.35.
[25] Note 23, p.61.

This is self-evident. The task of the ILC, however, is to codify the rules governing State responsibility *de lege lata*, although, of course, its function is not only codification in the sense of the "more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine" but also the "progressive development of international law" meaning the "preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States"[26].

In the ILC's discussion of Chapter V Riphagen was not in favour of an exhaustive enumeration on the grounds that there would otherwise be a danger of inadvertent omission and that the rigidity of such a clause would be particularly unrealistic in international relations[27]. It is not surprising that the Government of the Netherlands, assenting to Chapter V in a comment, emphasized that the provisions do not intend to list exhaustively all circumstances precluding wrongfulness, so that an *a contrario* reasoning would not be correct[28].

This approach leads to uncertainty as to the admissibility of additional pleas justifying otherwise illegal acts. It is based on a line of reasoning that could be applied against the codification of international law in general. If arts.29 to 34 are not considered to be exclusive, what is the sense of enumerating and carefully distinguishing so many circumstances precluding wrongfulness in Chapter V of the draft articles?

c) The legal effect

All the circumstances in Chapter V have one essential feature in common, namely rendering indefinitely or temporarily inoperative the international obligation in respect of which one of these circumstances is present[29]. In other words, in the case of any circumstance enlisted in arts.29 to 34 the preclusion of the "wrongfulness" of the act in question implies that there is no internationally wrongful act and no breach of an international obligation committed by that State. This construction derives from the interrelationship of the "breach of an international obligation", the "internationally wrongful act" and "responsibility" as assumed in arts.1 to 3.

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[26] Art.15 of the Statute of the ILC.
[27] YILC 1980, vol.I, p.188.
[28] UN Doc. A/CN.4/351/Add.3, 6.5.1982, p.2.
[29] See YILC 1979, vol.II (Part 2), p.106 *et seq.*

The Commission did recognize the "abstract possibility" of circumstances which would preclude responsibility, but would in no way affect wrongfulness[30]. But it thought that there is some inevitable logic in concluding that the preclusion of "responsibility" requires the preclusion of "wrongfulness":

> "For the Commission, it is difficult to conceive that international law could characterize an act as internationally wrongful without attaching to it disadvantageous consequences for its author. It is difficult to see what would be the point of making such a characterization. Imposing an obligation while at the same time attaching no legal consequences to breaches of it would in fact amount to not imposing the obligation at all. Such a situation would, moreover, be in flagrant contradiction with some of the dominant characteristics of a system of law so imbued with effectiveness as the international legal order"[31].

The problem is that arts.29 to 34 refer to very different types of situations in which it seems inappropriate and ill-founded to balance the interests and rights of the States involved on the same universal level by cutting off any reasonable differentiation as to the legal effects of those circumstances. In the case of arts.30 and 34 the State against which justified action may be taken has previously committed an international offence to which the reaction is a response. Here it is reasonable to assume that the illegality of the initial act of the delinquent State constitutes the legality of the response by precluding the wrongfulness of the act taken against the offender. Otherwise the possibility of the delinquent State of taking countermeasures could not be legally excluded.

The situation is fundamentally different as far as arts.31, 32 and 33 are concerned. The target State may be completely innocent of the cause entitling the other State to take action infringing the rights of that State. There is no international offence committed previously by the injured State. If the wrongfulness of the act in question is precluded *per se* and indiscriminately, by definition of the ILC there is no wrongful act and no breach of an international obligation against which the victim State would have the right to protect itself or to take countermeasures. It would be deprived of the possibility of defending its rights against a State claiming to act on the grounds of «*force majeure*», "distress" or "necessity" although it is in no way responsible for the situation giving rise to such grounds. Art.35 does not solve the problem as it is only concerned with possible compensation for damage and not with the issue whether an injured State

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[30] *Ibid.*, p.107.
[31] *Ibid.*

may take counteraction against measures of another State based on arts.31, 32 or 33. This appears to be a major defect of the system of the circumstances precluding wrongfulness as accepted by the ILC in first reading which, as such, is beyond the scope of this paper.

III. Countermeasures in Respect of an Internationally Wrongful Act (Art.30)

1. The Term "Countermeasures"

Whereas art.30 refers to "countermeasures" in the title and to "measures" in the text, the original formulation of the draft article as proposed by the Special Rapporteur Ago employed the phrase "legitimate application of a sanction"[32]. Ago defined "sanction" as "an action the object of which is to inflict punishment or to secure performance and which takes the form of an infringement of what in other circumstances would be an international subjective right, requiring respect, of the subject against which the action is taken"[33].

This definition of the word "sanction" did not restrict the term to the use of armed force. Ago also rejected what he considered to be an "excessively broad interpretation" of the term "sanction" that would include all the various legal consequences that may be attached to an internationally wrongful act. Stressing that the punitive object was one of the typical attributes of a sanction, Ago mentioned economic reprisals as "sanctions" which do not involve the use of armed force. On the other hand, he argued that the object of the attribution of the right to obtain reparation for damage as a possible legal consequence of an international offence is not punishment but solely indemnification, which could hardly be described as a sanction. Furthermore, Ago noted that "sanctions" could be applied not only on the basis of an individual and independent decision of a State but also by States other than the injured State on the authorization by a competent international organization[34].

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[32] Ago proposed the following wording: "Article 30. Legitimate application of a sanction: The international wrongfulness of an act not in conformity with what would otherwise be required of a State by virtue of an international obligation towards another State is precluded if the act was committed as the legitimate application of a sanction against that other State, in consequence of an internationally wrongful act committed by that other State". YILC 1979, vol.I, p.55.

[33] YILC 1979, vol.II (Part 1), p.39.

[34] *Ibid.*, pp.43–44.

In the Commission's discussion of Ago's report there was a divergence of opinion as to the precise meaning of the term "sanction"[35]. The Drafting Committee deleted the word "sanction" in Ago's proposal so as to clarify that art.30 is not limited to sanctions that were mandatory under the

[35] Ushakov, YILC 1979, vol.I, p.57, supported art.30 but expressed reservations about the phrase "legitimate application of a sanction". It would be premature to describe as "sanctions" the measures whose application against a State which had committed a wrongful act would be deemed legitimate under Part 2 of the draft articles. In his view, it would be better to speak of an act by a State against another State, rather than of measures. Ushakov suggested the following wording: "The commission by a State, against another State which has committed a wrongful act, of an act as a measure provided for as legitimate in part II of the present draft articles, precludes the wrongfulness of the latter act in cases where it is not in conformity with the obligation of the former State which has committed the said wrongful act". This wording would obviate the need to describe acts committed by a State against a State which had committed a wrongful act as sanctions, reprisals, retaliatory measures or coercive measures. If the Commission retained the concept of sanction in art.30 it would be entering into the question of measures that could be taken in response to an internationally wrongful act, a question reserved for Part 2 of the draft articles.

Yankov, *ibid.*, p.57, was also apprehensive about the use of the term "sanction" for the sole reason that the trend in modern international law was to regard sanctions as measures adopted by an international organization that were legally binding on the members of that organization. Furthermore, Yankov stated that it might be more appropriate, in the context of art.30, to use wording such as "responsive measures taken by a State in accordance with international law" and "sanctions applied by virtue of a valid decision of an international organization" to cover the different types of cases that might arise. Njenga, *ibid.*, p.58, affirmed that Yankov had suggested a very useful formulation.

Francis, *ibid.*, p.60, arrived at the conclusion that, for drafting purposes, it was immaterial whether the article spoke of "sanctions" or "measures", but it was important that it should reflect "three core elements": legitimate application of reprisals, self-defence and the application of international sanctions. Francis' main concern regarding the formulation of art.30 was whether or not a distinction should be made between cases in which punitive action was taken by a State in response to a wrongful act committed by another State and cases in which sanctions were applied by the international community for a breach of an international obligation which had serious implications for the international community as a whole. Referring to the arguments put forward by Yankov, Francis considered that the wording of art.30 should indeed draw such a distinction (*ibid.*, p.59).

Jagota, *ibid.*, p.61, was not entirely in favour of the word "sanction" as it had acquired a somewhat unfortunate connotation and was now largely associated with the use of force in one form or another. It was of course also used in the sense of "measures", and, where self-defence was concerned, in the sense of measures of self-protection. A sanction, however, was not legitimate if applied by one or more States; it had to be applied by a body such as the United Nations. Therefore, it would be preferable, within the context of art.30, to use the word "measure" rather than "sanction". Alternatively both words could be used, in which case the former could perhaps be understood as action taken by the State concerned on its own initiative and the latter as action taken pursuant to the decision of a competent international organization. Jagota suggested the following wording: "Legitimate measure or sanction: The international wrongfulness of an act not in conformity with what would otherwise be required by a State by virtue of an international obligation towards another State is

United Nations Charter[36]. The word was substituted by the term "countermeasures" to ensure that other legitimate measures are embraced such as the application of the *exceptio non adimpleti contractus* under art.60 of the Vienna Convention on the Law of Treaties (subsequently: Vienna Convention)[37], which in the context of multilateral or bilateral relations might in a broad sense amount to a sanction in international law. In the discussion of his report Ago had already indicated that he would have no objection to replace the term "sanction", which some members of the Commission interpreted in a restrictive manner, by the expression "retaliatory measure" or "countermeasure"[38].

In substance, the Commentary to art.30 defines "countermeasures" in the same way as Ago defined "sanctions". The object of countermeasures is to inflict punishment or to secure performance and under different circumstances they would infringe a valid and subjective right of the subject against which the measures are applied. The Commentary explains that countermeasures are more than the mere exercise of the right to obtain reparation for damage, that they do not necessarily involve the use of armed force, and that they must be distinguished from retaliatory measures

precluded if the act was committed as a legitimate measure or sanction, whether on its own initiative or pursuant to a decision of a competent international organization, against that other State, in consequence of an internationally wrongful act committed by that other State".

Vallat, *ibid.*, p.61, commented that, in English usage, the word "sanction" had come to have a narrow meaning, particularly in international legal circles, and tended to be used for action taken by or on the decision of the Security Council. Such usage would perhaps limit unduly the scope of the draft article. He considered that some additional word was needed to amplify the meaning of "sanction" or, alternatively, that some other phraseology should be found to cover the situation.

Verosta, *ibid.*, p.62, remarked that if the word "sanction" was to be retained, it would be preferable to speak in the French version of legitimate "application" rather than "exercise" of a sanction. Later he suggested the replacement of the title of the article by "Legitimate reaction against a wrongful act of the State" (*ibid.*, p.63).

At the end of the discussion Yankov, *ibid.*, p.62, proposed the following new wording for the title and the text of draft art.30: "Legitimate responsive measures or application of a sanction: The international wrongfulness of an act not in conformity with what would otherwise be required of a State by virtue of an international obligation towards another State is precluded if the act was committed as a legitimate responsive measure under international law or in application of a sanction imposed by a decision of a competent organ of an international organization against that other State, in consequence of an internationally wrongful act committed by that other State".

[36] YILC 1979, vol.I, p.171.

[37] Vienna Convention on the Law of Treaties, published in AJIL vol.63 (1969), p.875 *et seq.*; ZaöRV vol.29 (1969), p.711 *et seq.*

[38] YILC 1979, vol.I, p.63.

which are harmful to the target State but would not violate an international obligation[39].

Later the Commentary clarifies that the term "countermeasure" in the title of art.30 and the term "measure" in the text have been preferred to the word "sanction" to prevent any misunderstanding as to the two distinct cases universally covered by the provision:

a) the case in which the act in question is "a reactive measure applied directly and independently by the injured State against the State which has committed an internationally wrongful act against it"; and

b) the case in which the act is "a reactive measure applied on the basis of a decision taken by a competent international organization which has entrusted the application of that measure to the injured State itself, to another State, to a number of States or to all the member States of the organization"[40].

The Commission decided to make allowance for a presumed trend in international law of reserving the term "sanction" for measures applied on the basis of a decision taken by an international organization following a breach of an international obligation "having serious consequences for the international community as a whole", in particular with view to the adoption of measures by the United Nations under the system established by the Charter to maintain international peace and security[41].

Whether there actually exists such a trend in international law may be doubted, there is, however, no point in attaching too much importance to terminology in this case[42]. By the definition of "countermeasures" it is first

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[39] YILC 1979, vol.II (Part 2), p.116.

[40] *Ibid.*, p.121.

[41] *Ibid.*

[42] F. Klein, Sanktion, in: Strupp-Schlochauer, Wörterbuch, vol.3, p.159, states that the word and notion of "sanction" are not used uniformly in modern international law and that there is substantial disagreement as to the term in legal literature (for an extensive list of writings see p.161 *et seq.*). As to references to authors referring to sanctions, or to reactions to an internationally wrongful act and other coercive or non-coercive measures see also Ago, YILC, vol.II (Part 1), p.45. According to Kelsen, Principles of International Law (2nd ed. revised and ed. by R. W. Tucker, New York 1967), p.18, by "sanction" in international law many writers mean the obligation to repair the moral and material damage caused by the delict. Kelsen, p.19, distinguishes a "sanction" from an "obligation" and defines the first as a coercive act in consequence of a delict. J.L. Kunz, Sanctions in International Law, AJIL vol.54 (1960), p.324, has defined legal sanctions as "the reaction of the legal community against a delict". It is also possible to distinguish "individual" and "collective sanctions" as forms of retaliation as responses to breaches of international law, "collective sanctions meaning measures applied by a universal institution in concert with its member States", see W.C. Maddrey, Economic Sanctions against South Africa: Prob-

of all clear that art.30 is not concerned with retortions. A retortion is an unfriendly act against another State with the object to persuade that State to end its harmful conduct[43]. As measures of retortion do not infringe the rights of the target State and only interfere with its interests, they do not require a special legitimization by international law[44]. Therefore they fall outside of the scope of "circumstances precluding wrongfulness" which assume that the conduct in question would otherwise constitute a violation of an international obligation towards the target State[45].

It also seems clear that art.30 covers the traditional area of reprisals as a reaction against an international offence. Following a suggestion made by the Institut de Droit International in 1934, reprisals may be defined as «des mesures de contrainte, dérogatoires aux règles ordinaires du droit des gens, prises par un Etat à la suite d'actes illicites commis à son préjudice par un

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lems and Prospects for Enforcement of Human Rights, Virginia Journal of International Law, vol.22 (1982), p.347. See also Berber (note 1), p.92 *et seq.*; W. Wengler, Völkerrecht, vol.1 (Berlin 1964), p.526 *et seq.*; H. Steiger, Zur Struktur der Kontroll- und Durchsetzungsverfahren gegenüber Mitgliedstaaten in Internationalen Organisationen, in: Festschrift für H.-J. Schlochauer (Berlin 1981), p.649 *et seq.*

[43] C. Tomuschat, Repressalie und Retorsion. Zu einigen Aspekten ihrer innerstaatlichen Durchführung, ZaöRV vol.33 (1973), p.184 *et seq.* C.G. Fenwick, International Law (4th ed. New York 1965), p.635, writes: "Although commonly associated with methods of coercion falling short of war, retortion is not strictly speaking a measure of redress for legal injuries. It consists in retaliation where the acts complained of do not constitute a legal ground of offense but are rather in the nature of unfriendly acts done primarily in pursuance of legitimate state interests but indirectly hurtful to other states". S.A. Williams/A.L.C. de Mestral, An Introduction to International Law Chiefly as Interpreted and Applied in Canada (Toronto 1979), p.12, regard retortion as a form of action which a State may use to enforce its rights: "Retortion is a lawful measure which is taken by one state to injure the offending state". See also A. Verdross/B. Simma, Universelles Völkerrecht. Theorie und Praxis (Berlin 1976), p.648; J.M. Mössner, Einführung in das Völkerrecht (Munich 1977), p.137.

[44] As to the possible restriction of the use of retortions by treaty law see Tomuschat (note 43) and K.J. Partsch, Retorsion, in: Strupp-Schlochauer, Wörterbuch, vol.3, p.110.

[45] The Commentary to art.30 states that the "measures" considered under that provision always involve action which under different circumstances would represent a breach of an international obligation and the infringement of another's subjective right: "This distinguishes the measures referred to here from those which, although harmful to the State against which they are directed, do not involve any action that, in other circumstances, would not be in conformity with an international obligation – for example, retaliatory measures" (YILC 1979, vol.II [Part 2], p.116). In his report (YILC 1979, vol.II [Part 1], p. 43) Ago was clearer explaining that if there was no conduct conflicting with an international obligation "the action would amount to mere retortion, and would not constitute reprisals in the strict sense".

autre Etat et ayant pour but d'imposer à celui-ci, au moyen d'un dommage, le respect du droit»[46].

Reprisals must meet certain conditions to be legitimate; these will be examined later. At this point, the question is whether the definition of "countermeasures" excludes certain acts which could be regarded as reprisals. The Commentary to art.30 has accepted Ago's proposition that the mere exercise of the right to obtain reparation for damage caused by an internationally wrongful act is not a "sanction" ("countermeasure") because the object is not punishment but solely indemnification. While it is generally recognized that reprisals have a punitive character, it is also obvious that they may pursue various purposes in particular[47]. A reprisal may seek to impose a satisfactory settlement of the dispute created by the international offence committed by the target State, or to compel the delinquent State to abide by the law in the future, or to secure reparation for the harm done[48]. Some authors maintain that a reprisal may at the same time be both a form of punishment and a form of protection for the future, since it may have a deterrent function to prevent a repetition of the initial wrongful act[49]. Others stress that a reprisal must not have the sole purpose

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[46] Annuaire de l'Institut de Droit International, vol.38 (1934), p.708 (Art.1 of the «Résolution sur le régime de représailles en temps de paix»). Accepting this definition: K.J. Partsch, Repressalie, in: Strupp-Schlochauer, Wörterbuch, vol.3, p.104; Tomuschat (note 43), p.186. In Berber's view (note 1), p. 95, this definition is not quite satisfactory. He suggests: »Unter Repressalien sollte man Maßnahmen eines Völkerrechtssubjektes, dessen Rechte von einem anderen Völkerrechtssubjekt verletzt werden, verstehen, die auch ihrerseits in die Rechte des verletzten (obviously meaning: »des verletzenden«) Völkerrechtssubjekts eingreifen, um dieses zur Abstellung der ursprünglichen Rechtsverletzung zu veranlassen«. Probably to distinguish more clearly reprisals from self-defence Verdross/Simma (note 43), p.652, also offer a slightly different definition: »Unter einer Repressalie verstehen wir einen Rechtsbegriff eines in seinen völkerrechtlichen Rechten verletzten Staates in einzelne Rechtsgüter jenes Staates, der ihm gegenüber den Unrechtstatbestand gesetzt hat, um ihn zur Wiedergutmachung des Unrechts zu bewegen«. According to Kelsen (note 42), p.21, the usual definition is as follows: "Reprisals are acts which, although normally illegal, are exceptionally permitted as reaction of one state against a violation of its rights by another state". For further views see Wengler (note 42), p.515 *et seq.*; Fenwick (note 43), p.636 *et seq.*; Williams/de Mestral (note 43), p.12; J.C. Venézia, La notion de représailles en droit international public, RGDIP 1960, p.465 *et seq.*; A. Bleckmann, Gedanken zur Repressalie, in: Festschrift für H.-J. Schlochauer (Berlin 1981), p.193 *et seq.* with further references.

[47] See Berber (note 1), p.95 *et seq.*; Wengler, p.515 *et seq.*; Bleckmann, p.197 *et seq.*

[48] D.W. Bowett, Reprisals Involving Recourse to Armed Force, AJIL vol.66 (1972), p.3.

[49] R.W. Tucker, Reprisals and Self-Defense: The Customary Law, AJIL vol.66 (1972), p.591; see also Wengler (note 42), p.524 *et seq.*

of retaliation but must attempt to induce the delinquent State to end its harmful conduct or to force it to repair the damage[50]. At any rate, the right to reprisal can be invoked for the sole purpose of obtaining reparation. Thus it is difficult to understand why a reprisal the object of which is solely indemnification should not fall into the category of "countermeasures".

A further question concerns the relationship between the right to reprisal and the application of the *exceptio non adimpleti contractus* under art.60 of the Vienna Convention which, as the Commission explained, could also be a "countermeasure" in the sense of art.30. It is disputed whether the right not to fulfil a treaty or exceptionally to terminate it if the other party is responsible for a material breach of the treaty can be considered as a reprisal or not[51]. There is indeed an essential difference. Reprisals concerning obligations under general international law cannot "terminate" these obligations in a definite sense[52]. A reprisal may only suspend the performance of such an obligation temporarily. The reason is that, disregarding *ius cogens*, general international law can only be derogated by agreement of the respective subjects of international law and not by the unilateral decision of a State. This is a *conditio sine qua non* for the existence of an international legal order. The situation is different as to special legal relationships between the parties of a treaty requiring a certain degree of confidence in each other. If this confidence is betrayed it must be possible to reduce the relationship to the lower level governed by the norms of general international law by terminating the treaty unilaterally[53]. The ILC did not consider this question in the context of art.30[54]. It seems

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[50] Tomuschat (note 43), p.186.

[51] For references see B. Simma, Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law, Österreichische Zeitschrift für öffentliches Recht, vol.20 (1970), p.24. Partsch (note 46), p.106, writes: »Da Repressalien immer an sich rechtswidrige Handlungen enthalten, sind sie von rechtlich zulässigen eigenmächtigen Handlungen in synallagmatischen Verhältnissen (außerordentliche Kündigung von völkerrechtlichen Verträgen, Einrede des nichterfüllten Vertrages, Zurückbehaltungsrecht, Aufrechnung) zu unterscheiden«. He admits, however, that this distinction is disputed. See furthermore Wengler (note 42), p.537 *et seq.*

[52] Simma (note 51), p.23. As to the dogmatic distinction between the law of reprisal and the law of treaties, as far as Art.60 of the Vienna Convention is concerned, see also B. Simma, Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge (Berlin 1972), p.64 *et seq.*

[53] See also Tomuschat (note 43), p.188, accepting the view of Simma. For another perspective see Bleckmann (note 46), p.202 *et seq.*

[54] In the discussion of Ago's report Jagota (YILC 1979, vol.I, p.61) maintained that, insofar as art.30 was concerned, a legitimate sanction meant a sanction that was in conformity with the Vienna Convention and with State practice developed on the basis of that

doubtful whether both situations can properly be dealt with on the basis of the same article.

The question also arises in the context of reactive measures applied on the basis of a decision of an international organization which the term "countermeasures" puts on the same level as reprisals although the conditions may differ considerably. Sanctions on the basis of binding decisions of international organizations can be divided into three categories: measures taken by States to implement the decision; military measures taken by the organization itself; and deprivation of certain advantages of membership[55]. As the ILC's draft articles are concerned solely with the responsibility of States and not with the responsibility of international organizations, only the first category is of interest in this context.

Before entering into a more detailed examination of the requirements of what the ILC has termed "countermeasures" it seems appropriate to emphasize the limited purpose of draft art.30.

2. The Limited Purpose of Art.30

Within the context of State responsibility "countermeasures" can be studied under two different aspects: as legal consequences following from an internationally wrongful act and as circumstances precluding wrongfulness. Ago emphasized that it was not the task of the Commission in dealing with art.30 to determine the conditions under which sanctions were legitimate or illegitimate, for this question should be left to Part 2 of the draft articles codifying "content, forms and degrees" of State responsibility. In the context of art.30 it would be sufficient to affirm that an

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Convention. It has already been mentioned that the Drafting Committee preferred the term "countermeasures" to the word "sanctions" with the reasoning, *inter alia*, that other legitimate measures such as the application of the *exceptio non adimpleti contractus* under art.60 of the Vienna Convention should be embraced by art.30 (YILC 1979, vol.I, p.171). There was no further discussion reported on the relationship between art.30 of the draft articles on State responsibility and art.60 of the Vienna Convention. The question of the relationship between the Vienna Convention and the draft articles on State responsibility in general will inevitably arise in the context of drafting Part 2 for which the new Special Rapporteur Riphagen is responsible. It is interesting to note that in his Fourth Report on the Content, Forms and Degrees of State Responsibility (Part 2 of the draft articles) (UN GA Doc. A/CN.4/366/Add.1, 15.4.1983, p.18) Riphagen clearly distinguishes a reprisal from the unilateral termination or suspension of a treaty as a consequence of its breach.

