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CHAPTER V

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

Addendum

E. Text of the draft articles on Responsibility of States for internationally wrongful acts (*continued*)

2. Text of the draft articles with commentaries thereto (*continued*)

CHAPTER III

SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

(1) Chapter III of Part Two is entitled "Serious Breaches of Obligations Under Peremptory Norms of General International Law". It sets out certain consequences of specific types of breaches of international law, identified by reference to two criteria: first, they involve breaches of peremptory norms of general international law; second, the breaches concerned are in themselves serious, having regard to their scale or character. Chapter III contains two articles, the first defining its scope of application (article 40), the second spelling out the legal consequences entailed by the breaches coming within the scope of the Chapter (article 41).

(2) Whether a qualitative distinction should be recognized between different breaches of international law has been the subject of a major debate.[1] The issue was underscored by the International Court of Justice in the *Barcelona Traction* case, when it said that:

> "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[2]

The Court was there concerned to contrast the position of an injured State in the context of diplomatic protection with the position of all States in respect of the breach of an obligation towards the international community as a whole. Although no such obligation was at stake in that case, the Court's statement clearly indicates that for the purposes of State responsibility certain obligations are owed to the international community as a whole, and that by reason of "the importance of the rights involved" all States have a legal interest in their protection.

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[1] For full bibliographies see M. Spinedi, "Crimes of States: A Bibliography", in J. Weiler, A. Cassese & M. Spinedi (eds.), *International Crimes of States* (Berlin/New York, De Gruyter, 1989), pp. 339-353 and N. Jørgensen, *The Responsibility of States for International Crimes* (Oxford, Oxford University Press, 2000) pp. 299-314.

[2] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970,* p. 3, at p. 32, para. 33. See M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford, Clarendon Press, 1997).

(3) On a number of subsequent occasions the Court has taken the opportunity to affirm the notion of obligations to the international community as a whole, although it has been cautious in applying it. In the *East Timor* case, the Court said that "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable."[3] At the preliminary objections stage of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, it stated that "the rights and obligations enshrined in the [Genocide] Convention are rights and obligations *erga omnes*":[4] this finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound by the Convention.

(4) A closely related development is the recognition of the concept of peremptory norms of international law in articles 53 and 64 of the Vienna Convention on the Law of Treaties.[5] These provisions recognise the existence of a small number of substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty.[6]

(5) From the first it was recognised that these developments had implications for the secondary rules of State responsibility which would need to be reflected in some way in the Articles. Initially it was thought this could be done by reference to a category of "international crimes of State", which would be contrasted with all other cases of internationally wrongful acts ("international delicts").[7] There has been, however, no development of penal consequences for States of breaches of these fundamental norms. For example, the award of punitive damages is not recognised in international law even in relation to serious breaches of obligations arising under peremptory norms. In accordance with article 34 the function of damages is essentially

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[3] *East Timor (Portugal v. Australia), I.C.J. Reports 1995*, p. 90, at p. 102, para. 29.

[4] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996,* p. 595, at p. 616, para. 31.

[5] Vienna Convention on the Law of Treaties, 23 May 1969, *U.N.T.S.,* vol. 1155, p. 331.

[6] See article 26 and commentary.

[7] See *Yearbook*… 1976, vol. II Part 2, pp. 95-122, especially paras. 6-34. See also commentary to article 12, para. (6).

compensatory.[8] Overall it remains the case, as the International Military Tribunal said in 1946, that:

> "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[9]

(6) In line with this approach, despite the trial and conviction by the Nuremburg and Tokyo Military Tribunals of individual government officials for criminal acts committed in their official capacity, neither Germany nor Japan were treated as "criminal" by the instruments creating these tribunals.[10] As to more recent international practice, a similar approach underlies the establishment of the *ad hoc* tribunals for Yugoslavia and Rwanda by the United Nations Security Council. Both tribunals are concerned only with the prosecution of individuals.[11] The jurisprudence of the tribunals has recognised the principle. In its decision relating to a *subpoena*

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[8] In *Velásquez Rodríguez (Compensation)*, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages: *Inter-Am.Ct.H.R., Series C, No. 7* (1989), p. 52. See also *Re Letelier and Moffit,* (1992) *I.L.R.,* vol. 88, p. 727 concerning the assassination in Washington by Chilean agents of a former Chilean Minister; the *compromis* excluded any award of punitive damages, despite their availability under United States law. On punitive damages see also N Jørgensen, "A Reappraisal of Punitive Damages in International Law", *B.Y.I.L.,* vol. 68 (1997), p. 247; S Wittich, "Awe of the Gods and Fear of the Priests: Punitive Damages in the Law of State Responsibility", *Austrian Review of International and European Law,* vol. 3 (1998), p. 31.

[9] International Military Tribunal for the Trial of the Major War Criminals, judgment of 1 October 1946, reprinted in *A.J.I.L.,* vol. 41 (1947), p. 172, at p. 221.

[10] This despite the fact that the London Charter of 1945 specifically provided for the condemnation of a "group or organization" as "criminal", *cf*. Charter of the International Military Tribunal, London, 8 August 1945, *U.N.T.S.,* vol. 82, p. 279, arts. 9, 10.