[55] M. Bothe, International Obligations, Means to Secure Performance, in: R. Bernhardt (ed.), Encyclopedia of Public International Law (EPIL), Instalment 1 (1981), p.105. For an analysis of the structures of control and enforcement procedures of international organizations towards member States see Steiger (note 42), p.649 *et seq.*

infringement of a subjective right of a State that would normally be an international offence was not wrongful if it represented a legitimate reaction to an internationally wrongful act committed by that State[56].

The Commission accepted this approach which somewhat artificially separates issues which are in fact closely interlinked. According to the Commentary to art.30, the provision simply presumes that international law permits "in certain cases and under certain conditions" the adoption of countermeasures against an illegal act committed previously, and that these countermeasures may, in a given case, constitute conduct "not in conformity with what would otherwise be required by an international obligation". Art.30 would neither define "the various forms which may be taken by the reactive measures or sanctions to which it refers", determine "the conditions for their application", nor specify "the situations in which one or another of these forms is applicable". The Commission reserved the right to study these questions in the context of Part 2 of the draft articles[57].

Thus the answers to substantial problems relating to draft art.30 have been postponed and the burden falls to the new Special Rapporteur Riphagen who is responsible for the drafting of Part 2 of the draft articles[58]. Nevertheless, the Commentary to art.30 does enter into some detail to explain the application of the rule it establishes and the criteria for the legitimacy of "countermeasures" as circumstances precluding wrongfulness. It stresses that the countermeasure adopted must be "legitimate" under international law in order to preclude wrongfulness and that the selection of the word "constitutes" illuminates that the legitimacy of the measure must be objectively established by reference to international law[59].

3. The Legitimacy of Countermeasures Applied Directly and Independently by the Injured State

The analysis will proceed by stating briefly the law on reprisals and then examining the position taken by the ILC on the legitimacy of "countermeasures" applied directly and independently by the injured State.

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[56] YILC 1979, vol.I, p.62 *et seq.*

[57] YILC 1979, vol.II (Part 2), p.121.

[58] See Add.1 to Riphagen's Fourth Report (note 54).

[59] See note 57. The Government of the Netherlands (note 28), p.3, criticized that the formula "if the act constitutes a measure legitimate under international law" contains an insufficient distinction between admissibility under international law of countermeasures in

a) The law on reprisals

In classical international law the right to reprisal as an instrument of self-help in response to an international offence was frequently invoked with little attention paid to the proportionality of the wrong suffered and the wrong inflicted upon the delinquent State[60]. As the right to wage war was unrestricted, there was also no prohibition on the use of armed force in measures of reprisal[61]. This does not necessarily imply that a distinction between reprisals in peace-time and in wartime was therefore obsolete[62].

The special problems relating to the legality of wartime reprisals under modern international law will not be considered in the present context[63]. As to peace-time reprisals, there is no doubt that, under certain conditions and within certain limits, they are still admissible under modern international law. Although the concept of reprisals may have acquired a pejorative connotation[64], it is obvious that the enforcement of international law and of international subjective rights in a decentralized legal system and with view to the ineffectiveness of the United Nations in this respect in the last resort depends on this form of self-help[65].

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a concrete situation on the one hand and the limits imposed by international law on the modalities of a countermeasure which is in principle admissible, on the other.

[60] See E.S. Colbert, Retaliation in International Law (New York 1948), pp.77 and 79; Schlochauer (note 1), p.273.

[61] At least prior to the Kellogg-Briand Pact and the Charter of the United Nations, see Kelsen (note 42), p.21; Fenwick (note 43), p.637.

[62] Although Schlochauer (note 1), p.269, argues that the distinction between reprisals in peace-time and reprisals in wartime is not a result of legal differentiation as the conditions for the exercise of the right of reprisal were the same in peace and war, under modern international law most writers adhere to such a distinction, see, for example, R. Thode, in: E. Menzel/K. Ipsen, Völkerrecht (2nd ed. Munich 1979), p.460; Partsch (note 46), p.104 *et seq.*, considering a wartime reprisal, however, to be merely a sub-case of the general legal institute of reprisal; Berber (note 1), p.97 *et seq.*; Kelsen (note 42), p.21.

[63] See F. Kalshoven, Belligerent Reprisals (Leyden 1971); Partsch (note 46), p.105 *et seq.*

[64] Francis, YILC 1979, vol.I, p.59; Mössner (note 43), p.140, discusses the disadvantages of reprisals for the international legal system and the affected States. Bothe (note 55), p.104, offers the following explanation as to "why reprisals have fallen into disrepute": As a possible reaction to an international offence reprisals depend on the power relationship between the parties and are highly problematic in the absence of an authoritative determination of a breach of an international obligation. Experience would show that the party at fault often claims not to be at fault, and that it may even denounce the reaction of the victim as being illegal and resort to countermeasures. Measures of self-help would evidently involve a serious risk of escalation. See also Bleckmann (note 46), p.213, pleading for more precise limitations on reprisals.

[65] Even such critical observers of the development of reprisals as Mössner (note 43),

It is accepted that the target State must have committed a prior international offence against the claimant State as a necessary precondition for the legitimacy of a reprisal[66]. In principle, reprisals are only permissible as a reaction by the State that has suffered an internationally wrongful act. A non-victim State therefore can react only by retortion, not by a reprisal against the delinquent State[67]. There are, however, exceptions to this principle in cases where a breach of an international obligation legally concerns not only the State primarily affected, but the international community as a whole or all the parties to a multilateral treaty. As far as necessary in the context of this article, these special cases will be dealt with later. On the other hand, it is recognized that reprisals are only permissible if they are directed against the delinquent State and illegal if they are directed against a third State[68].

According to the award of 1928 by the Portugal/Germany Arbitration Tribunal concerning the *Naulilaa* incident[69], which has subsequently been treated as an authoritative decision on the customary law of reprisals, the reprisal must be preceded by an unfulfilled demand of the claimant State to obtain redress by other means[70]. This condition, however, must be

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p.141, admit: »Auch wenn die Repressalie daher ein äußerst zweischneidiges Schwert zur Aufrechterhaltung der internationalen Rechtsordnung in den internationalen Beziehungen darstellt, so ist der ihr zugrundeliegende Gedanke der Selbstbeurteilung und Selbsthilfe dem entwicklungsgeschichtlichen Stand der Völkerrechtsordnung angemessen«. See also G. Dahm, Völkerrecht, vol.2 (Stuttgart 1961), pp.433 and 435. For a discussion of the function of possible retaliation in ensuring compliance with international norms see A. D'Amato, The Concept of Human Rights in International Law, Columbia Law Review, vol.82 (1982), p.1118 *et seq.*

[66] This is not disputed. The question is whether reprisals require the completion of an internationally wrongful act. Wengler (note 42), p.516, accepts the legitimacy of preventive reprisals under certain conditions.

[67] Bothe (note 55), p.104; as to retortion see note 43.

[68] In its decision of June 30, 1930 the Portugal/German Arbitration Tribunal stated in the *Cysne* case: «Les représailles ne sont admissibles que contre l'Etat provocateur» (RIAA vol.2, p.1057). Writers confirm this principle: J. Stone, Legal Controls of International Conflict (London 1959), p.290; D.W. Bowett, Self-Defence in International Law (Manchester 1958), p.167 *et seq.*; Schlochauer (note 1), p.273 *et seq.*; Partsch (note 46), p.104; Dahm (note 65), p.430; Berber (note 1), p.95; Ago, YILC 1979, vol.II (Part 1), p.46, cites additional authorities. The 1934 Resolution of the Institut de Droit International (note 46), p.710 (art.6 para.3) is less strict stating that the rights of third States must be respected «dans toute la mesure possible». The prohibition of reprisals against States other than the delinquent State does not mean that the violation of an international obligation towards a third State could not be justified on other grounds such as "necessity", see Wengler (note 42), p.515 *et seq.*

[69] RIAA vol.2, p.1025.

[70] See the 1934 Resolution of the Institut de Droit International (note 46), art.6 para.2;

qualified. It has been observed that in the *Naulilaa* Case the arbitrators did not refer to earlier authority to support this condition. According to Bowett, in the earlier textbooks and in some later there is little mention of this condition as a specific requirement and the emphasis was more upon the necessity of the reprisal in the sense that it required a lawful motive[71]. Others argue that State practice at that time permitted considerable uncertainty on this point and that this uncertainty was reflected in the standard treaties of an earlier period[72]. Indeed, it seems exaggerated to insist on the requirement of a prior attempt to obtain redress by other means before taking a measure of reprisal in response to an international offence if such an attempt is inappropriate or impossible in the circumstances[73].

Another limitation on the right to reprisal also established by the *Naulilaa* award is that reprisals must not be disproportionate[74]. Although it may be a question whether proportionality must be measured by the wrong done or by the punitive functions of the reprisal[75], the prevailing view is that the reprisal must be limited to the necessities of the case and that the damage inflicted in response to an internationally wrongful act must be roughly proportional to the damage initially caused by the offence[76]. Proportionality does not mean that the injured State is obliged to respond by the same kind of measure which the delinquent State has taken[77].

Partsch (note 46), p.104; Mössner (note 43), p.140; Schlochauer (note 1), p.274; Verdross/Simma (note 43), p.652 *et seq.*; Thode (note 62), p.459; Berber (note 1), p.96; Tomuschat (note 43), p.186 and p.191 *et seq.*

71 Bowett (note 48), p.3.

72 Tucker (note 49), p.592.

73 Tucker, *ibid.*, p.593. Dahm (note 65), p.429, states that, according to the prevailing opinion, an unfulfilled demand must precede a reprisal – in contrast to the case of self-defence – in order to give the delinquent State a last chance to rectify the situation. However, he refers to Kelsen, who is of a different opinion, and adds that this requirement would be obsolete in certain cases, in particular, in wartime. Wengler (note 42), pp.516–517, referring to the coercive purpose (*Beugezwang*) of a reprisal, generally requires an unfulfilled demand, but states that in the case of a purely defensive reprisal (*Abwehrrepressalie*) no warning is necessary if it is clear that the delinquent State has acted intentionally in breach of the international obligation, or if serious damage can only be avoided by acting immediately.

74 Note 69, p.1028.

75 See Tucker (note 49), p.591 *et seq.*

76 Kelsen (note 42), p.21; Dahm (note 65), p.430; Wengler (note 42), p.519; Mössner (note 43), p.140; Partsch (note 46), p.104; Schlochauer (note 1), p.276; Verdross/Simma (note 43), p.653; R.A. Falk, The Beirut Raid and the International Law of Retaliation, AJIL vol.63 (1969), p.431. For a critical view as to the concept of proportionality see Bleckmann (note 46), p.209 *et seq.*, advocating stricter rules.

77 See Dahm (note 65), p.431 *et seq.*; Wengler (note 42), p.517 *et seq.*

A further essential condition for the legitimacy of reprisals is that they must not use armed force. It is debatable whether this condition existed in international law as an unrestricted principle prior to the United Nations Charter[78]. Although the Charter does not expressly refer to "reprisals" or "retaliation", the unconditional prohibition of armed reprisals can be deduced from art.2 (4) of the Charter[79]. This principle has been confirmed by the Friendly Relations Declaration of the General Assembly in 1970, stating that "States have a duty to refrain from acts of reprisal involving the use of force"[80] and also by art.1 (a) II of the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1975[81]. The view that armed reprisals are forbidden under the Charter of the United Nations

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[78] The Hague Convention (II) of 1907 respecting the Limitation of the Employment of Force for the Recovery of Contract Debts introduced an earlier restriction of the legitimacy of recourse to armed reprisals. There were other steps in this direction such as on the basis of the Covenant of the League of Nations or the Kellogg-Briand Pact, see Ago, YILC 1979, vol.II (Part 1), p.42. Art.4 of the 1934 Resolution of the Institut de Droit International (note 46) advocated the prohibition of armed reprisals in the same way as recourse to war. However, it seems difficult to conclude more from this development than I. Brownlie, International Law and the Use of Force by States (Oxford 1963), p.222, does, namely that "the controversy as to whether the Covenant and the Pact prohibited reprisals indicated that their status as measures of self-help was far from secure".

[79] As to the meaning of art.2 (4) of the Charter and the prohibition of the use of force see W. Wengler, Das völkerrechtliche Gewaltverbot, Probleme und Tendenzen (Berlin 1967); C.H.M. Waldock, The Regulation of the Use of Force in International Law, RdC vol.81 (1952 II), p.451 *et seq.*; H. Wehberg, Krieg und Eroberung im Wandel des Völkerrechts (Frankfurt/M. 1953); G. Dahm, Das Verbot der Gewaltanwendung nach Art.2 (4) der UNO-Charta und die Selbsthilfe gegenüber Völkerrechtsverletzungen, die keinen bewaffneten Angriff enthalten, JIR vol.2 (1962), p.48 *et seq.*; R.M. Derpa, Das Gewaltverbot der Satzung der Vereinten Nationen und die Anwendung nichtmilitärischer Gewalt (Bad Homburg 1970); W. Schaumann (ed.), Völkerrechtliches Gewaltverbot und Friedenssicherung (Baden-Baden 1971); R.A. Falk, Legal Order in a Violent World (Princeton, N.J. 1968); J. Žourek, L'interdiction de l'emploi de la force en droit international (Leiden 1974); Brownlie (note 78); H.P. Neuhold, Internationale Konflikte – verbotene und erlaubte Mittel ihrer Austragung (Vienna 1977); B.V.A. Röling, Aspects of the Ban on Force, NILR vol.24 (1977), p.242 *et seq.*; H.B. Reimann, Das völkerrechtliche Gewaltverbot im Wandel, in: Festschrift für Rudolf Bindschedler (Berne 1980), p.549 *et seq.*; C. Tomuschat, Gewalt und Gewaltverbot als Bestimmungsfaktoren der Weltordnung, Europa-Archiv, vol.36 (1981), p.325 *et seq.*

[80] Principle I of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV) Annex) adopted on October 24, 1970.

[81] As to the legal status of the Final Act see Th. Schweisfurth, Zur Frage der Rechtsnatur, Verbindlichkeit und völkerrechtlichen Relevanz der KSZE-Schlußakte, ZaöRV vol.36 (1976), p.681 *et seq.*

is held by most authors[82]. It is based upon a restrictive interpretation of the rules in the Charter permitting the use of armed force, in particular of the right to self-defence in the sense of art.51 of the Charter which is construed as the permissible use of armed force in reaction to an armed attack by another State only[83].

In spite of the prohibition of armed reprisals there have been numerous occasions in State practice after the Second World War in which resort to the use of armed force was taken even though there was no armed attack by another State. One could conclude that art.2 (4) of the Charter has become obsolete on the grounds of *desuetudo,* but this argument is not persuasive in view of the fact that all States that have taken violent action attempted to justify their conduct on the basis of the United Nations Charter[84]. It is more difficult to counter the conclusions drawn by some authors from the ineffectiveness of the system established by Chapter VII of the United

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[82] Bowett (note 48), p.1, writes: "Few propositions about international law have enjoyed more support than the proposition that, under the Charter of the United Nations, the use of force by way of reprisals is illegal". He remarks that the literature on this point, although in his view not very penetrating on account of authority of the proposition is very extensive and refers to the following authors as a sample: Goodrich/Hambro; Brownlie; Higgins; Waldock; Sørensen; and Skubiszewski. For extensive references as to the prevailing view see Derpa (note 79), p.23 *et seq.;* Neuhold (note 79), p.222; W. Kewenig, Gewaltverbot und noch zulässige Machteinwirkung und Interventionsmittel, in: Schaumann (note 79), p.184. Ago, YILC 1979, vol.II (Part 1), p.42, cites the *Corfu Channel* Case (Merits), ICJ Reports 1949, p.35, as an international legal precedent to support the prevailing view. The significance of this decision, however, is disputed. According to J. Brierly, The Law of Nations (6th ed. 1963), p.426, the Court "drew a sharp distinction between forcible affirmation of legal rights against an expected unlawful attempt to prevent their exercise and forcible self-help to obtain redress for rights already violated; the first it accepted as legitimate, the second it condemned as illegal". Waldock (note 79), p.501, argues that the Court allowed a "demonstration of force not merely for insuring safe exercise of the right of passage but to test the attitude of the wrongdoer and to coerce it into future good behaviour. This seems to go close to allowing forcible self-help without reference to the United Nations". B. Levenfeld, Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law, Columbia Journal of Transnational Law, vol.21 (1982), p.35, concludes: "The Corfu Channel court apparently ratified a resort to forcible self-help – the passage of battle-ready British warships through a disputed channel. In doing so, the court hinted that some residual right to reprisal remains in the modern international legal order".

[83] Brownlie (note 78), p.281, states: "There is a general assumption by jurists that the Charter prohibited self-help and armed reprisals. The combined effect of paragraph 4 of Article 2 and Article 51 is represented as rendering all use of force illegal except in the exercise of the right of self-defense 'if an armed attack occurs'". This question and the distinction between "self-defence" and "reprisals" will be discussed later in the context of examining draft art.34.

[84] Verdross-Simma (note 43), p.248; see also Reimann (note 79), p.556.

Nations Charter[85]. They say that the prohibition of the use of force in the Charter would depend on the functioning of this system of coercive measures and that States could only renounce the use of force to protect their rights if the Security Council is able to ensure the respect for art.2 (4) and international law. As this system has obviously failed, some argue that art.2 (4) has become void[86], while others extend the notion of "self-defence" beyond the limits of a reaction to an armed attack in the strict sense or maintain that armed reprisals are still admissible. It has been argued that in the light of the "credibility gap" arising from the malfunctioning of the United Nations security system the necessity would exist to extend the notion of self-defence by applying the *clausula rebus sic stantibus* to art.51 of the Charter[87]. But there has been no substantial alteration of the situation since the Charter entered into force; rather the weakness of the United Nations collective security system was inherent in that system right from the beginning[88]. Even if one could apply the *clausula rebus sic stantibus*, no member State could withdraw unilaterally from its treaty obligations but would be required to claim a revision of the Charter by agreement[89]. Furthermore, the Judgment of the International Court of Justice in the *Corfu Channel* Case (Merits) of 1949 stated clearly that defects in international organization are no excuse for a manifestation of a policy of force, in particular the use of armed self-help[90].

However, it cannot be denied with view to the reality of international relations that the unconditional prohibition of the use of armed force in peace-time based on a restrictive interpretation of self-defence and the principle of the inadmissibility of armed reprisals has the consequence that in exceptional cases States are deprived of an effective response to an international offence and left without due protection of their rights[91].

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[85] The fact that this system does not work in practice is not disputed and the reasons are well-known. For literature see note 184.

[86] T. M. Franck, Who killed Art.2 (4)? Or: The Changing Norms Governing the Use of Force by States, AJIL vol.64 (1970), p.809 *et seq.* See the reply by L. Henkin, The Reports of the Death of Article 2 (4) are Greatly Exaggerated, AJIL vol.65 (1971), p.544 *et seq.*

[87] G. Schwarzenberger, The Fundamental Principles of International Law, RdC vol.87 (1955 I), p.339.

[88] See U. Beyerlin, Die israelische Befreiungsaktion von Entebbe in völkerrechtlicher Sicht, ZaöRV vol.37 (1977), p.223 with reference to G. Dahm and I. Brownlie.

[89] Beyerlin, *ibid.*, p.224; M. Bothe, Das Gewaltverbot im allgemeinen, in: Schaumann (note 79), p.25.

[90] See note 82; Verdross/Simma (note 43), p.245.

[91] Berber (note 1), p.96: »bedenkliche Rechtslücke«; Thode (note 62), p.459 *et seq.*: »Regelungslücke«; Verdross/Simma, p.245, raise the question, »... ob sich das in Rede stehende Repressalienverbot, das Verbot militärischen Selbstschutzes und das Verbot

One area is the protection of nationals abroad[92]. On various occasions several western States have expressed the view that the use of armed force is legal to rescue their own nationals if their lives or health are endangered in a foreign country[93]. There have been a number of such rescue operations since the Charter has been in force, such as the Stanleyville rescue operations in the Congo in 1964 by Belgium and the United States, the Israeli rescue operation at Entebbe in 1976, and, most recently, the abortive attempt by the United States in 1980 to free the American diplomatic staff held hostage by Iran. A number of western authors maintain with manifold arguments that such rescue operations are in conformity with international law, some of them extending this alleged right of the use of armed force even to the protection of property of nationals abroad[94].

This view is not generally accepted[95]. On policy grounds such a development in international law recognizing the legality of the use of

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der präventiven Notwehr in der Praxis wird behaupten können, wenn das Sicherheitssystem der UN-Charta ... nicht wirksamer ausgestaltet werden wird«. Bowett (note 48), p.2, writes: "It cannot be doubted that a total outlawry of armed reprisals, such as the drafters of the Charter intended, presupposed a degree of community cohesiveness and, with it, a capacity for collective action to suppress any resort to unlawful force which has simply not been achieved. Not surprisingly, as states have grown increasingly disillusioned about the capacity of the Security Council to afford them protection against what they would regard as illegal and highly injurious conduct directed against them, they have resorted to self-help in the form of reprisals and have acquired the confidence that, in so doing, they will not incur anything more than a formal censure from the Security Council. The law on reprisals is, because of its divorce from actual practice, rapidly degenerating to a stage where its normative character is in question". See also Levenfeld (note 82), p.19 *et seq.*

[92] See Beyerlin (note 88), p.231 *et seq.*; M. Akehurst, The Use of Force to Protect Nationals Abroad, International Relations, vol.5 (1977), p.3 *et seq.*; Th. Schweisfurth, Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights, GYIL vol.23 (1980), p.159 *et seq.*; S.H. Wilder, International Terrorism and Hostage-Taking: An Overview, Manitoba Law Journal, vol.11 (1981), p.367 *et seq.*

[93] A. Randelzhofer, Use of Force, EPIL 4 (1982), p.273, referring to the United States, the United Kingdom, Belgium and Israel.

[94] According to Randelzhofer, *ibid.*, "a minority". For references to Bowett, Franzke and Westlake see Beyerlin (note 88), p.221.

[95] Rejected by Beyerlin, p.239, citing other authorities; Randelzhofer (note 93); Verdross/Simma (note 43), p.650, with reference to the Friendly Relations Declaration of 1970. According to Thode (note 62), p.458, however, the prevailing view in legal literature recognizes the right of intervention to protect the life of own nationals abroad, which is distinguished from illegal humanitarian intervention to protect foreign nationals. It should also be mentioned that in 1971 Kewenig (note 82), p.206, came to the conclusion: »Unter der Voraussetzung, daß eine akute Lebensgefahr besteht, daß weder der Aufenthaltsstaat noch die Vereinten Nationen zur unmittelbaren Gewährung ausreichenden Schutzes in der Lage sind und daß die Aktion sich in zeitlicher, in räumlicher und in jeder anderen

armed force in the aforementioned type of cases cannot be welcomed as it would privilege the powerful States enjoying the capability of undertaking such operations and as claims to protect nationals abroad could serve, as often in history, as a pretext for intervention[96]. Nevertheless, from a moral and political point of view, there are instances where the use of armed self-help is difficult to condemn. Rescue operations to protect own nationals have found approval or understanding by other States under certain circumstances and have met a relative lack of condemnation by organs of the United Nations although they have not been approved as being lawful[97].

Another grey zone of international law as far as armed reprisals are concerned is the difficulty of finding effective protection of a target State against attacks from terrorists, guerillas or liberation movements based on foreign soil without resorting to what is traditionally regarded as "aggressive war" if the foreign government is unwilling or unable to suppress the terrorist activities. The special problems arising from the unconditional prohibition of armed reprisals in the context of the Arab-Israeli conflict have led to a renewed discussion which was introduced by Falk's article in the American Journal of International Law dealing with the legality of the Beirut raid by Israel on December 28, 1968 in response to an attack by Arab terrorists based in Lebanon on an Israeli civilian aeroplane at the Athens airport[98]. The difficulty in assessing the legality of the use of armed force in the Middle East lies in the fact that, as Falk has put it, the situation "is one of quasi-belligerency in which there is an agreed ceasefire and a *de facto* situation of hostility that frequently results in intergovernmental violence"[99]. The basic problem seems in situations between peace and war whether to apply the law of peace permitting the use of armed force only in self-defence against an armed attack by another State and prohibiting armed reprisals in response to highly injurious attacks

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Hinsicht an den durch ihre Funktion bedingten Rahmen hält, dürfte ein solches Vorgehen deshalb auch heute noch als zulässige Gewaltanwendung anzusehen sein«. In the discussion of Kewenig's lecture (at p.216) there was agreement that the use of force is not admissible in the case of humanitarian intervention and reserved to a decision of the Security Council. But in exceptional cases intervention to protect life and health of own nationals in foreign countries would be permitted if the purpose was only to evacuate the persons. However, it was pointed out that only a major power could exercise such a right beyond the area of neighbouring States, if one regarded inadmissible »eine stellvertretende Ausübung durch Intervention zugunsten von Angehörigen eines Drittstaates«.

96 B.-O. Bryde, Self-Help, EPIL 4 (1982), p.217; Beyerlin (note 88), p.241.

97 See Beyerlin, *ibid.*, p.240; Randelzhofer (note 93).

98 Falk (note 76), p.415 *et seq.*

99 *Ibid.*, p.434; see also Thode (note 62), p.459.

short of war or to apply the laws of war[100]. It is obvious that in the first case States suffering a dangerous attack short of an armed attack would be left without effective redress although they may be continuously harassed by terrorist operations from foreign territory. The difficulties of distinguishing between reprisals and self-defence increase considerably once not merely the particular incident, but the whole context of the conflict is taken into consideration[101]. Suggestions to solve such problems by either interpreting the notion of "armed attack" in the sense of art.51 of the United Nations Charter more extensively[102], or by exceptionally recognizing the right to armed reprisal on the basis of a restrictive application of the doctrine of "necessity" as expounded by Daniel Webster in the *Caroline* Case[103] have been rejected on the grounds that this would not conform to the Charter system and to the relationship between art.2 (4) and art.51 of the Charter[104]. The attempt to fill in the existing gap in international law by extending the right to use armed force might undermine the principle of the prohibition of the use of force.

However, as Falk stated referring to the Israeli border-crossing operations in 1956 and 1967 in response to terrorist attacks: "the logic of self-help which continues to underlie the search for security in a world of sovereign states may encourage this sort of border-crossing operation, although the provocation does not constitute an 'armed attack' and the response is difficult to justify as an instance of 'self-defence'"[105]. Falk

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[100] Thode, *ibid.*; Kewenig (note 82), p.210 *et seq.*

[101] Kewenig, *ibid.*; see, in particular, Tucker (note 49), p.586 *et seq.*

[102] For example: H.G. Franzke, Die militärische Abwehr von Angriffen auf Staatsangehörige im Ausland, insbesondere ihre Zulässigkeit nach der Satzung der Vereinten Nationen, Österreichische Zeitschrift für öffentliches Recht (N.F.), vol.16 (1966), p.134 *et seq.* with references; Bowett (note 68), p.192.

[103] Dahm (note 65), p.442 *et seq.* The significance of the *Caroline* Case will be discussed later. R.A. Friedländer, Retaliation as an Antiterrorist Weapon: The Israeli Lebanon Incursion and International Law, Israel Yearbook of Human Rights, vol.8 (1978), p.77, concludes: "The U.N. Charter, primarily designed as a peace-keeping instrument, did not foresee the use of terrorism as surrogate warfare, much the less the role of non-State actors and private armies making war upon the State. Absent an effective collective security and international peace-keeping organization, necessity and self-preservation by default continue to be viable norms of customary international law. Whether one uses the term reprisals, retaliation, or rectification ..., the ultimate objective remains the same – the right of a polity to exist and the right of a people to survive". For a view on the international responsibility of a State for acts of international terrorism see M. Kilian, Zur völkerrechtlichen Verantwortlichkeit des Staates bei Akten des Internationalen Terrorismus, Neue Zeitschrift für Wehrrecht, vol.24 (1982), p.121 *et seq.*

[104] See Kewenig (note 82), p.212; Thode (note 62), p.460.

[105] Falk (note 76), p.427.

suggested a sort of "second-order level of legal inquiry" to overcome the inadequacies of modern international law "on the doctrinal level" when applied to situations such as in the Middle East. Thus he considered the legality of the Beirut raid in 1968 by reference to pre-Charter legal conceptions contained in customary international law on the subject of reprisals. He conceded that technically customary law inconsistent with the Charter is derogated, but maintained that the inability of the United Nations to impose its views of legal limitation upon States would lead to the aforementioned "second-order level of legal inquiry" that would be guided by "the more permissive attitudes toward the use of force to uphold national interests that is contained in customary international law"[106].

From a normative point of view it is difficult to accept this line of argument as it leaves it to the acting State to decide when it should be entitled to invoke customary law against the Charter. It also fails to conform with the view expressed by the International Court of Justice in the *Corfu Channel* Case (Merits) referred to earlier which excludes the possibility of derogating from the prohibition of the use of armed force by pointing to defects in international organization. Having determined that the legal rules and standards in international law do not come to grips with the underlying policy setting provided by the Arab-Israeli conflict and that the determinations of the Security Council "are authoritative" but "nevertheless not very likely to engender respect"[107], Falk outlined a framework of certain general policy principles concerning the use of force in periods of peace in retaliation against prior terrorist attacks[108].

In a reply to Falk's essay Blum disputed in principle that the doctrine of peace-time reprisal is at all applicable to the Beirut raid as, in his view, there is a state of war in the Middle East[109]. In this context there is no need to dwell upon the issue whether or not the Israeli action was legal if the law of peace-time reprisals would be applied under the assumption that the use of armed force is admissible if prior warning has been given and the principle of proportionality is observed[110]. More interesting is that Blum

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[106] *Ibid.*, p.430.

[107] *Ibid.*, p.437.

[108] *Ibid.*, p.441 *et seq.* The framework consists of 12 points which are of secondary importance for this paper.

[109] Y.Z. Blum, The Beirut Raid and the International Double Standard, AJIL vol.64 (1970), p.76 *et seq.*

[110] Falk's view is that under these terms the Beirut raid was illegal, while Blum, for the sake of argument, holds the opposing opinion. The latter denies that the law of peace is applicable which is rejected by Levenfeld (note 82), p.22 *et seq.* Critical as to the "state of

advanced arguments that raised considerable doubts as to whether the new framework suggested by Falk may have a practical effect or represents any progress[111]. Blum concludes that Falk's approach amounts to a "repudiation of any normative legal order, and the substitution for it of *ad hoc* rules, each of which is designed to meet a specific situation"[112].

As far as the practice of the United Nations Security Council is concerned, its position on the unconditional prohibition of the use of armed reprisals seemed clear at least until 1964 when it condemned the British retaliatory armed attack upon a Yemeni fortress as illegal[113]. However, this practice has become more and more ambiguous as the Council examined in various other instances, instead of condemning all armed reprisals in peacetime as illegitimate, whether the reprisals had been taken against the subject in breach of an international obligation or whether the rule of proportionality had been observed[114].

It was an extensive analysis of the Security Council practice by Bowett that came to the conclusion that "there is evidence to suggest that reprisals satisfying certain criteria of reasonableness may avoid condemnation by the Security Council even though the Council will maintain the general proposition that all armed reprisals are illegal"[115]. Similarly, Tucker argued that there has been "at least a partial rehabilitation of armed reprisals in the recent practice of the Security Council" largely as a result of the Council's reluctance to abandon an essentially restrictive view of self-defence[116]. The author admitted that any attempt to assess the legal significance of Security Council practice is beset with extreme difficulties. He also mentioned the Council's "consistent position that, in principle, armed reprisals are to be condemned as unlawful"[117]. However, he focused on the

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war"-concept employed to justify Israeli retaliatory action in the Middle East: W.T. Mallison/S.V. Mallison, The Israeli Attack of June 7, 1981 upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?, Vanderbilt Journal of Transnational Law, vol.15 (1982), p.432 *et seq.*

111 For details see Blum (note 109), p.94 *et seq.*

112 *Ibid.*, p.104. For a more favourable comment on Falk's framework see Kewenig (note 82), p.203; Levenfeld (note 82), p.35; Bowett (note 48), p.27 *et seq.* with a discussion of the particular points.

113 UN Doc.S/5649, 1111th Meeting on April 9, 1964, by 9 votes to 0, the United Kingdom and the United States abstaining. The Council expressly condemned armed reprisals.

114 K.J. Partsch, Self-Preservation, EPIL 4 (1982), p.219 with reference to Bowett.

115 Bowett (note 48), p.26.

116 Tucker (note 49), p.595.

117 *Ibid.*

fact that when dealing with forcible measures taken by Israel, the Council refrained from condemning a number of measures which Israel expressly characterized as reprisals. Although Tucker acknowledged that this lack of condemnation may be explained on other grounds, he preferred the "more plausible explanation" that the Council has moved, "however reluctantly and through the back door, toward a position that simply can no longer be squared with the unqualified prohibition of armed reprisals"[118]. He concluded: "Thus the condemnation of reprisals, in principle has gone hand in hand with the failure to condemn particular instances in which armed force has been resorted to as reprisals, provided that these ostensible measures of reprisal meet certain criteria of 'reasonableness'"[119].

This conclusion can be countered simply by the argument that it is improper to establish the legality of armed reprisals on the politically motivated omission of the Security Council in particular cases to condemn such measures in principle[120]. The suggestion that "reasonable" armed reprisals have become admissible in peace is not supported by the prevailing view although there is no doubt that there is a regulative gap in international law with view to exceptional situations for which appropriate rules do not exist. At present , however, it seems wiser to hope that the international community will tolerate illegal armed action in exceptional cases because of the distressing situation of the acting State by refusing to condemn that State expressly and by not imposing any sanctions upon that State rather than to lower the standards of a fundamental principle of international law such as the prohibition of the use of force in order to do justice to extreme cases[121]. However, if the Charter system continues its process of deterioration, it will only be a matter of time when the resort to the use of armed force in self-help will again become to be regarded as legitimate because inevitable.

A further problem concerning the law on reprisals should be mentioned briefly. Developing nations supported by socialist States have for decades put forward the view that the prohibition of the use of force in international relations contained in art.2 (4) of the Charter would extend to non-

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[118] *Ibid.*

[119] *Ibid.*

[120] See Verdross/Simma (note 43), p.244 *et seq.*

[121] See Beyerlin (note 88), p.241 with further references; Bryde (note 96) remarks: "But while the progress reached in international law in ruling out forcible self-help must be preserved, it must also be admitted that, given the present stage in the development of international society, there will be instances where the resort to force will be difficult to condemn in certain circumstances".

military political and, in particular, economical coercive measures taken by an individual State[122]. This view is correctly rejected by western authors[123] for the following reasons. At the San Francisco Conference in 1945 the Brazilian proposal to declare illegal not only the "threat or use of force" but also the threat or use of economic coercion was clearly dismissed[124]. The view that art.2 (4) is confined to the use of military force was confirmed in the discussions of the Special Committee on Friendly Relations in 1965[125] and also by the Friendly Relations Declaration of 1970. The Declaration deals with armed force only and separates the issues of the use of force and the principle of non-intervention stating in the latter context: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind"[126]. The definition of "aggression" adopted in 1974 by the General Assembly Resolution 3314 (XXIX) is only concerned with the use of armed force[127].

Furthermore, in interpreting art.2 (4) of the Charter, it is necessary to pay regard to para.7 of the Preamble of the Charter stipulating that "armed force shall not be used save in the common interest" and to art.44 from which can be deduced that the Charter uses the word "force" where evi-

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[122] For a summary of the arguments see Neuhold (note 79), p.79 *et seq.*; Derpa (note 79), p.43 *et seq.*

[123] Wehberg (note 79), p.69 *et seq.*; Bowett (note 68), p.106 *et seq.*; Brownlie (note 78), p.362; Kewenig (note 82), p.189 *et seq.*; D.P. O'Connell, International Law, vol.1 (2nd ed. London 1970), p.304; Bowett, Economic Coercion and Reprisals by States, Virginia Journal of International Law, vol.13 (1972/73), p.1 *et seq.*; D.W. Bowett, International Law and Economic Coercion, *ibid.*, vol.16 (1976), p.245 *et seq.*; J.A. De Lanis, "Force" under Article 2 (4) of the United Nations Charter: The Question of Economic and Political Coercion, Vanderbilt Journal of Transnational Law, vol.12 (1979), p.101 *et seq.*; W.A. Kewenig, Die Anwendung wirtschaftlicher Zwangsmaßnahmen im Völkerrecht (Berichte der Deutschen Gesellschaft für Völkerrecht, vol.22) (1981), p.7 *et seq.*; E.-U. Petersmann, Internationale Wirtschaftssanktionen als Problem des Völkerrechts und des Europarechts, Zeitschrift für vergleichende Rechtswissenschaft, vol.80 (1981), p.1 *et seq.*

[124] Doc.215, I/1/10, p.6 (United Nations Conference on International Organization Doc.559 (1945), p.334 *et seq.*).

[125] See Maddrey (note 42), p.352 with references.

[126] Note 80.

[127] Published in AJIL vol.69 (1975), p.480 *et seq.* Art.I reads: "Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition".

dently armed force is meant[128]. An interpretation of art.2 (4) extending the provision to other forms of force would deprive States of responding by coercion other than armed force to an international offence committed by another State which is not acceptable in present international law. Coercive measures short of the use of armed force, therefore, are not prohibited by art.2 (4) of the Charter but are governed by the rules of non-intervention[129].

If economic reprisals are admissible under modern international law, they are only legitimate insofar as the principle of proportionality is observed. Furthermore, it is a general requirement for the legality of reprisals that their effectiveness must cease when their objective has been achieved[130]. If their continuation is unavoidable, there is an obligation to restore the previous situation after the aim has been achieved. For example, foreign property may be seized but not confiscated unless reparation is refused indefinitely[131].

Naturally, the right to reprisal may be restricted by special treaty obligations[132]. But it is still questionable whether without special obligation a State must first seek a solution by peaceful settlement of disputes before resorting to a reprisal against the delinquent State[133].

A final question is whether reprisals may be taken against foreign nationals. Berber, for example, declares such reprisals as inadmissible since the 18th century[134]. The contrary view is that reprisals may be directed against all legal commodities of a State and against its nationals. Mössner refers to the danger that innocent individuals may suffer under this rule and indicates that a broad right to reprisal would conflict with the modern attempt to give the individual a guaranteed legal status in interna-

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[128] Randelzhofer (note 93), p.168.

[129] See Berber (note 1), p.96; Verdross/Simma (note 43), p.249; Maddrey (note 42), p.353 *et seq.*

[130] Schlochauer (note 1), p.275 *et seq.*

[131] Verdross/Simma (note 43), p.653 with references.

[132] Partsch (note 46); Wengler (note 42), pp.517–518, notes that in special regulations of treaty law there are often obligations which permit only the suspension of very specific international duties by way of reprisal. He also states (p.519) that even unarmed reprisals are often excluded at least temporarily by treaties when during an arbitration procedure or a procedure of peaceful settlement the parties are obliged to omit any conduct which would escalate the dispute or which the arbitration court forbids expressly by order.

[133] Partsch, *ibid.*

[134] Berber (note 1), p.95 with reference to Dahm and Hyde. Dahm (note 65), p.427, however, only confirms the suggestion that the right of private individuals to take reprisals has been restricted, not that reprisals are no longer admissible against foreign nationals.

tional law[135]. But he does not deny that it is difficult to dismiss the justifying effect of a reprisal in such cases, for reprisals permit action that otherwise would be a violation of international law and as the position of the individual would be constituted by international law. With respect to the international development of human rights, with whatever problems the conception of these rights and their effectiveness are beset on a universal level, the question of certain "minimum standards" protecting the individual from excessive reprisals taken against foreign nationals seems to require further investigation. On the other hand, arguments restricting the right to reprisal on this basis must be balanced against the fact that the expropriation of foreign nationals often may be the only effective countermeasure at the disposal of a State which has suffered an international offence. At any rate, it seems convincing that reprisals in peace-time may not infringe rights protected by international law in wartime[136].

If a reprisal does not conform to the requirements outlined in this chapter it is not legitimate and constitutes itself an international offence against which justified reprisals may be taken[137]. The difficulty that owing to the lack of appropriate "fact-finding procedures" and of an independent organ assessing legality and illegality of action the danger that such a circle of excessive reprisal and counterreprisal might lead to an escalation is inherent in the law of reprisal as a form of self-help and cannot be completely avoided in the present system of international law.

b) The view of the ILC

As to the legitimacy of countermeasures the Commentary to art.30 starts with the general statement that the right to resort to reprisal does not necessarily exist in every case of a breach of an international obligation by

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[135] Mössner (note 43), p.141.

[136] Verdross/Simma (note 43), p.653; Wengler (note 42), p.518, writes that reprisals are inadmissible as far as they would violate the norms in the Geneva Conventions of 1949 protecting the wounded prisoners of war and the population of occupied territory. These prohibitions of reprisals are based on the idea that persons who are innocent of the breach of an international obligation and who have no influence on the fulfilment of the duty the reprisal attempts to enforce should not be harmed. Wengler points out that there is apparently no *opinio iuris*, however, that a respective general prohibition of reprisals exists that would prohibit to expel or confiscate property of foreign nationals. Nevertheless, in modern international law reprisals violating principles of humanity are illegal.

[137] Verdross/Simma (note 43), p.653. Of course, a counterreprisal against a legitimate reprisal is illegal and constitutes in itself an international delict, see Schlochauer (note 1), p.276.

the delinquent State[138]. If according to international law the only consequence of the initial offence would be that it entitles the injured State to demand reparation, an infringement of the rights of the delinquent State in retaliation would be clearly illegal. The Commentary points out that the same would hold true if international law requires a prior attempt to seek adequate reparation before resorting to sanctions against the delinquent State. In substance, this statement refers to one of the preconditions generally accepted as a requirement for the legality of a reprisal as established by the *Naulilaa* award. The Commentary does not enter into a detailed evaluation but is content to stipulate: "In other words, the fact that it has suffered a breach of an international obligation committed by another State does not, in all cases, purely and simply authorize the injured State in its turn to breach an international obligation towards the State which has committed the initial breach. What is legitimate in some cases does not become legitimate in others"[139].

The Commission has accepted that, if the necessary conditions are fulfilled, "there is nothing to prevent a State which has suffered an internationally wrongful act from reacting against the State which committed the act by a measure consisting of unarmed reprisals"[140]. In a footnote four conditions are specified:

a) the offence to which the reprisals are intended to be a response must not be such as to entail any consequence other than to give rise to the right of the injured party to obtain reparation;

b) if such is the case, the injured party must have made a prior attempt to obtain reparation;

c) in any event, the reaction must not have been disproportionate to the offence;

d) an additional condition would be that there must not be any procedures for peaceful settlement previously agreed upon by the parties[141].

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[138] YILC 1979, vol.II (Part 2), p.116; Ago's report, YILC 1979, vol.II (Part 1), p.39.

[139] *Ibid.*

[140] *Ibid.*, p.118 para.11.

[141] *Ibid.* note 595. The Commentary is more definite on the last requirement than Ago's report. It says that an "additional condition is ..." whereas Ago (note 115, p.43 note 191) referring to art.5 of the 1934 Resolution of the Institut de Droit International, proposed that an additional condition "would be". There were different views in the Commission's discussion on the requirement b). Yankow (YILC 1979, vol.I, p.57 para.31) did not agree with the opinion that if the action were to be legitimate a prior claim must have been made for reparation. Francis (*ibid.*, p.59 para.6) maintained that the fact that art.30 required a State to demand reparation before taking punitive measures would rule out any possibility of comparison with the right of self-defence.

Conditions b) and c) are established basically by reference to the *Naulilaa* Case[142]. As to third States the Commentary refers to the *Cysne* Case[143] and to legal literature to state the principle that "the legitimate application of a sanction against a given State can in no event constitute *per se* a circumstance precluding the wrongfulness of an infringement of a subjective international right of a third State against which no sanction was justified"[144]. The use of the term "sanction" in this context contradicts the position taken by the Commission that it should be reserved to measures taken on the basis of a decision of an international organization. It is more important to note, however, that notwithstanding the principle that art.30 cannot have the effect of precluding the wrongfulness of any injury caused by a countermeasure to a third State, the Commentary adds that the wrongfulness of such injury "may on occasions" be precluded on the ground of other circumstances "which come into play in the case in point"[145].

The Commentary expressly acknowledges that economic reprisals are in principle admissible in modern international law as a response to an international offence[146]. It correctly assesses that other forms of reaction which were permissible under "classical" international law, such as armed reprisals, are no longer tolerated in peace-time. Ago's report was not as definite on this matter as he qualified the statement with the words "or at any rate are tolerated only within strict limits"[147], which have been deleted in the Commentary. The latter explains that in general the tendency is to restrict reactions involving the use of armed force to the most serious cases and, in any event, to leave the decision about their use to subjects other than the injured State. The use of force by a State injured by an internationally wrongful act of another State would still be wrongful in many cases, for it could not be viewed as the application of a "legitimate" countermeasure. Moreover, even where a reaction involving the use of force would be justified, whatever the subject responsible for applying it, action taken in

142 Commentary (note 138), p.117 para.7.

143 *Ibid.*, p.117 para.8, p.120 paras.17–19.

144 *Ibid.*, p.120 para.18.

145 Commentary (note 138), p.122 para.24. Francis (YILC 1979, vol.I, p.60 para.8) said that it was fortunate that Ago had not yet come to any firm conclusion on the question of necessity as a circumstance that might preclude the wrongfulness of an act infringing the rights of a third State. In his view, the ILC should confine the exceptions to *force majeure* and to other relevant situations, since the concept of necessity was obviously open to abuse.

146 *Ibid.*, p.116 para.5.

147 Report (note 138), p.39 para.81.

this guise could not include, for example, a breach of obligations of humanitarian law[148].

With reference to the *Corfu Channel* Case (Merits), Security Council Resolution 188 of April 9, 1964 and to the Friendly Relations Declaration confirming that the ban on the use of force as a fundamental principle of contemporary international law extends to armed reprisals, the Commentary conludes: "Thus, a State which is the victim of a breach of an international obligation towards it cannot legitimately react by armed reprisals against the State which committed the breach, since international law now forbids individual States taking reprisals which involve the use of armed force against other States"[149]. However, this fact would not prejudice the undeniable collective right of self-defence provided for in art.51 of the Charter of the United Nations[150].

It is not quite true, as the Commentary maintains, that the incompatibility of reprisals involving the use of armed force has been maintained by "virtually all writers on this question"[151]; this is the prevailing but not entirely undisputed view as has been shown above. In a footnote, the Commentary takes note of the renewed discussion of this principle, owing to the difficulties encountered by the Security Council in performing the function assigned to it by the Charter, and refers to the debate that took place in the American Journal of International Law in 1969–1972 following the publication of Falk's essay. The Commentary does not enter into this discussion. It is content to state that "even those writers who consider the use of force justifiable in the cases in question are none the less inclined to base such justification on notions other than reprisals"[152]. This is not

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[148] Commentary (note 138), p.116 para.5; Ago's report (note 138), p.40 para.81.

[149] Commentary, p.118 para.10. Ago's report, p.42 para.89, was again not as definite on this point: "we are inclined to think, that action taken as a 'sanction' against an internationally wrongful act but involving the use of armed force cannot in most cases be considered even under general international law, as a 'legitimate' sanction; the wrongfulness of such an action cannot therefore be ruled out".

[150] Commentary (note 138), p.118 note 593. It is not clear why the Commentary only refers to the right of collective and not also to the right of individual self-defence. In the discussion of Ago's report which did not contain such a reservation clause Schwebel (YILC 1979, vol.I, p.57 para.25) said that the fact that armed reprisals were quite properly excluded from modern international law did not detract from the right of a State to take legitimate measures in the exercise of its right of self-defence.

[151] Commentary, p.118 note 591 with reference to Brownlie (note 78), p.281, and the authorities he quotes. Authors accepting a continuing, permissible rôle for armed reprisals are Colbert and J. Stone, both cited by Bowett (note 48), p.1. See also Friedländer (note 103), p.77.

[152] Commentary, p.118 note 591.

correct so far as Falk, Bowett and Tucker are concerned. It has been shown that these and other authors consider armed reprisals to be legitimate in certain situations if they meet certain criteria of "reasonableness" or conform to certain principles.

In the context of art.30 the ILC has attempted to avoid the question of whether the use of armed force in measures short of war may be a circumstance precluding wrongfulness in exceptional situations, as has been discussed above with a view to the problem of the protection of own nationals abroad and to conflict situations of quasi-belligerency or the permissible reactions to attacks by terrorists based on foreign soil[153]. The question arises whether it has dealt with these issues in the context of art.34 which will be examined later.

It is clear that art.30 does not justify reprisals that go beyond the limits prescribed by international law, for example if they are no longer commensurate with the injury suffered as a result of the offence in question[154].

4. The Legitimacy of Countermeasures taken on the Basis of a Decision of an International Organization

a) Obligations erga omnes

In modern international law the question arises whether only the State directly injured by an internationally wrongful act is entitled to resort to reactive measures that otherwise would be unlawful, or whether there are instances in which a third State may take such action against the delinquent State. As far as the right to collective self-defence (art.51 of the United Nations Charter) is concerned, there is no doubt that third States may come to the assistance of a State encountering an armed attack by another State and are entitled to use armed force against the aggressor[155]. But in the

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[153] Only Njenga (YILC 1979, vol.I, p.58 para.33) raised a question in this direction. Specifically mentioning incursions of Rhodesian troops into Zambia, Njenga referred to numerous cases in Africa alone of "clearly illegal acts" in which States resorted to the use of force "against peoples which were fighting for self-determination, and even against neighbouring countries". The States in question employed the "new concept" of so-called "legitimate hot pursuit", or reprisals against other countries for harbouring guerillas or "terrorists". In Njenga's view, art.30 should take account of contemporary situations, and it failed to deal with the possibility of a State alleging that its acts had been lawful when it pursued guerillas beyond its frontiers.

[154] Commentary (note 138), p.116 para.5.

[155] The problem of collective self-defence will be discussed later.

context of art.30 of the ILC's Draft Articles on State Responsibility the question is whether third States are allowed to take reprisals against a delinquent State in cases other than an armed attack although they are not directly affected by the internationally wrongful act committed by that State. Again, this question is irrelevant as far as retortions by third States are concerned. For it is accepted that third States can react to an internationally wrongful act by retortion without being injured by the act themselves[156]. This follows from the fact that a retortion does not violate an international obligation towards the delinquent State. A retortion is lawful and requires no special justification.

As to reprisals by third States[157], the concept of obligations *erga omnes* in international law is of central importance. Obligations *erga omnes* are concerned with the enforcibility of such norms of international law, usually termed *ius cogens*[158], the violation of which is deemed to be an offence not only against the State or States directly affected by the breach but against all members of the international community[159]. The existence of such norms which are "the concern of all states" and the enforcibility of which all States have a legal interest was recognized by the International Court of Justice in *Barcelona Traction* in 1970[160]. The Court referred to the "basic rights of the human person", including the prohibition of slavery and racial discrimination and the prohibition of aggression and of genocide. The difficulty of interpreting the passage of the judgment in which the Court states: "However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality"[161] has recently been re-emphasized by Frowein[162]. His conclusion

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156 Bothe (note 55), p.104, with a brief survey as to the possible reactions of third parties to an internationally wrongful act.

157 M. Akehurst, Reprisals by Third States, BYIL vol.44 (1970), p.44.

158 See H. Mosler, Ius cogens im Völkerrecht, Schweizerisches Jahrbuch für internationales Recht, vol.25 (1968), p.9 *et seq.*; M.M. Whiteman, Jus Cogens in International Law, With a Projected List, Georgia Journal of International and Comparative Law, vol.7 (1977), p.609 *et seq.* F. Münch, Bemerkungen zum ius cogens, in: Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Hermann Mosler (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol.81) (Berlin etc. 1983), p.617 *et seq.*

159 This definition of obligations *erga omnes* is given by J.A. Frowein, Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung, in: Festschrift für Hermann Mosler, p.241 *et seq.*

160 ICJ Reports 1970, p.32 paras.33 and 34.

161 *Ibid.*, p.47 para.91.

162 Note 159, p.245 *et seq.* with references.

is that the judgment and dissenting opinions in *Barcelona Traction* do not offer clarity on the issue of possible reactions by third States to violations of obligations *erga omnes*[163]. Discussing the views in legal literature, the development in the International Law Commission, State practice, the relevance of the United Nations Charter and the rules governing the violation of multilateral treaties, Frowein accepts the right of third States to resort to reprisals against an aggressor State violating the prohibition of the use of force and in the case of the violation of such fundamental norms of international law as in the *Teheran Hostages* Case[164]. As to violations of human rights, even if the concept of "basic rights of the human person" can be restricted to the most elementary human rights, the author convincingly underlines the danger of legal uncertainty with regard to the present development of the international community if reprisals were considered admissible.

Indeed, the conflicting perceptions of human rights on the universal level would be likely to give rise to the revival of the problems related to "humanitarian intervention" in favour of foreign nationals if the right to reprisal by third States on their own decision were to be acknowledged[165].

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[163] *Ibid.*, p.246.

[164] *Ibid.*, p.258.

[165] For a discussion of this problem see Maddrey (note 42), p.362 *et seq.*, p.373 *et seq.* The possibility of not directly affected third States to react against violations of the human rights Covenants of the United Nations is disputed. J.A. Frowein, The Interrelationship between the Helsinki Final Act, the International Covenants on Human Rights, and the European Convention on Human Rights, in: T. Buergenthal (ed.), Human Rights, International Law and the Helsinki Accord (Montclair, N.Y. 1977), p.71 *et seq.*, holds the view that the procedures provided for in the Covenants are exclusive or at least entitle the State accused to disregard its treaty obligations to refer to the priority of the control system, ineffective as it may be, established by the Covenants. See also Frowein (note 159), p.255. For a contrary view see B. Simma, Fragen der zwischenstaatlichen Durchsetzung vereinbarter Menschenrechte, in: Festschrift für H.-J. Schlochauer (Berlin 1981), p.647 *et seq.*, who argues that there are other means of self-help available under international law to enforce legal claims besides the procedures in the Covenants to ensure the observance of the obligations they impose. J. Delbrück, Collective Security, EPIL 3 (1982), p.112, states that growing international concern for the protection of human rights has led to a lowering of the barriers of national sovereignty and a reduction in the scope of non-intervention and adds: "It has also revived a much-debated instrument of general international law, i.e. humanitarian intervention by the use of force, which was held to be outlawed under Art.2 (4) of the UN Charter. Although increasing concern from human rights is welcome, justification of the international use of force in the cause of human rights may well lead to a complete breakdown of the prohibition of the use of force under the Charter. As there is still much disagreement as to the meaning of a number of human rights and a decision in favour of humanitarian intervention may therefore be taken by individual States at will, the very idea of collective security could be frustrated".

Frowein, however, seems to regard reprisals by third States as lawful if and only if the violation of human rights (or "basic rights of the human person") has reached a high degree of definitiveness. But he insists that, in principle, collective decisions by international organs or groups of States must have priority over isolated measures[166]. The question is who determines whether there is a clear-cut case of a violation of human rights with the nature of obligations *erga omnes* in such a manner that reprisals by third States are justified.

Having examined other areas such as international offences against diplomatic, naval and flight communications, where proportional reprisals by third States are admissible in his view[167], and having discussed the question of standing in cases of *erga omnes* obligations and special problems related to the Vienna Convention on the Law of Treaties, Frowein arrives at the conclusion that, under certain conditions, third States are legally entitled to react against violations of obligations *erga omnes*, but that the admissibility of the particular measure must be established by a careful examination and consideration of the circumstances of the given case[168].

The International Law Commission's draft art.19, distinguishing in a problematic manner between "international delicts" and "international crimes", is based upon the assumption that there are certain obligations the infringement of which creates responsibility of the delinquent State not only towards the victim State but also towards the international community as a whole and towards other States[169]. But it is not yet clear which legal consequences follow in particular from the distinction made in art.19[170]. In the context of art.30, however, it is interesting to note that in his report Ago expressed strong reservations as to the recognition of the right of third States to react individually against the breach of certain international obligations. He stated that the former monopoly of the State directly injured by the internationally wrongful act of another State, as regards the possibility of resorting against that other State to sanctions which would otherwise be unlawful, is no longer absolute in modern

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166 Note 159, p.258 *et seq.*

167 *Ibid.*, p.259.

168 *Ibid.*, p.262.

169 Ch. Dominicé, Die internationalen Verbrechen und deren rechtliches Regime, in: Festschrift für St. Verosta (1980), p.227 *et seq.*; P.M. Dupuy, Observations sur le «crime international de l'Etat», RGDIP vol.84 (1980), p.449 *et seq.*

170 See Frowein (note 159), p.248 *et seq.* and note 9.

international law[171]. In his view this monopoly probably still subsists in general international law, "even if, *in abstracto*, some might find it logical to draw certain inferences from the progressive affirmation of the principle that some obligations – defined in this sense as obligations *erga omnes* – are of such broad sweep that the violation of one of them is to be deemed an offence committed against all members of the international community, and not simply against the State or States directly affected by the breach"[172]. Ago stressed the chief merit of this principle which is that it affirms the need for universal solidarity in dealing with the most serious assaults on international order. But he also emphasized that one cannot underestimate the risks that would be involved in pressing recognition of this principle "to the point where any State would be held to be automatically authorized to react against the breach of certain obligations committed against another State and individually to take punitive measures against the State responsible for the breach"[173].

Whether or not this statement contains a categorical rejection of the right of third States to take reprisals against the delinquent States individually and on their own decision in the case of the violation of obligations *erga omnes* is a question of interpretation. The following assessment given by Ago is an argument in favour of the interpretation that it does: "It is understandable therefore, that a community such as the international community, in seeking a more structured organization, even if only an incipient 'institutionalization' should have turned in another direction, namely towards a system vesting in international institutions other than States the exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and thereafter, for deciding what measures should be taken in response and how they should be implemented " (emphasis added)[174].

There was no substantial discussion in the Commission in the context of art.30 on the right of a third State to react individually against a breach of an obligation *erga omnes* as a circumstance precluding wrongfulness[175]. The wording of art.30 as adopted in first reading, is silent on this question as it does not determine whether reprisals by third States on their own

171 YILC 1979, vol.II (Part 1), p.43 para.91.
172 *Ibid.*
173 *Ibid.*
174 *Ibid.*
175 YILC 1979, vol.I, pp.54–63.

decision in such cases constitute "a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State". The Commentary to the article, however, repeats Ago's statement that modern international law has vested in international institutions other than States exclusive responsibility for determining the existence of a breach of an obligation *erga omnes* and for deciding what measures are to be taken in response and how they are to be implemented[176]. It must be concluded, therefore, that a reprisal by a third State against an internationally wrongful act is not a circumstance precluding wrongfulness in the sense of art.30 even in the case of obligations *erga omnes* if there is no authorization by an international institution[177].

b) Sanctions applied on the basis of a decision of an international organization

The Commentary to art.30 assumes that under the Charter of the United Nations the responsibilities concerning the enforcement of obligations *erga omnes* is vested in the competent organs of the United Nations[178]. It notes that these organs are empowered in certain circumstances not simply to authorize, but even to direct a member State other than the one directly injured by a particular international offence, or a group of member States, either directly or through the regional agencies referred to in art.53 in the Charter, or at times all member States, to apply certain sanctions, including measures involving the use of armed force, against a State which has committed an offence of a specified content and gravity.

The Commentary clarifies that the use of the word "sanctions" in the language of the United Nations does not necessarily and in all cases involve failure to conform with the requirements of an international obligation towards the delinquent State. They may only be measures harmful to the interests of that State[179]. In cases in which the application of sanctions under the Charter might conflict with treaty obligations of the State applying them towards the target State, however, such sanctions would not be wrongful in the legal system of the United Nations. Even in a case where the subject of the sanctions is not a member State it would seem indisputable that under art.103 of the Charter the member State called upon to

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176 YILC 1979, vol.II (Part 2), p.119 para.12.

177 For a discussion of Riphagen's position which is not as definite on this matter in the context of formulating Part 2 of the draft articles see Frowein (note 159), p.249 *et seq.*

178 Note 176, p.119 para.13.

179 *Ibid.*

apply the sanctions could not claim to be debarred from doing so by a treaty binding it to the non-member target State. The view that action which would otherwise infringe the rights of the target State is fully justified as the legitimate application of a sanction would seem to be valid not only in cases where the duly adopted decision of the organization authorizing the application of a sanction is mandatory for the member States but also where the taking of such measures is merely recommended[180].

The Commentary finally states that the condition of prior submission of a demand for reparation, and even the principle of proportionality between the offence reacted against and the reaction itself, do not play the same role in the case of reprisals and in the case of sanctions adopted collectively in a competent international organization[181].

These points raise a number of questions. In the Commission's discussion Schwebel had wondered whether an actual decision and not merely a recommendation was required in the case of a sanction applied pursuant to a decision of the Security Council or the General Assembly[182]. In Ago's view it did not fall within the purview of the ILC to determine in what instances a decision or a recommendation of the United Nations was binding on the member States[183]. In his opinion, it sufficed to say that a measure would no longer be internationally wrongful if it was carried out in implementation of a decision of a competent international organization, even if the measure in question was not obligatory for the member States of the organization and it had simply been recommended.

It is generally recognized that collective measures, in particular measures adopted under Chapter VII of the United Nations Charter, are justified[184]. The application by a State of a sanction even involving the use of armed force which was adopted by the competent organs of the United Nations or by a regional organization in the sense of art.53 of the Charter is legitimate irrespective of the question whether such a measure taken unilaterally would constitute an international offence towards the target State. What is disputed is which organs are competent under which conditions to

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[180] *Ibid.*, para.14.

[181] *Ibid.*, p.121 para.22. See the statement made by Francis, YILC 1979, vol.I, pp.59–60 para.7.

[182] Schwebel, YILC 1979, vol.II (Part 1), p.57 paras.26–27.

[183] Ago, *ibid.*, p.63 para.80.

[184] As to the system see M. Schaefer, Die Funktionsfähigkeit des Sicherheitsmechanismus der Vereinten Nationen (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol.77) (Berlin etc.1981); D.W. Bowett, The Law of International Institutions (4th ed. London 1982), pp.23–42.

authorize such measures[185]. Sanctions which are adopted *ultra vires* of the powers of an international organization or of the particular organ can hardly have the effect of legitimizing action that otherwise would be illegal. A further problem may arise as to the question whether in factual terms there were sufficient grounds for a decision to adopt collective sanctions[186].

In the framework of the United Nations the Security Council has the power to adopt measures under Chapter VII of the Charter[187]. Regional organizations are not entitled to adopt sanctions, at least as far as the use of armed force is concerned, without the consent of the Security Council[188]. The determination by the Security Council on the basis of art.39 of the

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185 Bothe (note 89), p.22.

186 P. Wittig, Der Aggressionsbegriff im internationalen Sprachgebrauch, in: Schaumann (note 79), p.62.

187 Art.39 UN Charter.

188 Art.53 UN Charter. The relationship between art.53 and the right of collective self-defence in art.51 is a matter of dispute related to the conflict between "regionalism" and "universalism" in the international legal system. In cases of an actual threat to peace, a situation properly belonging to Chapter VII, not Chapter VI, "enforcement" action under art.53 cannot be taken except under the authorization of the Security Council. Measures taken under art.51 by a regional alliance are permissible on the own decision of the States concerned until the Security Council has acted. There is a tendency of regional alliances to define themselves as organizations of collective security in the sense of art.51 and not as institutions in the sense of Chapter VIII to avoid the restrictions placed on their discretion by art.53 (see Kewenig [note 82], p.200). Bowett (note 184), pp.163–164, argues that the practice of the OAS has shown a tendency to minimize this restriction on the scope of regional collective action of a coercive nature in three ways. Firstly, it has been argued that the concept of "enforcement action" subject to prior authorization by the Security Council would not embrace measures falling short of the use of armed force such as in the case of the partial economic sanctions in 1960 against the Dominican Republic and in 1962 against Cuba and full sanctions against Cuba in 1964, that it would not embrace measures taken on the basis of a recommendation as opposed to a decision, and that the Security Council's authorization could lie in an *ex post facto* approval or even failure to disapprove the action. Secondly, the notion of "collective self-defence" in the sense of art.51 is defined more broadly to include the right to react by force not only against an "armed attack" but also against indirect aggression or subversion. Thirdly, there has been a development of a concept of "regional peace-keeping" involving the use of armed forces but not for "enforcement action" (OAS in the Dominican case in 1965 and the Arab League in Kuwait in 1961 and in the Lebanon in 1976). As to the dispute concerning the legality of the intervention by the United States in the Dominican Republic in 1965 see the references given by Kewenig, *op.cit.* As to the issue of the legality of the Cuban quarantine in 1962 see Verdross/Simma (note 43), p.146 with references; Berber (note 1), pp.99–100. For a detailed argument that collective OAS intervention in the affairs of a "communist-infected" American nation is a legal exercise of a broadly-interpreted right of self-defence see A. Van Wynen Thomas/A.J. Thomas Jr., The Organization of American States and the Monroe Doctrine, Legal Implications, Louisiana Law Review, vol.30 (1969/70), p.550 *et seq.*

"existence of a threat to the peace, breach of the peace or act of aggression" is binding upon all member States[189]. The Council has various options to act under art.39. It can "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security". It is important to note that the Council has a power to pass binding decisions, apart from art.94 (2), only under art.39[190]. The practice of the Security Council usually does not indicate upon which articles of the Charter its resolutions are based. To date only in the case of Rhodesia did the Council clearly express that it was deciding on the basis of art.39[191]. According to the opinion of the International Court of Justice in the *Namibia* Case of June 21, 1974, Security Council resolutions not based on Chapter VII are supposed to be binding on the grounds of art.25 if such an intention of the Council can be established by interpreting its decisions[192]. This view, however, has been rejected not only by dissenting judges but also by some western States represented in the Security Council[193].

Arts.41 and 42 distinguish between non-military and military measures. Only those member States which have concluded and ratified special agreements in the sense of art.43 of the Charter with the Security Council are obliged to participate in military enforcement action. As such agreements do not exist, the Council can only recommend that member States take

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[189] Art.25 UN Charter. J. Arntz, Der Begriff der Friedensbedrohung in Satzung und Praxis der Vereinten Nationen (Schriften zum Völkerrecht, vol.46) (Berlin 1975).

[190] Verdross/Simma (note 43), p.142.

[191] Resolutions 232 (1966) and 253 (1968), see Bowett (note 184), p.39. For a discussion of the Rhodesian sanctions, see H. Strack, Sanctions: The Case of Rhodesia (Syracuse, N.Y. 1978); as to the lifting of the sanctions A.J. Kreczko, The Unilateral Termination of U.N. Sanctions against Southern Rhodesia by the United Kingdom, Virginia Journal of International Law, vol.21 (1980), p.97 *et seq.* The Security Council avoided specific reference to art.39 even in determining that the armed attack upon the Republic of Korea constituted a "breach of the peace", Res. S/1501 of June 25, 1950; similarly in the Resolution of June 27, 1950 (S/1511). Bowett, *op.cit.*, p.39, notes that neither resolution, the latter of which recommended members to assist the Republic of Korea, cited art.41 or 42. One construction of these resolutions is that they were in exercise of the power of "recommendation" under art.39.

[192] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, p.52.

[193] W. Kewenig, Die Problematik der Bindungswirkung von Entscheidungen des Sicherheitsrates, in: Festschrift für U. Scheuner (1973), p.259 *et seq.*; R. Higgins, The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter?, ICLQ vol.21 (1972), p.275 *et seq.*

military measures against the State in breach of the peace. As to non-military measures, in principle all member States the Council calls upon are obliged to follow such a decision. The Council may, however, decide not to invite all member States to take enforcement action or even to exempt certain States entirely[194]. If there is no decision on the basis of art.39, every member State may remain neutral as there is no general duty to support an attacked State if the Security Council does not adopt enforcement measures[195].

As to the legitimizing effect of the adoption of sanctions by the Security Council, whether military or non-military, it indeed does not seem to matter whether the decision is binding or not. But as to decisions of the General Assembly there is dispute as to the extent to which sanctions adopted by this organ can preclude wrongfulness. One view is that the Assembly may only recommend what is admissible anyhow, namely measures of individual or collective self-defence. Such a decision would have political significance only and would not suffice as a legal justification for the use of armed force[196]. The opposite view assumes that the power to adopt military enforcement measures to maintain or restore peace is not restricted to the Security Council but may also be invoked by the General Assembly[197]. The background to this dispute is of course the "Uniting for Peace" Resolution adopted by the General Assembly on November 3, 1950[198], which stated that "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of

[194] See Verdross/Simma (note 43), p.144 *et seq.*

[195] *Ibid.*, p.145. The authors have the view that neutral conduct is also admissible if the General Assembly calls upon States to assist the attacked State as such recommendations are not legally binding. The absence of agreements under art.43 does not prevent member States from agreeing *ad hoc* to place forces at the disposal of the Council in particular situations. Examples are the composition of the United Nations Command in Korea in 1950 and the constitution of the UN Force in the Congo in 1960, see Bowett (note 184), p.41.

[196] Bothe (note 89), p.22; J. Stone, Legal Controls of International Conflict (London 1959), p.274 *et seq.*

[197] For a discussion see Kewenig (note 82), pp. 194–198; Bowett (note 184), pp.47–56.

[198] Res. 377 (V); Text in AJIL vol.45 (1951), Suppl.1.

aggression the use of armed force when necessary, to maintain or restore international peace and security". *Inter alia*, the Assembly also decided to introduce the possibility of holding "emergency special sessions".

This Resolution provoked an intensive discussion on the distribution of powers between the Security Council and the General Assembly in the field of the maintenance of peace[199]. In *Certain Expenses of the United Nations* (1962) the International Court of Justice confirmed the view that the General Assembly has "secondary responsibility" in this area[200]. Kewenig has correctly remarked that the pure fact that Assembly resolutions are not binding in nature is not an argument in principle against the legitimizing effect of an Assembly resolution recommending to the member States the use of armed force[201]. The discussion has become academic to a considerable degree since 1950[202], as there has not been a single case in which the Assembly recommended the use of armed force and as it is hardly conceivable in practical terms that a State following a resolution adopted by the General Assembly would be condemned as an aggressor by the Security Council[203].

As to the question of whether a State could challenge United Nations action on the grounds that it was *ultra vires*, the ICJ decided in *Certain Expenses of the United Nations* that there was no procedure for judicial or other review of decisions. The Court concluded that each organ of the United Nations is entitled to determine its own jurisdiction and that acts pursuing goals of the Charter are presumed not to be *ultra vires* "when the Organization takes action which warrants the assertion that it was appro-

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[199] See Neuhold (note 79), pp.117–121; Bowett (note 184), pp.49–51; Kewenig (note 82), pp.195–198; Kelsen (note 42), pp.51–58.

[200] ICJ Reports 1962, p.162; M. Bothe, Certain Expenses of the United Nations (Advisory Opinion), EPIL 1 (1981), pp.48–50 with literature; Bowett (note 184), pp.51–53.

[201] Kewenig (note 82), p.195. In the discussions of the Special Committee on Friendly Relations the Soviet Union insisted on its view already expressed towards the Uniting for Peace Resolution that only a decision of the Security Council according to art.42 of the Charter would be a recognized circumstance precluding wrongfulness. Nations of the Third World largely agreed with western States that a recommendation by the General Assembly could also have such a function.

[202] See Kewenig (note 82), pp.197–198; and also Neuhold (note 79), pp.120–121; Verdross/Simma (note 43), p.149; for a recent view see H. Reicher, The Uniting for Peace Resolution on the Thirtieth Anniversary of its Passage, Columbia Journal of Transnational Law, vol.20 (1981), p.1 *et seq.*

[203] Kewenig, *ibid.*, p.198.

priate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization"[204].

The general proposition put forward by the ILC that decisions or recommendations duly adopted by a competent international organization preclude the wrongfulness of acts implementing sanctions is correct in its generality but does not help to answer the substantial questions arising in the context of the United Nations collective security system, defective as it is. One may wonder about the usefulness of a general rule the application of which to concrete situations of conflict is unclear. It is also worth noting that art.30 does not deal with preventive action. Such action may be adopted under art.40 of the United Nations Charter[205]. There was some discussion on this point in the Commission[206], but Ago maintained that it was difficult to accept that an international organization would go so far as to undertake a measure which infringed an international subjective right of a State for purely preventive reasons. Even if that hypothesis were admissible, it should not be implied that an individual State could take preventive measures. In any case, if the Commission decided to take account of that type of measure, it should do so in a paragraph separate from the paragraph enunciating the general rule[207]. So far the Commission has not done so.

Finally, it may be said that art.30 is confusing as its abstract wording covers two basic cases which the ILC admits are quite distinct. The conditions under which an injured State may legitimately react against an internationally wrongful act committed against it by another State differ from those under which a third State may legitimately take action against the delinquent State on the basis of a decision of an international organization. Therefore, it would be more sensible to deal with each situation in a different article.

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[204] As to the dissenting opinions and to the significance of this statement see Bothe (note 200), pp.49–50.

[205] The binding nature of decisions under art.40 of the Charter is disputed, see Verdross/Simma (note 43), p.143; Bowett (note 184), pp.40–41 with cases.

[206] Vallat, YILC 1979, vol.I, p.62 para.20; Verosta, *ibid.*, p.62 para.23; Schwebel, *ibid.*, p.62 para.27.

[207] Ago, *ibid.*, p.63 para.32.

IV. Self-Defence (Art.34)

1. The Problems Relating to Self-Defence in Modern International Law

a) Self-defence in traditional international law

In traditional international law there existed no clear limitation upon the right of States to go to war[208]. Thus a special plea of self-defence was not necessary to justify one State waging war against another State, although governments legitimized wars in terms of self-defence or self-help for political reasons[209]. The use of armed force short of war, however, required special justification in international law. Such action could be excused on the grounds of reprisal, necessity or self-defence[210]. Self-defence or necessity were difficult to distinguish from armed reprisals as a form of self-help. Self-defence could be invoked for a wide variety of reasons, for preventive purposes, for the protection of nationals and property abroad, and, in certain circumstances, not only against a State which was threatening attack, but against a foreign territory which was being used as a base for attack by rebels of the threatened State[211].

The *Caroline* incident is generally regarded as the classic illustration of the right to self-defence, although it is said that the confusion between "self-defence" and "necessity" is more apparent in this case than in any other[212]. The facts of the *Caroline* Case are well known[213]. During the rebellion in Canada in 1837 preparations for subversive action against the British authorities were made in United States territory. Although the Government of the United States took measures against the organization of armed forces upon its soil, there was no time to halt the activities of the steamer Caroline which reinforced and supplied the rebels in Canada from

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[208] D.W. Greig, International Law (London 1970), pp.664–665; A. Randelzhofer, Use of Force, EPIL 4 (1982), pp.265–266.

[209] B.-O. Bryde, Self-Defence, EPIL 4 (1982), p.212.

[210] Greig (note 208), p.674.

[211] Friedländer (note 103), pp.67–68, states, however, that self-defence, both before and after the UN Charter "has pertained strictly to State conduct and, as a claim of right, has been asserted solely by governments against the actions and intentions of other governments".

[212] Greig (note 208), p.674.

[213] W. Meng, The Caroline, EPIL 3 (1982), pp. 81–82 with references; Greig, pp.674–677; O'Connell (note 123), p.316; Bowett (note 68), pp.58–59.

ports in the United States. A British force from Canada crossed the border to the United States, seized the Caroline in the State of New York, set her on fire and cast the vessel adrift so that it fell to its destruction over the Niagara Falls. Two citizens of the United States were killed during the attack on the steamer. American authorities arrested one of the British subjects involved in the action and charged him with murder and arson.

In the correspondence following Great Britain's protest, the conditions under which self-defence could be invoked to invade foreign territory were formulated in a manner that became to be treated as classical. There must be a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation" and the action taken must not be "unreasonable or excessive", and "limited by that necessity and kept clearly within it"[214]. In many subsequent occasions the *Caroline* Case was invoked and also employed by the Nuremberg Tribunal in handling the plea of self-defence raised to the charge of waging aggressive war[215].

Greig has shown that the *Caroline* incident had one important point of distinction as to a situation giving rise to the right of self-defence[216]. It was never alleged that the authorities of the United States were in breach of duty or in any other way responsible for the activities of the Caroline. The British operation raised two entirely different questions which the diplomatic exchanges tended to confuse: a) at the international level, could Great Britain justify the incursion into American territory?; and b) on the municipal level, could individuals taking part in that action plead the purpose and circumstances of the operation as a defence to criminal proceedings in the American courts? On the international level, to violate the territory of an "innocent" State could only be justified on the grounds of necessity or the wider concept of "self-preservation"[217]. According to Greig, the formulation of the law put forward by the American Secretary of State referring to the "necessity of self-defence" employed a language that kept within the Anglo-American concept of necessity that was almost

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[214] D. Webster, British and Foreign State Papers 1841–1842, vol.30 (1858), p.193.

[215] O'Connell (note 123), p.316. For a critical comment see Greig (note 208), pp.666–667.

[216] Greig, p.675; see also Bowett (note 68), pp.59–60: "Whatever the merits of the controversy it is clear that at no stage did Great Britain rest her case on the allegation of a prior breach of duty by the United States. Strictly speaking, therefore, *vis-à-vis* the United States the action taken by Great Britain was taken by virtue of its right of necessity, though the principles governing the actual exercise of the right, as stated by Webster, were applicable both to necessity and self-defence".

[217] Greig, *ibid.*

certainly too restrictive if applied to the common law notion of self-defence. The formulation had the purpose of setting strictly defined limits to an extension of the plea of self-defence among individuals to the preservation of public order. The British Foreign Office was content to justify the attack with the American formulation of the law and to add an apology to settle the matter finally.

The traditional rules of international law allowed the use of armed force, short of actually declaring war, to defend certain rights if they were threatened by another State. Greig argues convincingly that the interests which a State could protect in this way were sufficiently wide to suggest that a plea of self-defence was less restricted than one might suppose on an initial reading of the views expressed by the Government of the United States in the *Caroline* Case[218]. If there was no breach of duty by the State against which action was taken, the use of force could only be justified on the exceptional grounds of necessity, or self-preservation. However, it was the *Caroline* Case which established the condition that the force used must be proportionate to the harm threatened whether the action is taken in self-defence or based on "necessity".

b) Self-defence under art.51 of the United Nations Charter

With the progressive outlawing of war and the use of armed force in international relations[219], the concept of self-defence acquired a new meaning in the 20th century. The United Nations Charter established a general prohibition of the use of force and created a system of collective security which attempted to concentrate the legitimate use of force in the Security Council. As the major exception to this system, art.51 states that nothing in the United Nations Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures to maintain international peace and security.

This area is one of the most disputed realms concerning the problem of the prohibition of the use of force. According to art.51, self-defence is permissible in the case of an "armed attack" or, in the French version, of an «agression armée». It is arguable whether both terms mean exactly the

[218] *Ibid.*, p.677.

[219] For a detailed account see Ago, Eighth Report on State Responsibility, UN Doc.A/CN.4/318/Add.6, 10.6.1980.

same thing[220]. The notion of "armed attack" has remained ill-defined, although its basic meaning is clear, including, for example, the armed violation of the territorial integrity and political independence of another State, of its ships and aircraft on the high seas[221]. Not every use of force prohibited by art.2 (4) of the Charter constitutes an "armed attack" in the sense of art.51[222]. The prevailing opinion is that only a major use of armed force would amount to such an attack[223]. The definition of "aggression" by General Assembly Resolution 3314 (XXIX) did not clarify the situation, even if it is assumed – which is disputed – that the terms "armed attack" and "aggression" are identical[224].

c) The relationship between art.51 and the customary right of self-defence

The most crucial question concerning self-defence in modern international law is whether or not art.51 has restricted the customary right to self-defence. According to the prevailing view[225], art.51 restricts the customary right to self-defence and allows the use of armed force only to counter an "armed attack" without taking into consideration the importance of the interests or rights of a State threatened by another one. The qualification of the right of self-defence by the word "inherent" in art.51 indicates that this right can be invoked by any State whether it is a member of the United Nations or not. The strict view, referring to the principle of *effet utile* and taking into account art.1 (1) and para.7 of the Preamble of the Charter, assumes that there is no right to self-defence below the level of an armed attack by another State, for the prohibition of the use of force in art.2 (4) of the Charter would otherwise be undermined. These authors

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220 Bryde (note 209), p.213; Derpa (note 79), p.96, explains that the English text using "if" which is normally employed in a conditional sense seems to invite the interpretation that self-defence is conditioned by an armed attack, while the French text («dans le cas ... d'une agression armée») allows the construction that an armed attack is only a typical, but not exclusive case of self-defence.

221 Bryde, *ibid.*

222 Verdross/Simma (note 43), pp.239, 241, write that art.51 does not apply to incidents occurring between border forces (*Grenzorgane*) nor to defensive measures against illegal entry into sovereign airspace by foreign aircraft (with the exception of warplanes).

223 Randelzhofer (note 208), p.271.

224 Bryde (note 209), p.213; Badr (note 1), pp.16–20, for a detailed argument.

225 For extensive references see Ago, UN Doc.A/CN.4/318/Add.7, 17.6.1980, p.9; Derpa (note 79), pp.97–98, also with views expressed by States; L. Wildhaber, Gewaltverbot und Selbstverteidigung, in: Schaumann (note 79), p.150; Beyerlin (note 88), p.222; see also Badr, pp.10–14.

regard art.2 (4) as the basic and extensive rule and art.51 as a strictly limited exception thereto[226]. This interpretation leaves a gap between acts which violate rights of States, essential as they may be or appear, if they fall short of an armed attack, and acts against which self-defence is permissible, as has already been explained above.

The opposite view maintains that art.51 does not limit the traditional right of self-defence which would be recognized by the term "inherent"[227]. The reference to an "armed attack" in art.51 would not mean that self-defence is admissible only in the case of an armed attack. Bowett argues that on the basis of such an extensive interpretation of art.51 a State would have the right to protect its territorial integrity, political independence, its nationals abroad and certain economic rights against armed or also unarmed force[228]. Other authors hold the view that the traditional rights of self-help and self-preservation continue to exist in general international law[229]. Furthermore, there is a line of argument referred to earlier which bases the hypothesis of a revival of the customary right to self-defence on the defectiveness of the United Nations security system. As O'Connell said: "In considering the extent to which the United Nations Charter today has limited the scope of self-defence one cannot ignore the effectiveness or otherwise of international machinery as a substitute for individual action; if the law is ineffective the primordial right of self-defence must reassert itself"[230].

It has been shown above in the context of discussing the admissibility of armed reprisals in modern international law that the use of armed force is forbidden in principle unless there is an armed attack by another State, despite the fact that the system of collective security as provided for in the

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[226] Beyerlin, *ibid.*, pp.222–223.

[227] For extensive references see Ago (note 225), pp.4–5; Derpa (note 79), p.99; Wildhaber (note 225), p.151; Beyerlin (note 88), p.222; Levenfeld (note 82), pp.26–30, also holds this view.

[228] Bowett (note 68), p.270: "Whilst it is conceded that the right of self-defence generally applies within the context of force, it is neither a necessary nor an accurate conclusion that the right of self-defence applies only to measures involving the use of force. The function of the right of self-defence is to justify action, otherwise illegal, which is necessary to protect certain essential rights of the State against violation by other States. The substantive rights to which self-defence pertains, and for which it serves as a means of protection are: (a) The Right of Territorial Integrity, (b) The Right of Political Independence, (c) The Right of Protection of Nationals, (d) Certain Economic Rights".

[229] As to these concepts see Bryde (note 96), p.215 *et seq.*; Partsch (note 114), p.217 *et seq.*

[230] O'Connell (note 123), p.315.

United Nations Charter has to a large extent proved ineffective. This result is based on a rejection of an extensive interpretation of art.51 and of the proposition that there still exists a broader notion of self-defence in general international law. The development of the prohibition of the use of force in the 20th century which culminated in art.2 (4) of the United Nations Charter has also structured the understanding of customary international law[231]. This is largely confirmed by the practice of the United Nations[232]. A different conclusion would inevitably undermine the prohibition of the use of force and thus spare States the necessity of having to legitimize armed action taken against another State in the light of a narrow exception to art.2 (4) as provided for by art.51. It is also obvious that such a conclusion would be for the benefit of those States only which have the power and the means to impose their perception of the situation upon other States by the use of armed force.

Nevertheless, as has been pointed out earlier, international law cannot tolerate a fundamental separation from international reality on the long run. The truth in O'Connell's statement is that, however disappointing a regressive development may be, there is no barrier to a reassertion of the customary understanding of the right to self-defence if the international system continues to be ineffective and proves permanently incapable of granting remedies for the infringement of certain essential rights of States by illegal acts short of an "armed attack". This is indeed a question of time. Although the point of abandoning completely the restrictive view of self-defence has not yet been reached, many twilight areas remain, and the future seems uncertain in a world in which the dissens on fundamental concepts of international law reflects a crisis of the international legal order[233].

d) Anticipatory self-defence

Whether anticipatory self-defence is permitted under art.51 of the Charter is a matter of dispute. The question is whether a State must wait until a

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231 See note 225.

232 Wildhaber (note 225), pp.151–153. Even Levenfeld (note 82), p.15, admits: "The view that the Charter allows only a narrowly restricted right of self-defense has substantial scholarly support and has apparently been adopted by the Security Council".

233 See W. Grewe, Über den Gesamtcharakter der jüngsten Epoche der Völkerrechtsgeschichte, in: Festschrift für H.-J. Schlochauer (Berlin 1981), p.301 *et seq.*; B. Simma, Völkerrecht in der Krise?, Österreichische Zeitschrift für Aussenpolitik, vol.20 (1980), p.273 *et seq.*

cross-frontier armed attack has actually occurred or if it is entitled, under certain conditions, to take preventive action against the threat or military preparation of such an attack. One view is that art.51 does not permit anticipatory self-defence as the comprehensive prohibition of the use of force would leave no other option and as it would be necessary to restrict the possibility of abuse[234]. Other authors such as Mössner come to the conclusion that there is no clear answer to the question of whether preventive war is admissible. Because of the complexity of the problem States had been reluctant to establish definite norms, and, in his view, legal literature could only show that a prohibition was necessary but it could not establish such a norm[235].

Other authors arrive at more definite conclusions. Randelzhofer believes that only when a State pre-announces an armed attack against another State, a hardly conceivable practice, would preventive self-defence be lawful. He emphasizes that the prohibition of preventive self-defence would only be compatible with military requirements as long as a so-called second strike capability exists. Any change in this capability would not alter the legal requirements, but it would reduce the readiness to comply with them[236]. Bryde maintains that arts.2 (4) and 51 forbid preventive action in principle, but that there might be factual situations in which a pre-emptive strike against imminent attack is justified as self-defence. The author seems to rely on the facts of the individual case[237].

Verdross and Simma have presented an interesting line of reasoning based on the distinction made by Leo Strisower in 1919 between a preventive war and preventive self-defence[238]. In essence, this distinction requires an interpretation of the factual circumstances and of the intentions of the States involved. A preventive war would have the purpose of weakening an enemy supposedly intending a future attack. Preventive self-defence, on the other hand, would require the existence of an imminent armed attack by the other State. Preventive war, having an offensive nature, is regarded as illegal by the aforementioned authors, while preven-

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234 Badr (note 1), pp.21–23; for references to those authors who hold that there can be no anticipatory self-defence see Brownlie (note 78), pp.275–276; H. Wehberg, Beruht das Recht zur Selbstverteidigung auf einer allgemeinen Regel des Völkerrechts?, Gutachten 1952, p.3; Schlochauer (note 1), p.277; for further references see Neuhold (note 79), p.136.

235 Mössner (note 43), p.159.

236 Randelzhofer (note 208), p.272.

237 Bryde (note 209), p.213.

238 Verdross/Simma (note 43), pp.239–240.

tive self-defence serving a truly defensive purpose in the light of an imminent attack could be lawful.

This reasoning is opposed to the view that, as in customary law, anticipatory self-defence continues to be legal under the criteria established by the *Caroline* Case[239]. Whereas some authors such as Bowett[240] would allow anticipatory self-defence to prevent not only an armed attack but also the violation of other essential rights endangered by measures other than an armed attack, the prevailing view is that preventive self-defence can only be invoked against an imminent armed attack by another State[241].

The restrictive view adopts an entirely unrealistic approach to art.51. As Greig has said in this context: "Unless a rule of international law is based upon the practice of states or is sufficiently general to fit in with both that practice and the reasonable demands of states likely to be faced with the need to act, it is probable that it will not be observed. And in the international community, rules based solely upon the legal niceties of treaty construction without adequate recognition by states are unlikely to meet those demands"[242]. Clearly with respect to the present stand of armament and the technical development of weapons the first strike could mean total destruction or harm to an extent where defence is no longer an option. In case of an imminent attack it seems difficult to deprive a threatened State of the right to preventive self-defence. O'Connell concludes from the debates during and after the adoption of the Charter, and in particular on the formulation of the concept of aggression, that it seems unlikely that members of the United Nations would agree that art.51 excludes anticipatory action, or that it has abrogated the doctrine in the *Caroline* Case[243]. He mentions that Pakistan justified anticipatory action in Kashmir on art.51 and that the only objection to this argument came from India[244].

Verdross and Simma argue that neither the wording of art.51 nor the *travaux préparatoires* can support a definite conclusion as to the question of whether self-defence could only be invoked against an armed attack which has already reached its first objective[245]. This may be so. But it seems hardly likely that the drafters of art.51 should have forgotten the

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239 For references see Brownlie (note 78); Neuhold (note 79), p.136; Wildhaber (note 225), p.153.

240 Bowett (note 68), p.270.

241 Thode (note 62), p.454; Wildhaber (note 225), p.154.

242 Greig (note 208), p.680.

243 O'Connell (note 123), p.317.

244 *Ibid.* with references in note 37.

245 Verdross/Simma (note 43), p.239.

lessons of recent history and to insist, as Greig puts it, "that a state should wait for the aggressor's blow to fall before taking positive measures for its own protection"[246]. The Tokyo Tribunal had decided that the Dutch declaration of war upon Japan in December 1941 was justified on the grounds of self-defence, althought at that time Japan had not attacked Dutch territories in the Far East. It sufficed that Japan had made its war aims, including the seizure of those territories, known which were decided upon at the Imperial Conference of November 5, 1941[247].

Whatever the difficulties of interpreting the genesis and the wording of art.51 as to the question of preventive self-defence, the definition of aggression by the General Assembly offers some clarity[248]. Art.2 reads: "The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity". According to art.3 c a blockade is an aggression and, according to art.3 g, so is a major military action by "armed bands, groups, irregulars or mercenaries". If the first use of armed force by a State only gives *prima facie* evidence of an act of aggression which certainly encompasses an armed attack, then logically it must be assumed that under certain conditions the first use of armed force may be justified as a defensive preventive action.

The practice of States and of the United Nations is not quite clear, although it offers more evidence for the admissibility of preventive self-defence than for the contrary view[249]. In particular the 1967 Israeli attack against the United Arab Republic is a relevant case as the Security Council as well as the General Assembly rejected the attempts of some member States to have Israel condemned as an aggressor under circumstances which invite the conclusion that many other member States evaluated the Israeli attack as an admissible act of preventive self-defence[250].

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[246] Greig (note 208), p.682.

[247] Greig, *ibid.*; see also Verdross/Simma (note 43), p.240.

[248] See note 127.

[249] Levenfeld (note 82), p.16, refers to R. Higgins, The Development of International Law through the Political Organs of the United Nations (Oxford 1963), p.203, and to Q. Wright, The Prevention of Aggression, AJIL vol.50 (1956), p.529, to support the suggestion that United Nations practice has consistently refused to recognize a right of preventive self-defence. Those authors, however, were not able to consider the definition of aggression adopted by the General Assembly in 1974. See also Thode (note 62), p.454.

[250] Thode, *ibid.*, p.454.

Again in the Middle East context, the issue of preventive self-defence was discussed most recently in the Security Council's debate in June 1981 on the Israeli raid on the nuclear reactor in Iraq[251]. Israel declared: "In destroying Osiraq last Sunday, Israel was exercising its inherent and natural right of self-defence, as understood in general international law and well within the meaning of Article 51 of the United Nations Charter"[252]. The Israeli representative Blum referred to authorities such as Waldock, Kaplan, Katzenbach, Bowett, Schwebel and McDougal to support his view that there exists a right of preventive self-defence[253]. He pointed out that since 1948 Iraq had used force against Israel. The state of war and the unwillingness of Iraq to agree upon a cease-fire would give Israel "full legal justification to exercise its inherent right of self-defence to abort the Iraqi nuclear threat to Israel"[254]. It is interesting that Waldock, to whom Blum referred, stipulates that preventive self-defence on the basis of art.51 is only admissible if the threat of an armed attack is "manifestly imminent" and "within the strict doctrine of the Caroline"[255]. In Blum's view, the principles of the *Caroline* Case established 108 years before Hiroshima are no longer applicable in the nuclear age: "To assert the applicability of the Caroline principles to a State confronted with the threat of nuclear destruction would be an emasculation of that State's inherent and natural right of self-defence"[256].

The Security Council condemned the Israeli attack[257] but for different reasons. Some States rejected the plea of preventive self-defence in principle. The Soviet Union refused to accept the "doctrine of preventive war"[258]. Mexico upheld the restrictive view of self-defence and declared: "The concept of preventive war, which for many years served as a justification for the abuses of powerful States, since it left to their discretion to define what constituted a threat to them, was definitively abolished by the Charter of the United Nations"[259]. The use of the term "preventive war"

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[251] Documentation in ILM vol.20 (1981), pp.963–997; UN Chronicle, vol.18 (1981) No.8, pp.5–9, 61–74.

[252] ILM, *ibid.*, p.970.

[253] *Ibid.*, pp.973 and 989.

[254] *Ibid.*, p.989.

[255] For Blums incomplete quotation see ILM vol.20, p.973, and Al-Qaysi (Iraq), *ibid.*, p.997.

[256] ILM vol.20, p.989.

[257] Res. 487 (1981) 19.6.1981, ILM vol.20, p.993, adopted unanimously with 15 votes in favour, none against and no abstentions.

[258] ILM vol.20, p.991.

[259] *Ibid.*, p.978.

instead of "preventive self-defence" raises the question whether in the view of the aforementioned States preventive action would be justified in case of a manifestly imminent armed attack by another State. As far as the Soviet Union is concerned it is well known that she does not agree with such a proposition[260]. And Mexico stated in the Security Council's debate that the plea of self-defence would be inadmissible if no armed attack had occurred.

Other States were less clear. France accused Israel of a violation of the prohibition of the use of force with the words: "Where would we end up if a State were to proclaim itself judge of the intentions of another State ...?"[261]. But the French delegate did not expressly give a general opinion on the legality of preventive self-defence. The United States did not reject in principle the right to preventive self-defence. She condemned the Israeli action solely with the argument that "diplomatic means available to Israel had not been exhausted"[262] and emphasized that the violation of the Charter would be based only upon this argument[263]. The United Kingdom did not see any justification for the Israeli attack: "It has been argued that the Israeli attack was an act of self-defence. But it was not a response to an armed attack on Israel by Iraq. There was no instant and overwhelming necessity for self-defence. Nor can it be justified as a forcible measure of self-protection. The Israeli intervention amounted to a use of force which cannot find a place in international law or in the Charter and which violated the sovereignty of Iraq"[264].

The Security Council's condemnation of the Israeli attack was not based on a clear and unanimous rejection of the right to anticipatory self-defence in principle.

If the right to anticipatory self-defence exists under the Charter, which is disputed but in the author's view must be assumed, then it only exists as a strictly limited exception under the conditions established by the *Caroline* Case in the face of a manifestly imminent armed attack by another State. International law can only restrict the admissibility of the preventive

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[260] As to the Soviet position on the prohibition of the use of force see Th. Schweisfurth, Sozialistisches Völkerrecht? (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol.73) (Berlin etc. 1979), pp.305 *et seq.*, 455 *et seq.*; J. Yin, The Soviet Views on the Use of Force in International Law (Hong Kong 1980).

[261] ILM vol.20, p.976.

[262] *Ibid.*, p.985.

[263] *Ibid.*, p.994.

[264] *Ibid.*, p.977.

use of armed force as far as possible. It cannot prevent a State threatened in its existence from protecting itself by anticipatory action[265].

e) Self-defence against the indirect use of armed force

It is possible to distinguish military and non-military indirect forms of the use of force[266]. An indirect use of armed force against another State would be, for example, the organization, support or tolerance of irregular forces the aim of which is to incurse into foreign territory. The Friendly Relations Declaration stipulates: "Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State"[267]. According to the prevailing view the use of indirect military force is prohibited by art.2 (4) of the Charter[268]. However, there is no clear *opinio iuris* as to the admissibility of the right to self-defence against such action. The Soviet Union, Latin American and non-aligned States maintain the view that only adequate and proportionate measures are admissible in response, while the United States and some of her allies are in favour of treating forms of indirect and direct aggression on the same level within the context of art.51. An agreement on this matter is hardly likely in the near future[269].

As to the use of indirect non-military force such as the support of terrorist acts and guerilla activity outside of a State's own territory by financial help or delivery of arms, the prevailing view is, in conformity with the Friendly Relations Declaration, that such activity is not covered

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[265] Neuhold (note 79), p.137 *et seq.*; T.J. Farer, Law and War, in: Black/Falk (eds.), The Future of International Legal Order, vol.3: Conflict Management (Princeton, N.J. 1971), p.15 *et seq.* See also Grewe (note 233), p.321, stating that under the technical conditions of the use of nuclear weapons a right to preventive self-defence appears to be inevitable.

[266] See Thode (note 62), p.450.

[267] GA Res. 2625 (XXV), Annex, 24.10.1970. The text continues: "Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force".

[268] Derpa (note 79), p.20 *et seq.* For references establishing that a State is responsible for violating international law by the mere toleration of armed bands intending to attack another State see Levenfeld (note 82), p.6 *et seq.*

[269] Thode (note 62), p.454 *et seq.*

by the principle of the prohibition of the use of force but by the rules of non-intervention[270].

f) Self-defence and wars of national liberation

One of the most problematic topics in the dispute between western States on the one hand and socialist countries and developing nations on the other concerns wars of national liberation in exercise of the right to self-determination[271]. While western States apply the traditional rules governing situations of civil war in international law[272], the latter argue that wars of national liberation against a colonial power have an international nature *per se*[273]. Recently socialist States and developing countries have presented the argument that colonialism may be considered as a "permanent armed attack" against which individual or collective self-defence would be admissible[274].

The arguments put forward to support this view[275] are not acceptable from a legal perspective, for they conflict with even the most extensive interpretation of art.51 as set forth above. The new doctrine reintroduces *bellum iustum* as an element of modern international law which is incompatible with art.2 (4) of the United Nations Charter and cannot be based on the right to self-determination[276].

Nevertheless, numerous General Assembly resolutions[277] may indicate that there is a tendency which could result in a gradual alteration of the *opinio iuris*[278]. No support for the new doctrine can be derived, however, from art.7 of the definition of aggression adopted by the General Assembly[279], declaring the right of peoples to "struggle" for national liberation.

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270 *Ibid.*, p.450.

271 See H.-J. Uibopuu, Wars of National Liberation, EPIL 4 (1982), p.343 *et seq.*; E. Klein, Nationale Befreiungskämpfe und Dekolonisierungspolitik der Vereinten Nationen, ZaöRV vol.36 (1976), p.618 *et seq.*; Neuhold (note 79), p.225 *et seq.*; as to the right of self-determination see J. Delbrück, Das Selbstbestimmungsrecht der Völker im Völkerrecht der Gegenwart, Bemerkungen zum Stand der Diskussion, Vereinte Nationen, vol.25 (1977), p.6 *et seq.*

272 See D. Rauschning, Gewaltverbot in Bürgerkriegssituationen, in: Schaumann (note 79), p.83.

273 As to the development of this reasoning see Neuhold (note 79), p.141 *et seq.*

274 Randelzhofer (note 208), p.272.

275 See Neuhold (note 79).

276 Randelzhofer (note 208); Thode (note 62), p.457.

277 For references see Neuhold (note 79), p.143.

278 Thode (note 62), p.457.

279 See note 127.

There are divergent views as to the interpretation of this provision. In the drafting of the article western States successfully opposed the proposed formulation speaking of the right to "use force" and have subsequently interpreted the word struggle in the final text in the sense of struggling by peaceful means[280]. Developing nations and socialist States disregard the genetic history of the resolution when they interpret "struggle" to include the use of force. In any case, the definition of aggression does not affect art.2 (4) or 51 of the Charter and constitutes a non-binding recommendation only[281].

g) The requirements of legitimate self-defence – Immediacy and proportionality

It is clear that self-defence is constructed as a provisional remedy which is available only until the Security Council has taken appropriate remedy[282]. As explained above, self-defence may be invoked only against an armed attack of some gravity by another State that has actually occurred and exceptionally in anticipatory defensive action against a manifestly imminent armed attack. It is not quite clear whether art.51 allows military action against the indirect use of armed force by support given to armed bands or irregulars based on foreign territory.

Some authors such as Badr argue that there is a "requirement of priority in time" for self-defence, meaning that the start of an armed attack must precede the exercise of the right of self-defence[283]. This condition is based upon a restrictive interpretation of art.51 which refuses to recognize the right to anticipatory self-defence even in the case of an imminent armed attack and therefore cannot qualify for such exceptional situations.

The requirement of "immediacy" is usually regarded as a precondition for the legitimate exercise of the right of self-defence once an armed attack has occurred. Self-defence must immediately follow upon the start of an attack or at least be undertaken while the attack is still in progress[284]. The purpose of self-defence is to repulse the attack. Thus, once the attack is

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[280] Randelzhofer (note 208), p.272.

[281] *Ibid.* It is up to the Security Council to decide whether there is an act of aggression in a given case without being bound by the definition of aggression passed by the General Assembly.

[282] As to the role of the Security Council see Bryde (note 209), p.213; Verdross/Simma (note 43), p.242; O'Connell (note 123), p.318; Wildhaber (note 225), pp.148–149; Bothe, in Schaumann (note 79), p.20 *et seq.*

[283] Badr (note), p.21 *et seq.*

[284] *Ibid.*, p.23 *et seq.*

consummated and active military operations have ceased by the attacker there is no scope left for invoking the right of self-defence.

This requirement should not be taken too literally and without due regard to the circumstances of the particular case. Badr, for example, takes the view that there may be justification for the aim of removing the effects of an attack and restoring the pre-existing situation, but "strictly speaking, this also does not appear to be covered by the legal concept of self-defense". Such action would be in reality a forcible affirmation of the rights of the State, an autonomous concept of international law subject to its own rules and not to be judged under the rules of self-defence[285]. It seems difficult to agree with this suggestion as it would have deprived Great Britain of invoking the right of self-defence, as she correctly did, to counter the attack by Argentina on the Falkland Islands (Malvinas)[286]. The view maintaining that the British response was not "immediate" as the British fleet took too long to reach the islands after Argentina's attack had achieved a *fait accompli* reflects a dogmatic approach misunderstanding the true sense of the requirement of "immediacy" which is to prevent abuse and military aggression under the pretext of self-defence after hostilities have ceased long before. It would lead to the obscure result that Britain could have invoked the right to self-defence only by immediately using nuclear weapons if this was at all possible. If the use of nuclear weapons would have been considered disproportionate in this case then Britain would have had no right to self-defence although there is no doubt that she was subject to an armed attack. The correct evaluation is that under the given circumstances and taking geographical distance into consideration Britain's response was immediate by ordering her navy to leave for the area of conflict.

The most important limitation on the right of self-defence is without doubt the requirement of proportionality. This limitation was already established in general international law before the Charter[287], and under

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[285] *Ibid.*, p.26.

[286] For a documentation see C. Rousseau, Argentine et Grande-Bretagne, Revue de Droit International Public, vol.86 (1982), p.724 *et seq.* Department of State Bulletin No.2067 (October 1982), pp.78–90; W. Wagner, Der Konflikt um die Falkland-Inseln, Europa-Archiv 1982, pp.509–516; J. Pearce, The Falkland Islands Dispute, World Today, vol.5 (1982), pp.161–165; J. Vernant, La crise des îles Falkland, Défense Nationale, vol.38 (1982), pp.103–110.

[287] See Greig (note 208), p.677; Brownlie (note 78), p.261; as to the dispute whether this principle still applies under the United Nations Charter see Neuhold (note 79), p.139 *et seq.*

art.51 the permissible use of force is restricted to a necessary minimum. The manner and the intensity of the attack determine the manner, duration, amount and intensity of the use of armed force in self-defence[288]. It is not quite clear whether proportionality must be measured with view to the end (definitive repulsion of the attack or of the danger of its repetition; preservation or restoration of the *status quo ante*), with regard to the means employed in self-defence (necessary and proportional to the violation that gave rise to self-defence) or with respect to both. The principle of proportionality may also serve as an argument to restrict the meaning of the term "armed attack" to incidents of some gravity[289]. It is not convincing to stipulate that the rule of proportionality would support the view that preventive action in principle is inadmissible with the argument that the use of force will not regularly be a proportionate response to mere preparations[290]. Of course, anticipatory self-defence must be proportional to the manifestly imminent attack but proportionality in itself is no criterion to assess whether there actually is a manifestly imminent armed attack. However, in cases of indirect aggression, it seems reasonable to assess that "the proportionality rule will usually not justify direct action against the supporting State, while it might allow attacks on the bases of such groups on foreign territory"[291].

b) Collective self-defence

Art.51 refers to collective as well as individual self-defence. The term "collective self-defence" is not very precise and should be "collective defence"[292]. At the San Francisco Conference art.51 was introduced into the draft of the Charter at the insistence of, in particular, Latin American States which wanted to ensure that the collective security pacts they had entered into were legally not questioned by the Charter[293]. Art.51 is the basis of a series of collective security pacts of a bilateral or multilateral nature which are only partly governed by the rules provided for in Chapter VIII of the United Nations Charter[294].

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288 Wildhaber (note 225), pp. 153–154; Badr (note 1), p.27.
289 Thode (note 62), p.455; Neuhold (note 79), p.140.
290 Bryde (note 209), p.214.
291 *Ibid.*
292 See Wildhaber (note 225), p.167 referring to Kelsen and Stone.
293 Greig (note 208), p.684 *et seq.*
294 See J. L. Kunz, Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations. AJIL vol.41 (1947), p.872 *et seq;* D. W. Bowett, Collective Self-

According to a minority view, collective self-defence is an accumulation of individual rights to self-defence. Bowett maintains "that a state resorting to force not in defence of its own rights, but in the defence of another state, must justify its action as being in the nature of a sanction and not as self-defence, individual or collective ... The requirements of the right of collective self-defence are two in number; firstly that each participating state has an individual right of self-defence, and secondly that there exists an agreement between the participating states to exercise their rights collectively"[295]. However, Bowett recognizes the right to collective self-defence if a geographically, politically, economically or strategically close ally is attacked. The prevailing view is that any non-attacked third State is entitled to come to the assistance of another State regardless whether or not its own rights are threatened or injured by the attack[296].

Bowett's view is supported by the wording of art.51 but not by its genesis. The prevailing opinion can rely upon State practice after the creation of the Charter. There is no reason not to accept unilateralism in the form of military blocks if unilateralism of individual States is an inevitable result of the incapacity of the major powers to reach a collective decision[297].

State practice after 1945 also rejects the view presented by Dinh that collective self-defence would be admissible only on the basis of a prior concluded treaty and in a regional context but at the same time without necessarily requiring a request by the attacked State[298]. Any State may come to the assistance of another State suffering an armed attack whether there is such a prior agreement or not[299]. But under art.51 no State is obliged to do so[300]. It is also clear that the right to collective self-defence is not reserved to member States of the United Nations.

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defence under the Charter of the United Nations, BYIL vol.22 (1955/56), p.130 *et seq.*; J. Delbrück, Collective Self-Defence, EPIL 3 (1982), pp.114–117 with further references; Neuhold (note 79), p. 147 *et seq.*

295 Bowett (note 68), p.207.

296 Wildhaber (note 225), p.166 with references; Neuhold (note 79), pp.146–147; Delbrück (note 294), pp. 114–115; Thode (note 62), p.455.

297 Wildhaber, *ibid.*, p.167.

298 N.Q. Dinh, La légitime défense d'après la Charte des Nations Unies, RGDIP vol.52 (1948), p.244 *et seq.*

299 Neuhold (note 79), p.148 with references to literature discussing the invasion into Cambodia by the United States and South Vietnam during the Vietnam war.

300 As to the relationship between regional organizations based on art.51 and regional arrangement or agencies formed under art.52 of the Charter see Delbrück (note 294), p.116.

i) The distinction between self-defence and other forms of self-help in modern international law

In 1964 the Government of the United Kingdom declared in the Security Council: "There is, in existing law, a clear distinction to be drawn between two forms of self-help. One, which is of a retributive or punitive nature, is termed 'retaliation' or 'reprisal'; the other, which is expressly contemplated and authorized by the Charter, is self-defence against armed attack"[301]. The views expressed in legal literature are more diverse[302]. Some deny any difference between these two forms of self-help, others maintain that both forms are at least very similar, and that there have been intermingled cases. Kalshoven refers to a number of cases where States have taken divergent positions[303].

Criticizing the view of Kelsen formulated in 1932[304] that the right of self-defence would fall within the domain of reprisal as it requires the commission of an international offence by another State, Schlochauer refers to the recent development of international law in which self-defence became a separate circumstance precluding wrongfulness. While a reprisal would be an offensive action against illegal conduct, the right to self-defence would be a defensive means of self-help[305]. Similarly, Wehberg argues that the right of self-defence must be clearly distinguished from reprisals[306]. Both would have common elements: the requirement of a breach of an international obligation by the target State and the nature of being a response to a violation of international law. However, a reprisal would be a sanction with the purpose of repairing the injured right by a coercive measure which would be otherwise unlawful. Self-defence, on the other hand, would consist in the repulsion of a harm, namely of an illegal attack. Self-defence would not be unlawful but admissible *per se*. Furthermore, Wehberg mentions that reprisals in principle would not affect diplomatic relations, whereas a defensive war would lead to the status of war if it had not previously existed.

Partsch distinguishes between self-help in armed conflicts and in peace-time[307]. In his view, in armed conflicts there may be recourse to

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301 Cited by Bowett (note 48), p.8.
302 See Partsch (note 114), p.218.
303 Kalshoven (note 63), pp.26–27, 291–293.
304 H. Kelsen, Unrecht und Unrechtsfragen im Völkerrecht, Österreichische Zeitschrift für öffentliches Recht, vol.12 (1932), p.481.
305 Schlochauer (note 1), p.269.
306 Wehberg (note 234), p.3.
307 Note 229, p.218.

both reprisals and self-defence. In peace-time self-defence would be legitimate against an armed attack while armed reprisals would be unlawful. Under this assumption the author regards the distinction between self-defence and reprisals to be of the utmost importance. He notes that there are some common preconditions. The target State must be guilty of a prior internationally wrongful act against the claimant State and the use of force must be limited to the necessary measures with respect to the rule of proportionality. In some cases a distinction on the basis of the time element would be possible. Self-defence could be taken immediately after the attack has started, while reprisals would always require an attempt to resolve the conflict by peaceful means[308]. If, however, a measure of self-defence would be taken with a certain delay, the question would arise whether the intentions of the acting State are relevant for the determination of the nature and character of the measure.

Brownlie stipulates that the use of force in self-defence, collective self-defence, and defence of third States now involves "a specific legal regime", although it related in the past "to the ambulatory principle of self-preservation"[309]. Greig mentions that the restriction of the right to wage war made it necessary to distinguish between self-defence and other forms of coercion falling short of war, for instance, reprisals[310]. While there was little practical significance of such a distinction in traditional international law, arts.2 (4) and 51 of the United Nations Charter would have the consequence that "the distinction between self-defence and reprisals has assumed fundamental importance"[311]. Referring to the debates on the Suez operation in 1956 in the Security Council, O'Connell cautiously states that the United Nations Charter "would appear" to limit the right of self-defence to occasions of direct attack, and to exclude the use of force altogether from the right of self-help: "A real distinction may thus be in process of emerging between self-defence, which is a justification for belligerent action, and non-belligerent legal redress ... However, both conceptions still share the same limitation that action cannot be more than preventive or cummutative and cannot be punitive or retributive"[312].

The suggestion that it is possible to distinguish clearly between self-defence and reprisals has been challenged by Bowett. Starting from the

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[308] *Ibid.*, p.219.
[309] Brownlie (note 1), p.452.
[310] Greig (note 208), p.678.
[311] *Ibid.*, p.679.
[312] O'Connell (note 123), p.318.

assumption that both are forms of "the same generic remedy, self-help"[313], Bowett explains that they have in common the preconditions that

a) the target State must be responsible for a prior internationally wrongful act against the claimant State;

b) the claimant State must have made an attempt to obtain redress or protection by other means unless such an attempt is inappropriate or impossible in the circumstances;

c) the use of force must be limited to the necessities of the case and proportionate to the wrong done by the target State.

The difference between self-defence and reprisals would essentially lie in their aim or purpose. Self-defence would be permissible for the purpose of protecting the security of the State and the essential rights – in particular the rights of territorial integrity and political independence – upon which that security depends. In contrast to this wide definition of self-defence, reprisals, in Bowett's view, are punitive in character and seek to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute, or to compel the delinquent State to abide by the law in the future. Reprisals could not be characterized as a means of protection as they come after the event and when the harm has already been inflicted.

Bowett argues that this seemingly simple distinction would abound with difficulties. The motive or purpose of a State would be difficult to elucidate. But, more important, the dividing line between protection and retribution would become more and more obscure "as one moves away from the particular incident and examines the whole context in which the two or more acts of violence have occurred"[314]. Under certain quasi-belligerent conditions an act of reprisal could be regarded as being at the same time both a form of punishment and the best form of protection for the future, since it may serve as a deterrent against future acts of violence by the other party. The argument is based upon the assumption that anticipatory self-defence is still admissible under the Charter[315].

Verdross and Simma have shown that Bowett's arguments are not well founded[316]. They emphasize that reprisals consist of separate interferences into the rights of a State which has committed an internationally wrongful act towards the claimant State, while self-defence is restricted

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313 Bowett (note 48), p.2.
314 *Ibid.*, p.3.
315 *Ibid.*, p.4.
316 Verdross/Simma (note 43), p.245.

to the repulsion of an existing attack. If a State were to attack an adversary after having repulsed its attack, it would not act in self-defence but take measures of reprisal to deter the enemy from attacking in the future or to obtain reparation. If a State, however, were to act against a new manifestly imminent attack, it would be a case of preventive self-defence. Indeed, the distinction between self-defence and reprisals is blurred only if the notion of self-defence is not restricted to the repulsion of an armed attack[317].

2. The Position Taken by the ILC

a) The place of self-defence within the ILC's draft articles on State responsibility

Ago originally proposed to include self-defence as a circumstance precluding wrongfulness in Chapter V of the draft articles with the following wording of art.34:

> *"Article 34. Self-defence*
>
> The wrongfulness of an act of a State not in conformity with an international obligation to another State is precluded if the State committed the act in order to defend itself or another State against armed attack as provided for in Article 51 of the Charter of the United Nations"[318].

Apart from the questions concerning the formulation of this provision, there were divergent views in the Commission as to whether self-defence should be included in Chapter V as a circumstance precluding wrongfulness. Riphagen stated that there were three options open to the Commission in dealing with self-defence. It could decide to deal with the matter more or less along the lines proposed by Ago; it could choose not to deal with the matter at all, on the grounds that it could not, or should not, add to or detract from the relevant provisions of the Charter of the United Nations; or it could make an explicit reference to international law, as it had done in draft art.30[319]. Riphagen noted that if the Commission

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[317] Referring to the ambiguous practice of the United Nations Security Council, Partsch (note 114), p.219, states that if during peace-time all reprisals with the use of force are prohibited, they cannot be regarded as legitimate if the prerequisites valid for reprisals during an armed conflict are met.

[318] Ago, Eighth Report on State Responsibility, UN Doc.A/CN.4/318/Add.7, 17.6.1980, p.18.

[319] YILC 1980, vol.I, p.188 para.1.

intended to introduce an article, at some stage, in Chapter V of Part 1 of the draft articles corresponding to art.42 of the Vienna Convention[320], it would have to deal with self-defence in some way, even if only by a "saving-clause" such as that contained in art.75 of that Convention. If the Commission did not intend to include such an article, the option of not dealing with self-defence at all would remain open to it[321].

Ushakov denied that self-defence was a circumstance precluding the wrongfulness of an act[322]. In his view, self-defence was a principle of greater scope. To say that self-defence precluded wrongfulness was tantamount to regarding it as the sole limitation on the prohibition of the use of armed force. He pointed out that Chapter VII of the Charter authorized the United Nations to employ force in a number of circumstances other than aggression; to think of self-defence as the sole limitation on the prohibition of the use of force was like "regarding suicide as lawful murder". Ushakov argued that self-defence as the inalienable right of a State that suffered armed attack was lawful *per se* and not a circumstance precluding wrongfulness. Self-defence typified an action which at no point was tainted by wrongfulness and which took the form *ab initio* of the exercise of a right. For this reason he considered that art.34 was out of place in Chapter V. It should form part of a separate chapter and a separate article dealing with self-defence[323].

Francis, on the understanding that art.51 of the Charter is an exception to art.2 (4) of the Charter stressed that self-defence, although in his view differing in its legal character from necessity, *force majeure* and distress, was one of the circumstances which precluded wrongfulness[324].

Similarly, Šahović, referring to self-defence as one of the inherent attributes of the sovereignty of States and its exceptional nature, said that one might well ask whether it was essential to formulate an article on self-defence. But that was not the problem in his view. A definition of aggres-

320 Art.42: "Validity and continuance in force of treaties. 1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty".

321 Note 319, para.2.

322 *Ibid.*, p.190 para.16.

323 *Ibid.*, para.17.

324 *Ibid.*, p.192 para.9.

sion based on the prohibition of the use of force already existed and, as an exception to that prohibition, self-defence definitely had a place in Chapter V of the draft[325].

Vallat remarked that there seemed to be general agreement on the need to include an article on the question of self-defence in the draft. The omission of such an article could have very serious consequences regarding the content of other draft articles which did not contemplate the use of armed force[326].

The Chairman articulated that he sympathized with those who considered that draft art.34 should not be included under the heading of "Circumstances precluding wrongfulness", since self-defence had implications that went far beyond the preclusion of wrongfulness[327]. However, he stressed that Ago was attempting not to codify the rules on self-defence but rather to place self-defence within a somewhat special schematic presentation of the elements which attracted wrongfulness and of the circumstances which precluded it. Within the context of that systematic exposition, he saw no reason to object to the inclusion of the draft article in Chapter V.

While Verosta referred to Riphagen's comments on the three options open to the Commission[328], Tabibi said that the principle of self-defence was so crucial that it should not appear among the rules precluding wrongfulness and it should have a special place[329].

Following a suggestion made by the Drafting Committee and with a specific reservation made by Ushakov[330], the Commission decided to include self-defence in Chapter V with the following text of art.34:

> *"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"[331].

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325 *Ibid.*, p.193 para.17.
326 *Ibid.*, p.194 para.20.
327 *Ibid.*, p.222 para.18.
328 *Ibid.*, p.229 para.14.
329 *Ibid.*, p.230 para.21.
330 *Ibid.*, 271–272 paras.53–61.
331 *Ibid.*, para.53.

b) The wording of draft art.34

The difference in the wording as compared to Ago's original proposal reflects the divergence of views in the Commission on the concept of self-defence. As accepted by the Commission, there is no express reference in the provision to art.51 of the Charter as suggested by Ago[332]. The Commentary explains that the Commission has been particularly careful to avoid any formulation which might give the impression that it intended to interpret or even amend the United Nations Charter[333]. The words "in conformity with the Charter of the United Nations", according to the Commentary, refer to the Charter in general "and get round the problems of interpretation that might arise from a reference solely to Article 51 of the Charter out of context, or to both the Charter and general international law alone"[334].

This wording is a compromise solution leaving open the possibility of contradicting interpretations of the right of self-defence in modern international law. It does not help to decide in which cases the right to self-defence can be invoked. The Commentary also mentions the reservations of some members of the Commission about this wording. Some agreeing with Ago favoured a specific reference to art.51 of the Charter[335]. Others proposed to use the actual terminology of that article, namely "inherent right of ... self-defence"[336]. Another suggestion was to replace the words "a lawful measure of self-defence taken in conformity with ..." by the words "action taken in exercise of the right of self-defence in conformity with ..."[337]. The majority of the Commission took the view that in the context of Chapter V the only question was the situation of the State acting regardless whether that situation constituted the exercise of a "right", of a "natural right" or of any other subjective legal situation[338].

The Commentary also mentions Ushakov's reservation, who approved of the idea of the article in substance, but criticized that the text could not possibly begin with a reference to "an act of a State not in conformity with an international obligation of that State", because no act of a State constituting self-defence would be contrary to any international

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[332] See note 318 and accompanying text.
[333] YILC 1980, vol.II (Part 2), p.60 para.25.
[334] *Ibid.*
[335] *Ibid.*, para.26.
[336] *Ibid.*
[337] *Ibid.*
[338] *Ibid.*

obligation[339]. Ushakov had suggested the following text: "Recourse by a State to self-defence in conformity with Article 51 of the Charter of the United Nations precludes the wrongfulness of an act of that State constituting such recourse to self-defence"[340]. This formulation is not consistent with Ushakov's approach. If self-defence is not contrary to any international obligation it is superfluous to stipulate that self-defence precludes the wrongfulness of an act.

c) The limited purpose of draft art.34

According to the Commentary, the sole purpose of art.34 is "to indicate that, when the requisite conditions for a situation of self-defence are fulfilled, recourse by a State to the use of armed force with the specific aim of halting or repelling aggression by another State cannot constitute an internationally wrongful act, despite the existence at the present time, in the Charter of the United Nations and in customary international law, of the general prohibition on recourse to the use of force"[341]. The article would not seek to define a concept that, as such, goes beyond the framework of State responsibility: "There is no intention of entering into the continuing controversy regarding the scope of the concept of self-defence and, above all, no intention of replacing or even simply interpreting the rule of the Charter that specifically refers to this concept. The article merely takes as its premise the existence of a general principle admitting self-defence as a definite exception, which cannot be renounced, to the general prohibition on recourse to the use of armed force, and merely draws the inevitable inferences regarding preclusion of the wrongfulness of acts of the State involving such recourse under the conditions that constitute a situation of self-defence"[342].

In other words: if there is a situation of self-defence, self-defence permits the use of armed force in exception to the general prohibition on the use of force. The Commentary later affirms that in stating this principle "the Commission has no intention of defining or codifying self-defence, any more that it defined or codified consent, countermeasures in respect of an internationally wrongful act and so on"[343].

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339 *Ibid.*, para.27.
340 *Ibid.*, p.61 note 215.
341 *Ibid.*, p.52 para.1.
342 *Ibid.*
343 *Ibid.*, p.60 para.23.

The question arises whether in spite of this reservation the Commission was not forced to give an implicit definition of self-defence in order to distinguish this circumstance precluding wrongfulness from others enlisted in Chapter V.

d) The distinction between "necessity" and "self-defence"

In his report Ago started from the assumption that at the present time self-defence is the only form of armed self-protection that is still conceded to a State by international law[344]. In his view, it is wrong to treat self-defence, any more than state of necessity, as a "right", although the expression is in current use even in the Charter of the United Nations. Both "self-defence" and "state of necessity" were expressions that connote a situation or *de facto* condition, not a subjective right[345].

As to the distinction between self-defence and necessity, Ago outlined that in both cases the State would act in response to an imminent danger, which must be in both cases serious, immediate and incapable of being countered by other means[346]. But in the case of necessity there was no internationally wrongful act committed by the State against which justified action may be taken. That State was in no way responsible by any of its own actions for the danger threatening the State invoking necessity. By contrast, the target State itself would be responsible for the threat posed to the State acting in self-defence by breaching the general prohibition of the use of armed force: "Acting in self-defence means responding by force to forcible action carried out by another; and the only reason why such a response is not itself wrongful is that the action which provoked it was wrongful"[347].

Clearly, Ago limited the concept of self-defence to a reaction against an armed attack for which another State was responsible[348]. As to forcible action carried out from foreign territory by private individuals Ago took the position that the test for deciding that a case falls within the scope of necessity and not within the scope of self-defence "is that the cause of the serious and imminent danger must not be an event attributable to the State

344 Ago (note 219), p.4 para.6.
345 *Ibid.*
346 *Ibid.*, p.5 para.7.
347 *Ibid.*, p.6.
348 Ago (note 319), p.184 para.3: "... the concept of self-defence should be confined to a defensive reaction against an armed attack by another State, and should exclude an attack by private individuals".

and constituting a non-performance by that State of an international obligation it owes to the State which reacts out of 'necessity'"[349]. Ago criticized authors such as Schwarzenberger[350] who, in his view, are influenced by an old official but now obsolete terminology and who were wrong to include under the notion of self-defence measures taken against individuals, merchant ships or private aircraft in circumstances not implying any international responsibility on the part of the State of nationality of those individuals, ships or aircraft[351].

In examining the writings of scholars between the two world wars, Ago discovered that a number of writers relied on a notion of self-defence that was in fact much closer to what he had defined as "necessity". Those writers, mostly from the English-speaking world, spoke of "self-defence" where the threat or danger came from individuals or groups which are private or, at any rate, unrelated to the organization of the victim State[352]. This school of thought would treat the *Caroline* Case[353] as a typical example of self-defence in international law. Ago cited Brierly and De Visscher as examples that no distinction is drawn as to the fundamental issue whether the threat comes from the foreign State itself, or from mere private individuals, or even insurgents or organs of a third State, without any wrongful act, and still less any aggression, being committed by the foreign State[354]. In Ago's opinion, "the confusion between two so different situations hampers the task of arriving at an accurate definition of self-defence"[355].

In the context of discussing the dispute between the restrictive and broader interpretation of self-defence in contemporary literature Ago returned to this question in rejecting the latter view. It was no accident that those authors often cite the *Caroline* Case to confuse the issues: "It is indispensable to differentiate more clearly the concept of self-defence properly so-called from the various notions that are often grouped together under the common label of self-help. It is worth repeating that self-defence is a concept clearly shaped by the general theory of law to indicate the situation of a subject of law driven by necessity to defend himself by the use of force, and in particular by the use of a weapon or weapons, against

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349 Note 219, p.5 note 5.
350 Schwarzenberger (note 87), p.332.
351 For a correct view Ago referred to G. Arangio-Ruiz.
352 Note 219, pp.25–26 para.25.
353 See note 213.
354 Note 219, p.26 note 39.
355 *Ibid.*, p.26 para.25.

another's attack"[356]. Ago dit not deny that "States can, in other circumstances, resort to certain courses of conduct that are justified by a situation of necessity, or even distress, or that are untainted by wrongfulness because they are legitimate reactions to an infringement of their rights falling short of an armed attack, subject of course to the present limitations on such a reaction"[357]. He also realized that the idea of describing as instances of self-defence which in his view did not come within such a definition might be based on the attempt to circumvent the too categorical obstacle to the use of force in reprisal to an international offence falling short of an armed attack or on the realization of the consequences of the ineffectiveness of the United Nations system. Ago conceded that this could, although one should not embark lightly on such a course because of the many disadvantages, lead to a possible review "even by a spontaneous evolution, of the inflexibility of certain prohibitions"[358]. But he stated that such an evolution has not taken place nor is it about to take place. In no case would there be any advantage in advocating "misguided interpretations of certain provisions", for they could only lead to a dangerous confusion of principles. He declared the fear in the final analysis groundless that the effect of adopting "an accurate and strict definition" of the circumstances in which recourse to self-defence is permissible may be to prevent the State from acting lawfully to protect its rights for other reasons and in other circumstances: "There is nothing to be gained from distorting the concept of self-defence in order to make its field of application much wider than it actually is, for such an enlargement would certainly not contribute to the necessary clarification of concepts"[359].

In the Commission's discussion Schwebel, citing Ago's statement that a State could act in self-defence only in response to the action of another State and not, for example, in response to attacks by private individuals or organizations, showed ignorance with respect to the distinction Ago had developed in his report. Schwebel said that if Ago's statement meant that State responsibility applied solely to State action or to acts or omissions by a State or imputed to it, he could agree. But if it meant that a State could not act in self-defence to attacks or threats of attack by other entities, he could not. Surely, a State was entitled to act in self-defence against, for instance, attacks by terrorist organizations or individuals.

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356 Note 318, p.7 para.32.
357 *Ibid.*
358 *Ibid.*, p.8 note 45.
359 *Ibid.*, p.8.

Schwebel indicated that he would be grateful for Ago's view on that point[360].

There is no answer by Ago reported in the summary records of the Commission's discussion. But it is clear from his report, as outlined above, that he regards the use of armed force in self-defence admissible only if the State is in one way or another responsible for such action carried out from its territory. Francis agreed with Ago as to the interpretation of the *Caroline* Case, since there was a clear difference between a situation in which a State acted in self-defence to protect its own interests and a situation – involving private individuals – to which the State was not a party and of which it might not even be aware. In the latter case, the issue was whether the State could act within the context of necessity[361].

The Commentary to art.34 reproduces Ago's arguments as to the distinction between self-defence and necessity[362]. Thus, it contains an implied definition of the concept of self-defence insofar as it rejects the view that self-defence may be invoked to use armed force to repulse an attack by private individuals from foreign territory even if the foreign State is not responsible, as in the *Caroline* Case. The question is the extent to which the Commission has taken account of this problem in the context of art.33 dealing with necessity. Again, the Commentary to this article emphasizes the importance of distinguishing necessity from self-defence: "In both cases the act which in other circumstances would be wrongful is an act dictated by the need to meet a grave and imminent danger which threatens an essential interest of the State; for self-defence to be invokable, however, this danger must have been caused by the State acted against and be represented by that State's use of armed force"[363].

Discussing the limits upon the plea of necessity imposed by obligations relating to the respect of foreign territorial sovereignty and by the prohibition of aggression, the Commentary to art.33 refers, *inter alia*, to certain actions by States in the territory of other States which, although they may sometimes be of a coercive nature, serve only limited intentions and purposes bearing no relation to the purposes characteristic of a "true act of aggression"[364]. Examples given are incursions into foreign territory to forestall harmful operations by an armed group preparing to attack the

360 Note 319, p.192 para.5.
361 *Ibid.*, p.193 para.11.
362 Note 333, pp.52–53 para.3.
363 *Ibid.*, p.34 para.2.
364 *Ibid.*, p.44 para.23.

territory of the State, or in pursuit of an armed band or gang of criminals who had crossed the frontier and perhaps had their base in that foreign territory, or to protect the lives of nationals or other persons attacked or detained by hostile forces or groups not under the authority and control of that State, or to eliminate or neutralize a source of troubles which threatened to occur or to spread across the frontier. According to the Commentary, the common features of these cases are:

a) the existence of grave and imminent danger to the State, to some of its nationals or simply to human beings – a danger of which the territory of the foreign State is either the theatre or the place of origin, and which the foreign State has a duty to avert by its own action, but which its unwillingness or inability to act allows to continue;

b) the limited character of the actions in question, as regards both duration and the means employed, in keeping with their purpose, which is restricted to eliminating the perceived danger[365].

The Commentary cites the *Caroline* Case and raises the question whether in the light of the development of international law since that incident the Charter of the United Nations, by art.2 (4), is or is not intended to impose an obligation of *ius cogens* which cannot be avoided by invoking a state of necessity[366]. Should it be inferred that the drafters of the Charter might have had the intention of implicitly excluding the applicability of the plea of necessity, however well founded in specific cases, to any conduct not in conformity with the obligation to refrain from the use of force? The Commission's answer is: "The Commission considered that it was not called upon to take a position on this question. The task of interpreting the provisions of the Charter devolves on other organs of the United Nations"[367]. Obviously, the Commission employed this formula in order to avoid a decision which could not be reached because of the conflicting views on these matters. The formula itself is hardly convincing as it is difficult to see how the law on international responsibility can be codified without interpreting the relevant norms of the United Nations Charter.

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[365] *Ibid.;* see also A g o, Eighth Report on State Responsibility, UN Doc.A/CN.4/318/Add.5, 29.2.1980, pp.54–55 para.56.

[366] Note 333, p.44 para.24.

[367] *Ibid.*, p.45; for A g o 's view see note 365, p.64 para.66. He also refrained from giving a clear answer with the argument that the Commission, being only concerned with the codification of "secondary" rules in the area of State responsibility, should not determine problems related to "primary rules" as contained in the Charter of the United Nations for the interpretation of which other organs were responsible.

The Commentary to art.33 also considers State practice following the adoption of the Charter. The only known case in which a State invoked a state of necessity – and then not exclusively – to justify violation of foreign territory, according to the Commentary, was the dispatch of Belgian parachutists to the Congo in 1960 to protect the lives of Belgian nationals and other Europeans who, the Belgian Government claimed, were being held as hostages by army mutineers and by Congolese insurgents[368]. Examining the conflicting views taken in the Security Council's debates on this incident, the Commentary concludes that the sides had concentrated on determination and evaluation of facts without taking a position of principle with regard to the possible validity of a "state of necessity". All that could be said, is that there was no denial of the principle of a plea of necessity as such[369].

The Commentary also mentions the second Belgian intervention in the Congo in 1964 which was justified by the Belgian Government by the consent of the Congolese Government, which the latter contested[370]. Furthermore, reference is made to the operations of the Federal Government of Germany in Somalia (Mogadishu) in 1977 and of Egypt in Cyprus (Lacarna) in 1978 where consent of the State concerned was invoked as a justification for raids carried out by organs of a State in foreign territory to liberate the hostages of terrorists who had diverted aircraft[371]. On the other hand, the Commentary notes that in the case of the raid on Entebbe (Uganda) undertaken by Israel in 1976, Israel relied on the plea of self-defence[372]. The Commission cites these cases in which armed operations have been undertaken on foreign territory for "humanitarian" purposes merely to show that the State which undertook them has relied on justifications other than "necessity" even if some of the facts of the case alleged "might relate more to a state of necessity than to self-defence"[373]. The Commentary states that it may be that the preference for other "justifications" than that of necessity was due "to an intention of bringing out more clearly certain alleged aspects of the case, such as the non-innocence of the State against which the act was committed, or to a belief that it was not

368 Note 333, p.45 para.25.
369 *Ibid.*; Ago (note 365), p.62 para.64.
370 Note 333, p.45 note 161.
371 *Ibid.*
372 *Ibid.* (note 162); see also Ago (note 365), p.63.
373 Note 333, p.45 para.26. It seems the Commission, as Ago did, relied too much on the particular terminology employed in those cases.

possible to prove that all the particularly strict conditions for the existence of a genuine state of necessity were fulfilled"[374]. It concludes, in any case, that the practice of States is of no great help in answering the question whether a state of necessity could be invoked to justify an act of a State not in conformity with an obligation of *ius cogens*[375].

We have seen that actions of these types, according to the ILC, cannot be justified neither upon the basis of art.30, as the legitimacy of armed reprisals is rejected categorically, nor upon the basis of art. 34, as far as no responsibility of the foreign State for private conduct is established, as "self-defence" is conceptually limited to a response to an armed attack by another State[376]. The expectation that the Commission would give a proper answer to these problems in the context of art.33 has not been fulfilled. It refused to take a position. In consequence, the possibility of justifying such action without consent of the foreign State on the grounds of necessity is not definitely excluded, but also not definitively affirmed.

e) The distinction between "self-defence" and "countermeasures"

The Commentary to art.34 acknowledges that there is a common element in action taken in self-defence and in action taken in the form of reprisals, namely that in both cases – at least normally – the State takes action after it has suffered an internationally wrongful act by the State against which action is taken[377]. But any possible analogy would stop here. While the internationally wrongful acts preceding countermeasures may be extremely varied, the only internationally wrongful act which exceptionally permits a response by the use of force, despite the general prohibition of the use of force, "is an offence which itself constitutes a violation of that prohibition"[378]. Hence the offence was not only an extremely serious one, but was also of a very specific kind.

In this context the Commentary adds in a footnote that it is often said that acts of unarmed aggression also exist (ideological, economic, political, etc.), but even though they were condemned, it could not be inferred that a State which is a victim of such acts was permitted to resort to the use of armed force in self-defence. These possibly wrongful acts would not fall

374 *Ibid.*
375 *Ibid.*, pp.45 and 43 para.23.
376 See note 348.
377 Note 333, p.53 para.4.
378 *Ibid.*

within the purview of the present topic, since recourse to armed force could be rendered lawful only in the case of armed attack[379].

This statement is particularly interesting in view of the positions formulated in the Commission's discussion of Ago's report. González had suggested that it would be more appropriate to refer to an act of aggression in the text of the draft article instead of to an armed attack[380]. In his view, the concept of aggression should not be confined solely to an armed attack. There were other types of aggression that could be far more effective in threatening or destroying a State, such as economic, ideological and cultural aggression[381]. Similarly, Tabibi argued that the right of self-defence against any coercive measures, whether military, economic, political or psychological, was an inherent right that must be respected by the community of nations[382]. Reuter also took the view that the reference to armed attack alone in art.34 was not enough[383]. He cited the example of a State sending its fishing vessels into a zone regarded by another State as an exclusive fisheries zone, thus provoking incidents with warships of that other State. This was a case of self-defence although it would be going too far to speak of aggression or crime, for the situation did provoke some acts of violence or coercion. Similarly, if a State launched a satellite which broadcasts to the territory of another State radio or television programmes that gave rise to internal disturbances, that other State might try to destroy the satellite and claim it was acting in self-defence against a cultural or political aggression. Reuter was not sure that in such a case it would be possible to speak of an armed attack. The Commentary clarifies at least that the concept of self-defence in art.34 is not meant to extend to forms of "aggression" falling short of an armed attack.

The aforementioned criterion to distinguish countermeasures and self-defence is considered to be less important than the thesis that they are reactions "that relate to different points in time and, above all, are logically distinct"[384]. In this context countermeasures are defined as "sanctions or enforcement measures"[385]. Self-defence taken to defend the territorial integrity or the independence of a State against violent attack would be action whereby "defensive" means are used to resist an "offensive" use of

379 *Ibid.*, p.53 note 176.
380 Note 319, p.220 para.4.
381 *Ibid.*, p.221 para.5.
382 *Ibid.*, p.229 para.15.
383 *Ibid.*, p.191 para.21.
384 Note 333, p.53 para.5.
385 *Ibid.*

armed force, with the object of preventing another's wrongful action from proceeding and achieving its purpose. Action taking the form of a sanction, on the other hand, would consist in "the application *ex post facto*, to a State committing a wrongful act, of one of the possible consequences that international law attaches to the commission of an act of this nature"[386]. The peculiarity of a sanction would be that its object is essentially punitive. This punitive purpose may be exclusive, an objective *per se*, or it may be accompanied by the intention to give a warning against a possible repetition of the conduct which is being punished, or "it might constitute a means of exerting pressure in order to obtain compensation for harm suffered, etc."[387]. The point would be, however, that self-defence was a reaction to a particular kind of internationally wrongful act, whereas sanctions, including reprisals, "are reactions that fall within the context of the consequences of the internationally wrongful act in terms of international responsibility"[388]. The Commentary also notes that a State suffering an armed attack, after acting in self-defence, may later adopt sanctions against the delinquent State. But these measures would not form part of the action taken in self-defence. Their purpose would be different as well as the reasons for their justification.

As a further element of differentiation, the Commentary to art.34 points out that self-defence "almost by its nature" involves the use of armed force[389]. Armed reprisals, on the other hand, as outlined in the context of draft art.30, are no longer legitimate[390]. Only the sanctions referred to in Chapter VII of the United Nations Charter could entail a lawful use of force. But, in that instance too, a distinction would have to be made between the use of measures involving recourse to armed force as a "sanction" properly speaking from the use of armed force in the context, for example, of collective self-defence.

f) Self-defence and self-help

In his report, Ago went at length to describe his view of the relationship between "self-help" or "self-protection" and "self-defence" starting from the assumption that, under modern international law, self-defence

386 *Ibid.*
387 *Ibid.*
388 *Ibid.*
389 *Ibid.*, p.54 para.6.
390 *Ibid.*

should be regarded as the only form of armed self-protection or self-help still open to a State[391]. Under international law, self-defence was "the sole exception to the general prohibition embodied in that law of the use of weapons for self-protection"[392]. Rejecting the views of authors such as Morelli, Sereni, Schwarzenberger and Bowett[393], Ago insisted that the term "self-protection" or "self-help" does not denote a separate and distinct "circumstance producing effects in a separate sector that would make it comparable to and *eiusdem generis* as the other circumstances capable of precluding the wrongfulness of an act of State described earlier in this chapter"[394]. "Self-help" should be construed to involve "what legal theory describes as and comprises under all the different forms taken by the system which in principle grants to the State, as the holder of a subjective right, the faculty of acting in order to protect and safeguard that right in certain circumstances"[395]. Self-defence would be a permitted form of self-help and not a separate concept.

The Commentary to art.34 states that self-defence cannot be confused with the concept of self-help (autoprotection, *Selbsthilfe, autotutela,* etc.) and defines the latter as Ago did[396]. Saying that one concept should not be "confused" with another one is something different, however, than maintaining that "self-help" is not a separate circumstance precluding wrongfulness. In contrast to Ago's report, the Commentary does not expressly state that self-defence is now the only form of armed self-help or self-protection legally available to States. It says: "'Self-defence' may therefore be regarded as a form of 'armed self-help or self-protection' that, under modern international law, States are permitted to exercise directly"[397]. In comparison with Ago's view the formulation seems to leave the option that there still may be other forms of armed self-help or self-protection than that of self-defence. On the other hand, this interpretation is difficult to reconcile with the statement made earlier in the Commentary to art.34 that "the only internationally wrongful act which makes it permissible, exceptionally for a State to react against it by recourse to force, despite the general prohibition of the use of force, is an offence which itself constitutes a violation of that prohibition", namely an armed

391 Note 344, p.12 para.12.
392 *Ibid.*, p.13 para.14.
393 *Ibid.* note 16.
394 *Ibid.*, pp.13–14.
395 *Ibid.*, p.14.
396 Note 333, p.54 para.7.
397 *Ibid.*

attack[398]. The conclusion would be that possibly armed self-help could be used in cases where the affected State is not responsible for an internationally wrongful act, as has already been discussed in the context of the distinction between self-defence and necessity. If there is an internationally wrongful act committed by that State, only self-defence, requiring an armed attack by that State, would permit the use of armed force.

g) Self-defence in art.51 of the United Nations Charter and in customary international law

The most important difference between Ago's report and the Commentary to art.34 concerns the dispute with regard to the relationship of the concept of self-defence as laid down in art.51 in the United Nations Charter and self-defence in customary international law. Ago, having examined extensively the historical process leading to the general prohibition of the use of force in international relations and giving shape to the principle of self-defence, assumed that it would be difficult to believe that there could be any difference whatsoever in content between the notion of self-defence in general international law and the notion of self-defence endorsed in the Charter of the United Nations[399]. It would be inconceivable that at the same moment in history and in consequence of the same historic events nearly all governments should have been able to sign a treaty instrument binding them reciprocally on the basis of a specific notion and that, at the same time, they should have been able to retain in their legal thinking the conviction of being reciprocally bound on the basis of a different notion.

Ago cited the school of thought which argues that art.51 of the United Nations Charter does not regulate all the situations in which self-defence is admissible and that under customary international law self-defence is permitted in cases other than when "an armed attack occurs"[400]. Presenting the main arguments of those authors Ago did not enter into a detailed discussion of their merits or flaws[401]. He also emphasized that an interpretation of the Charter and its provisions was clearly beyond the scope of the present task. But he stressed that the divergence between his view and the view of the aforementioned school of thought would not concern the

398 *Ibid.*, p.53 para.4 and note 176.
399 Note 318, pp.1–2 para.27.
400 *Ibid.*, pp.3–4 paras.29–30.
401 *Ibid.*, p.6 para.32.

interpretation of a provision of the Charter but rather the interpretation of general international law and, above all, the determination of the scope of the concepts employed.

The reasoning that the dispute would not concern the interpretation of a provision of the Charter is puzzling with regard to the fact that one of the major issues is what the expression "inherent right" in art.51 of the Charter is supposed to mean and what the intention of this article is with respect to the traditional notion of self-defence in customary international law. Ago himself acknowledged this fact by raising the question what was the fundamental reason why those authors "argue so strenuously that the scope of self-defence under general international law is much wider than that of resistance to armed attack and thus conclude that Article 51 of the Charter, in expressly safeguarding the right of a State to react in self-defence only in the case of armed attack, was not intended to cover the entire field of application of the concept of self-defence and left intact the much wider scope of that concept in general international law"[402]? In Ago's view, those authors rely on an antiquated notion of self-defence as expressed by the cases they refer to, such as the *Caroline* Case.

Furthermore, Ago supported his position by referring to the majority view which rebuts the aforementioned school of thought "firmly and effectively"[403]. Ago did not want to recount all the different arguments. It would suffice to say that "the plea of self-defence in justification of the use of armed force by a State in cases other than those in which the State in question is the object of an armed attack is held by the majority to be utterly inadmissible, either on the basis of a direct and exclusive interpretation of Article 51 of the Charter, or on the basis of the relationship between that Article and the corresponding rule in international law, or else on the basis of a study of customary law alone"[404]. Nevertheless, Ago entered into an interpretation of art.51 of the Charter. Quoting P. Lamberti Zanardi, Ago argued that the English term "inherent right", probably mistranslated into French by the term «droit naturel», was never used in practice to designate the customary right. On the other hand, Ago did not share Kelsen's view that the adjective is merely decorative[405]. The word "inherent" which was quite simply the one used in the United States note during the negotiation of the Kellogg-Briand Pact "is intended

402 *Ibid.*, p.7 para.32.
403 *Ibid.*, pp.8–9 para.33.
404 *Ibid.*, p.10.
405 *Ibid.* note 48.

primarily to emphasize that the ability to make an exception to the prohibition on the use of force for the purpose of lawfully defending itself against an armed attack is a prerogative of every sovereign State and one that it is not entitled to renounce"[406]. According to Ago, it is not possible to read into the text of art.51 any kind of extension of this right to other cases which the State is affected by an infringement of a right, which, however important, is not held to be one of those infringed by an armed attack. The idea that the case mentioned in art.51 is intended simply to serve as an example is rejected as "absurd" and as conflicting with the evidence in the *travaux préparatoires*[407]. Lastly, the plain truth would be that the principles which were current in general international law at the time when the Charter was drafted in no way differed, as to substance, from those laid down in art.51: "The entire question of a conflict between two allegedly different rules, one said to be operative in general international law and the other in the United Nations system of law, is artificial and has no basis in fact. There is no conflict, no 'referral' from the one to the other. In international law, whether customary general international law or the treaty law of the Charter, there is only one exception, that of 'self-defence', to the prohibition they now impose on the use of armed force in inter-State relations, i.e. the right to take up arms to resist an armed attack"[408].

Introducing his report to the Commission Ago pointed out that in the context of art.30 the Commission had been obliged to note that the United Nations system deprived States acting individually of one possibility open to them under earlier international law, namely, the possibility of using armed force when applying countermeasures[409]. The idea that the concept of self-defence was wider in general international law than it was in the Charter seemed to reopen the possibility of the use of armed force under the pretext of self-defence in the case of the infringement of a right, for such a possibility would be excluded as a countermeasure and because the United Nations system did not in fact offer all of the guarantees it had seemed to promise in the beginning. Ago said that it was not possible to go so far as to change the existing law in that way. Although it might be desirable to change the United Nations system and make it more restrictive or more flexible, distorting the concept of self-defence would not be the

406 *Ibid.*
407 *Ibid.*, p.11.
408 *Ibid.*
409 Note 319, p.187 para.20.

best way of bringing about such a change. The Commission's point of departure should be a concept of self-defence which, in substance, was identical in general international law and in the United Nations system, namely restricted to a response to aggression and not as a reaction to other unlawful acts[410].

Ago's view did not find acceptance in the Commission's discussion[411]. The prevailing view was that the Commission should not decide whether or not the rule of self-defence in general international law and in art.51 of the Charter is identical. This was the reason for deleting the specific reference to art.51 as originally proposed by Ago in draft art.34. The Commentary to that article refers to the dispute on the relationship between self-defence in customary law and in the Charter[412], but refuses to take a position: "... it is not for the Commission to take a stand on this matter in connection with the present draft articles, nor to allow itself to be drawn into a process of interpreting the Charter and its provisions, which would be beyond its mandate. The Commission therefore sees no reason why its commentary should set forth its position on the question of any total identity of content between the rule in Article 51 of the Charter and the customary rule of international law on self-defence. The Commission intends in any event to remain faithful to the content and scope of the pertinent rules of the United Nations Charter and to take them as a basis in formulating the present draft article"[413].

In fact, however, the Commission has taken a position in the Commentary to art.34 on the aforementioned issue in the context of distinguishing art.34 from arts.33 and 30. The criteria employed there are in substance based on a restrictive interpretation of self-defence as a response to an armed attack. What has happened is that the Commission could not agree to accept Ago's view on the relationship between self-defence in the Charter and in customary law without recognizing that this view is precisely the foundation upon which the distinctions set forth in the same Commentary are built to distinguish self-defence from other circumstances precluding wrongfulness. This is an inevitable result of the necessity of employing certain concepts to distinguish the various circumstances in Chapter V of the draft articles in spite of the verbal reservation that the

410 *Ibid.*, para.21.
411 *Ibid.*, p.188 *et seq.*
412 Note 333, pp.58–59 para.19.
413 *Ibid.*, p.59 para.20.

Commission would refrain from defining the concepts referred to in those provisions.

b) Preventive self-defence

In his report Ago had taken a position against the broader view of self-defence on the questionable assumption that this would not involve an interpretation of the Charter of the United Nations. In reality the separation of the question of interpreting the Charter and in particular art.51 from the question of interpreting the relationship between self-defence in the Charter and in general international law is completely artificial and impossible to maintain in the process of determining the meaning of self-defence in contemporary international law.

In dealing with the issue of preventive self-defence Ago started from the argument that the Commission had no mandate to express an opinion "on problems which, in the final analysis, only the competent United Nations bodies are qualified to settle"[414]. He was referring to the task of interpreting the Charter and its provisions. Accordingly, the Commission could hardly take sides in the controversy between those favouring a narrow and those favouring a broad interpretation of the language used in art.51 to describe the case in which "an armed attack occurs against a Member of the United Nations" («un membre des Nations Unies est l'objet d'une agression armée») as far as the question of preventive self-defence is concerned. Ago simply argued that it was well known that opinions differ as to this matter, that States have debated the issue in many specific cases and that there is no denying the shortcomings of either of the answers, and that it would be unlikely that general international law could offer greater clarity and certainty on this question than the legal system of the United Nations[415]. The rule that Ago proposed in formulating art.34 "can do nothing more than rely on decisions which can only be taken by other bodies"[416].

As no member of the Commission was in favour of expressly dealing with the issue of anticipatory self-defence[417], the Commission decided to follow Ago's suggestion[418].

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414 Note 318, pp.12–13 para.35.
415 *Ibid.*, p.13.
416 *Ibid.*
417 See in particular Schwebel (note 319) p.191 para.1.
418 Note 333, p.59 para.21 and note 211.

i) The interpretation of the terms "armed attack" and «agression armée»

In his report Ago stated it was not the purpose of art.34 to settle the problems related to the interpretation of the terms "armed attack" and «agression armée» and the question of their approximate equivalence[419]. One of the problems is to determine how intensive and extensive the use of armed force must be to qualify as an "armed attack" or «agression armée» in the sense of art.51 of the Charter. Ago referred to the definition of aggression adopted by the General Assembly the impact of which should not be underestimated in answering such questions. Moreover, difficulties could arise with view to the particular "object" against which the attack was directed or with respect to the "subjects" which carried it out. However, it would not be the purpose of art.34 to try to settle problems of this kind.

Introducing his report to the Commission, Ago emphasized that he had used the French expression «agression armée» which was not completely identical with the English equivalent "armed attack" or with the Spanish «ataque armado». The situation would be complicated by the definition of aggression by the General Assembly, yet the two concepts of aggression and armed attack were not exactly the same. The Commission should decide what it considered to be the most appropriate solution[420].

The Commission decided that in the Commentary to art.34 it should not deal with the question of the interpretation of these terms[421].

k) Collective self-defence

In his report Ago made two remarks concerning collective self-defence[422]. First, he dismissed the idea that collective self-defence means nothing more "than a plurality of acts of 'individual' self-defence committed collectively". Secondly, he did not agree with the view that collective self-defence may not be applied outside of the framework of regional arrangements for mutual assistance. A State could come to the assistance of another State suffering an armed attack without a prior treaty with that State, but the other State must request or consent to such assistance.

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419 Note 318, p.13 para.36.
420 Note 319, p.188 para.28.
421 Note 333, p.59 para.21.
422 Note 318, pp.13–14 para.37.

It is clear that Ago took the position of the prevailing view as to the meaning of collective self-defence. Again, the Commentary to art.34 refuses to determine the meaning of collective self-defence[423]. Only in a footnote did it point out in this connection "that the 'collective' self-defence expressly mentioned in Article 51 of the Charter is recognized in general international law, just as much as 'individual' self-defence, as being an exception to the general prohibition of the use of armed force"[424].

l) Self-defence against wrongful acts not using force

It is surprising that the Commentary to art.34 also expressly refrains from answering the question whether self-defence can be invoked to justify resistance to "an action which is wrongful and injurious, but undertaken without the use of force"[425]. In this context the text cites Bowett as an author "who goes a long way in this direction"[426]. This statement contradicts earlier passages in the Commentary to art.34 where the Commission determined that art.34 and the right to self-defence apply only in the case of an armed attack which definitely involves the use of force[427].

The reason why the Commission has left open this question and the aforementioned issues is explained with the argument that it would be both unnecessary and inappropriate to deal with them in art.34 as they "are at the very root of the 'primary' rules relating to self-defence"[428]. Thus, the Commission is referring to its fundamental distinction between "primary" and "secondary" rules in codifying State responsibility and to the restriction of its task by identifying only the latter.

The Commentary argues that it would be wrong for the Commission "to think that it was possible in a draft concerning rules governing the responsibility of States for internationally wrongful acts, to explore and devise solutions to these problems – some of which are a matter of consid-

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[423] Note 333, p.59 para.21. Riphagen (note 319), p.189 para.6, did not agree with Ago's view of "collective self-defence". According to Riphagen, the right to collective self-defence is a "real extension of the right of self-defence" and was inspired by a sound scepticism as to the capacity of the Charter system to protect the territorial integrity and political independence of all States. Schwebel, *ibid.*, p.191 para.1, agreed with the part of Ago's report dealing with collective self-defence.

[424] Note 333, p.59 note 213.

[425] *Ibid.*, p.59 para.21.

[426] *Ibid.* note 212.

[427] *Ibid.*, p.53 note 176.

[428] *Ibid.*, p.59 para.21.

erable controversy – arising in United Nations practice and in doctrine from the interpretation and application of Article 51 of the Charter. The Commission's task in regard to the point dealt with in article 34, as in the case of all the other draft articles, is to codify the law which relates to the international responsibility of States. The Commission would certainly be doing more than it has been asked to do if it tried, over and above that, to settle questions which ultimately only the competent organs of the United Nations are qualified to settle. It is not for the Commission to opt for one or another of the opposing arguments sometimes put forward with regard to the interpretation of the Charter and its clauses. Besides, it is not the purpose of the present article to seek a solution to these various problems"[429]. The self-restraint the Commission expresses with these words has in reality little to do with the task of the Commission or with its competence as compared with the competence of organs of the United Nations. It is a more or less elegant formulation of the inability of the Commission to agree on substantial and in part highly controversial matters relating to the right of self-defence in modern international law.

m) "Necessary character", "proportionality" and "immediacy" of self-defence

Ago's report dealt with three characteristics required by doctrine in order for an action to be qualified as legitimate self-defence. Firstly, the action taken in self-defence must be "necessary". The State acting in self-defence must have no other means available than the use of armed force to repel the attack. If it had been able to achieve the same result by measures not involving the use of armed force, it would not be justified by self-defence as an exception to the general prohibition of the use of force[430]. Ago stressed that this "self-evident" requirement would be particularly important if the idea of preventive self-defence was admitted.

The second requirement concerning proportionality would deal with the relationship of the action taken in self-defence and its purpose, namely of halting and repelling the attack, or, if anticipatory self-defence is recognized, of preventing it from occurring. Ago emphasized that it would be incorrect to think that there should be proportionality between the conduct constituting the armed attack and the opposing conduct. He focused on the result to be achieved by defensive action and not on the forms, substance and strength of the action itself which could assume dimensions

[429] Note 333, pp.59–60 para.21.
[430] Note 318, p.15 para.39.

disproportionate to those of the attack suffered[431]. Ago warned of the danger of confusing reprisals and self-defence[432]. In the case of reprisals it was necessary to ensure some proportionality between the injury suffered and the injury resulting from any sanctions. In the case of self-defence, it was essential to avoid the error of thinking that there should be some proportionality between the action of the aggressor and the action of the State defending itself. Proportionality could only be measured by the objective of the action which was to repel an attack and prevent it from succeeding. The State which was the victim of an attack could not be expected to adopt measures that in no way exceed the limits of what just might suffice to repel the attack. Ago was in favour of a flexible interpretation of the requirement of proportionality: "If, for example, a State suffers a series of successive and different acts of armed attack from another State, the requirement of 'proportionality' will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks"[433].

It is difficult to understand how this statement conforms to Ago's assessment that the requirements of "necessity" and "proportionality" of the action taken in self-defence could simply be described as two sides of the same coin: "Self-defence will be valid as a circumstance precluding the wrongfulness of the conduct of the State only if that State was unable to achieve the desired result by different conduct involving either no use of armed force at all or merely its use on a lesser scale"[434]. Both requirements refer to the purpose of self-defence of halting an armed attack and preventing it from succeeding. But if a State acting in self-defence is obliged by the requirement of "necessity" to employ no or a lesser amount of armed force, as far as that objective can be achieved, is there not a barrier to a single armed action "on a much larger scale" in response to a series of successive and different attacks? The answer is not clear as it depends on whether one looks at the successive incidents of armed attack in isolation and relates the possibility of self-defence to the respective incidents, or whether the whole context is taken in consideration in which the legitimacy of the form, substance and strength of the counterattack in self-defence is measured by the cumulative effects of or threat posed by the series of attacks. In the latter case the borderline between "offensive" and

[431] *Ibid.*, pp.15–16 para.40.
[432] See also note 318, p.188 para.25.
[433] Note 318, p.16 para.40.
[434] *Ibid.*

"defensive" action as well as between self-defence against an occurring attack and preventive self-defence tends to become blurred.

It is interesting to note that, in his report, Ago regarded as an inadmissible excessive form of self-defence the large-scale murderous bombing of large areas of a State's territory in order to secure the evacuation of a small island wrongfully occupied by its forces[435]. Introducing his report to the Commission, he referred to the "concept of reasonable action" which meant that self-defence could not justify "a genuine act of aggression committed in response to an armed attack of limited proportions"[436]. However, in his report he also maintained that the limits inherent in the requirement of proportionality would be clearly meaningless where the armed attack and the likewise armed resistance to it lead to a state of war between the two countries[437].

As to the requirement of immediacy, meaning that armed resistance to an armed attack should take place while the attack is still going on and not after it has ended, Ago explained that a State could no longer claim to be acting in self-defence if, for example, it drops bombs on a country which has made an armed raid into its territory after the raid has ended and the troops have withdrawn beyond the frontier[438]. Introducing his report to the Commission, Ago stated that if the aim of the reaction to an armed attack was to halt aggression it could not fail to be immediate. That was an "inherent aspect of self-defence", and not one of the requirements for the existence of that concept[439].

The Commentary to art.34 refrains from discussing the requirements of necessity, proportionality and immediacy as conditions for the legitimacy of the exercise of the right of self-defence. It states that the Commission did not feel that it should examine in detail issues such as the "necessary" character which the action taken in self-defence should display in relation to the aim of halting and repelling the aggression, or the "proportionality" which should exist between that action and that aim, or the "immediacy" which the reaction to the aggressive action should show: "These are questions which in practice logic itself will answer and which should be resolved in the context of each particular case"[440].

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435 *Ibid.*, p.17.
436 Note 319, p.188 para.25.
437 Note 318, p.17 para.40.
438 Note 318, p.17 para.41.
439 Note 319, p.188 para.26.
440 Note 333, p.60 para.22.

n) Self-defence against third States

The Commentary also notes that the interests of a third State must be fully protected in case of self-defence against an armed attack by another State. Art.34 would not preclude the wrongfulness of an act causing injury to a third State. The observations made in this connection in the Commentary to art.30 would apply *mutatis mutandis* to the case in which the rights of a third State are violated by action taken in self-defence[441].

V. Conclusion

The purpose of draft arts.30 and 34, as envisaged by the ILC, is conditioned by the function of Chapter V of Part 1 as a whole. In the context of dealing with the "origin" of State responsibility, Chapter V attempts to determine those cases in which there is exceptionally no international responsibility following from an act which would normally entail responsibility for the breach of an international obligation towards another State.

The Commission has identified seven separate circumstances precluding wrongfulness in arts.29 to 34 without, however, considering this enumeration to be exhaustive. As the catalogue cannot be construed to be exclusive, there is a degree of uncertainty arising as to the admissible pleas of exoneration from responsibility in international law. The argument that new circumstances precluding wrongfulness may evolve *de lege ferenda* is not quite convincing. The task of the Commission is to codify the law as it stands and to decide on issues where a progressive development of international law seems appropriate. The difficulty of achieving a consensus in this rather complex area must, however, be admitted.

The general distinction between the various circumstances precluding wrongfulness is based upon the criterion whether prior conduct of the injured State is relevant (arts.29, 30 and 34) or not (arts.31, 32 and 33). In contrast to all other circumstances only arts.30 and 34 require the prior commission of an internationally wrongful act by the State against which justified action may be taken, in the case of art.34 the commission of an internationally wrongful act of a specific kind.

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[441] *Ibid.*, p.61 para.28. Riphagen (note 319), p.189 para.7, had remarked that one point had been overlooked in both draft arts.33 and 34. The texts seemed to allow for the interpretation that an act of necessity or of self-defence precluded the wrongfulness of the "act *erga omnes*", which could have not been the intention of the drafter. Even in the case of self-defence against an aggressor State, the neutrality of a third State must in principle be respected.

Although arts.29 to 34 refer to quite different types of situations, their universal legal effect is to preclude the "wrongfulness" of the acts in question. This is an unsatisfactory solution as far as arts.31, 32 and 33 are concerned where the victim State may be completely innocent of the cause giving rise to a plea of exoneration. Within the legal framework of the draft articles on State responsibility it means that the act infringing rights of the victim State in the case of arts.31, 32 and 33 is not wrongful and that there is no breach of an international obligation. Legally, the victim State would therefore be barred from taking protective measures to defend its rights against a State invoking, for example, the plea of "necessity". This seems to be a major defect of the system of circumstances precluding wrongfulness as a whole which would deserve further investigation. For it is difficult to accept that, for example, in the case of the sinking of the French Fleet at Oran by the British in June 1940 to prevent the French ships from falling into the hands of Germany, which was justified on the grounds of necessity, the French forces were not entitled to protect life and ships against the British attack. To avoid such a result, which seems inevitable on the basis of the ILC's draft articles, I suggest to consider to introduce a distinction between the preclusion of "wrongfulness" and of "responsibility" or perhaps to apply rules analogue to the law of war. "Necessity" may exclude or affect international responsibility of a State for violating the rights of another, innocent State, as far as the obligation to pay damages is concerned, when it comes to *ex post facto*-evaluation and a final settlement of the issue. But on what grounds should the victim State be deprived of the right to defend itself against the action at the moment it occurs?

As to arts.30 and 34, it is significant that they refrain from defining the concepts to which they refer. This approach creates considerable difficulties in determining when the provisions actually apply. As in the case of other draft articles on State responsibility they are at such a high level of abstraction that they are of almost no practical value at all[442]. This is partly due to the ILC's theoretical distinction between so-called "primary" and "secondary" rules, only the latter of which the Commission is attempting to codify. Nevertheless, the questions excluded from Chapter V inevitably arise in the context of Part 2 dealing with the legal consequences of an internationally wrongful act. Chapter V may have to be redrafted in the light of the conclusions reached in determining the legitimacy of reactions against an internationally wrongful act in Part 2. It is artificial to distin-

[442] McDougal, quoted by R.B. Lillich, Proceedings of the 73rd Annual Meeting of the American Society of International Law 1979, p.244.

guish "countermeasures" and "self-defence" as "circumstances precluding wrongfulness" on the one hand and as legal consequences of State responsibility on the other. The requirements determining their admissibility are the same in both cases. Their function as possible forms of self-help against an international offence committed by another State distinguishes them essentially from the other circumstances enlisted in Chapter V.

Although the Commission expressly refuses to define the concepts referred to in the text of draft arts.30 and 34, emphasizing their limited purpose, it is nevertheless forced to employ certain concepts to distinguish the various circumstances precluding wrongfulness. While art.30 refers to legitimate reactions against a broad variety of international offences, the term "countermeasures" covers two distinct cases, the case in which a State acts unilaterally on its own decision against another State breaching an international obligation towards it, and the case in which a State takes action against the delinquent State on the basis of a decision of an international organization. The use of the term "countermeasure" instead of the word "sanction", as originally proposed by Ago, is merely a matter of terminology. As both cases are of quite a different nature, it seems highly doubtful whether they can be properly dealt with in the context of one and the same article. Similarly, it is questionable whether reprisals and the *exceptio non adimpleti contractus* under art.60 of the Vienna Convention are comparable forms of reaction to a breach of an international obligation.

As to the legitimacy of reprisals, the Commission refers to the conditions established by the *Naulilaa* award and correctly maintains that under the general prohibition of the use of force in modern international law armed reprisals are no longer admissible. It takes note of the renewed discussion of the latter aspect with view to the ineffectiveness of the United Nations system and with regard to special conflict areas such as in the Middle East. But it incorrectly stipulates that this discussion would rely on concepts other than armed reprisals and also avoids taking a position on this matter in the context of art.34 dealing with self-defence.

The formulation of art.34 is the result of an attempt to circumvent all the substantial problems related to the concept of self-defence in modern international law, to the interpretation of art.51 of the United Nations Charter and the determination of the relationship between art.51 and customary international law. The Commentary to this draft article contains contradictory statements. Ago's suggestion and his report were based on a restrictive view of self-defence permitting self-defence only in the case of an armed attack by another State and expressly rejecting the view that there still exists a broader concept of self-defence in customary international law

beyond art.51 of the Charter. The Commission was unable to agree on this view and under the pretext that it was not competent to interpret the Charter of the United Nations refused to take a position on the dispute concerning the concept of self-defence. However, in accepting Ago's passages concerning the distinction of self-defence from other circumstances precluding wrongfulness it inadvertently adopted a narrow view of self-defence. According to this distinction, art.30 refers to a broad variety of international offences against which justified action may be taken, while art.34 refers to a legitimate reaction against an international offence of a specific kind, namely an armed attack for which another State is responsible. The *Caroline* Case is considered to fall into the category of necessity and not into that of self-defence. In the context of art.33 dealing with necessity, however, the ILC does not decide whether or not the use of armed force in cases other than self-defence is admissible, for example, to protect nationals abroad. This contradicts the statement made in art.34 that an armed attack for which another State is responsible is the only exception permitting the use of armed force in self-defence to the general prohibition of the use of armed force in international relations. The Commentary to art.33 does not exclude the possibility that there may be further exceptions. Problems are shunted from art.30 to art.34 and then again to art.33 simply to state at the end that the Commission is unable to give a definite answer or that it would not be necessary in the context of the present provision.

Arts.30 and 34 seem to reflect a desire for systematization as *l'art pour l'art* on the basis of an intellectual approach to the codification of international law in a very complex area which may prove generally unhelpful. As R.B. Lillich remarked in the panel discussion of the American Society of International Law in 1979 on "State Responsibility, Self-Help and International Law": "Ago's articles have received almost no attention in the literature, and when one looks at them for guidance in an actual case – which I am sure the Department of State never does – they are not of much help"[443]. It would be unfair, however, not to point out the difficulty of achieving a consensus in an area so disputed between States such as "countermeasures" and "self-defence". To a certain degree the respective draft articles reflect the dissent on fundamental concepts in international law even where they attempt to circumvent the problems by not taking a position.

[443] *Ibid.*, p.245.

Appendix

1. Texts of the Articles of Part 1 of the Draft Adopted by the Commission on First Reading*

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. Characterization of an act of a State as internationally wrongful

An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.

*YILC 1980, vol. II (Part 2), p.30 *et seq.*

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 the 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 organization 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 organization 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 organization

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization 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 a 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 organization

The conduct of an organ of an international organization 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, paragraph 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 that 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 a 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 recognized as a crime by that community as a whole constitutes an international crime.

3. Subject to paragraph 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 of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 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 event, 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 continues.

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 that 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 recognized by the international community of States as a whole as a norm from which no

derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 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 a 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 prejudge any question that may arise in regard to compensation for damage caused by that act.