[11] See respectively arts. 1, 6 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993 (originally published as an Annex to S/25704 and Add.1, approved by the Security Council by Resolution 827 (1993); amended 13 May 1998 by Resolution 1166 (1998) and 30 Nov 2000 by Resolution 1329 (2000)); and arts. 1, 7 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for such Violations Committed in the Territory of Neighbouring States, 8 November 1994, approved by the Security Council by Resolution 955 (1994).

duces tecum in Prosecutor v Blaskić, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that "[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems."[12] The Rome Statute for an International Criminal Court of 17 July 998 likewise establishes jurisdiction "over the most serious crimes of concern to the international community as a whole", but limits this jurisdiction to "natural persons" (art. 25 (1)). The same article specifies that no provision of the Statute "relating to individual criminal responsibility shall affect the responsibility of States under international law".[13]

(7) Accordingly the present Articles do not recognise the existence of any distinction between State "crimes" and "delicts" for the purposes of Part One. On the other hand, it is necessary for the Articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which the International Court has given of obligations towards the international community as a whole[14] all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms

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[12] Case IT-95-14-AR 108*bis, Prosecutor v. Blaskić, I.L.R.,* vol. 110, p. 688 (1997), at p. 698, para. 25. Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996,* p. 595, in which neither of the parties treated the proceedings as being criminal in character. See also the commentary to article 12, para. (6).

[13] Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/10, art. 25 (4). See also art.10: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

[14] According to the International Court of Justice, obligations *erga omnes* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination": *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970,* p. 3, at p. 32, para. 34. See also *East Timor (Portugal v. Australia), I.C.J. Reports 1995,* p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996,* p. 226, at p. 258, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996,* p. 595, at pp. 615-616, paras. 31-32.

given by the Commission in its commentary to what became article 53 of the Vienna Convention[15] involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a small number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance - i.e., in terms of the present Articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole. The first of these propositions is the concern of the present Chapter; the second is dealt with in article 48.

Article 40

Application of this Chapter

1. This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Commentary

(1) Article 40 serves to define the scope of the breaches covered by the Chapter. It establishes two criteria in order to distinguish "serious breaches of obligations under peremptory

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[15] The International Law Commission gave the following examples of treaties which would violate the article due to conflict with a peremptory norm of general international law, or a rule of *ius cogens:* "(a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (b) a treaty contemplating the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every state is called upon to co-operate … treaties violating human rights, the equality of states or the principle of self-determination were mentioned as other possible examples": *Yearbook... 1966,* vol. II, p. 247.

norms of general international law" from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfil both criteria.

(2) The first criterion relates to the character of the obligation breached. In order to give rise to the application of this Chapter, a breach must concern an obligation arising under a peremptory norm of general international law. In accordance with article 53 of the Vienna Convention on the Law of Treaties,[16] a peremptory norm of general international law is one which is …

> "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."

The concept of peremptory norms of general international law is recognised in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.[17]

(3) It is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the Vienna Convention. Evidently such norms are not concerned with the systemic assumptions of the international legal system such as *pacta sunt servanda* or the principle of good faith.[18] Their concern is with substantive prohibitions of conduct which has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.

(4) Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory. This is supported, for example, by the Commission's commentary to what was to become article 53,[19] uncontradicted statements by governments in the course of the

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[16] Vienna Convention on the Law of Treaties, 23 May 1969, *U.N.T.S.,* vol. 1155, p. 331.

[17] For further discussion of the requirements for identification of a norm as peremptory see commentary to article 26, para. (5), with selected references to the case-law and literature.

[18] These are rules or principles "imposed by logical or legal necessity": see G. Abi-Saab, "The Uses of Article 19", *European Journal of International Law,* vol. 10 (1999), p. 339, at p. 349.

[19] *Yearbook*… 1966, vol. II, p. 247.

Vienna Conference,[20] the submissions of both parties in *Military and Paramilitary Activities* and the Court's own position in that case.[21] There also seems to be widespread agreement with other examples listed in the Commission's commentary to article 53: viz., the prohibitions against slavery and the slave trade, genocide, and racial discrimination and *apartheid*. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among governments as to the peremptory character of these prohibitions at the Vienna Conference. As to the peremptory character of the prohibition against genocide, this is supported by a number of decisions by national and international courts.[22]

(5) Although not specifically listed in the Commission's commentary to article 53 of the Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.[23] The peremptory character of this prohibition has been confirmed by decisions of international and national bodies.[24] In the light of the International Court's

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[20] In the course of the Vienna conference, a number of governments characterized as peremptory the prohibitions against aggression and the illegal use of force: see *United Nations Conference on the Law of Treaties, First Session,* A/CONF. 39/11, pp. 294, 296-7, 300, 301, 302, 303, 304, 306, 307, 311, 312, 318, 320, 322, 323-4, 326.

[21] *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986,* p. 14, at pp. 100-1, para. 190. See also President Nagendra Singh, ibid., at p. 153.

[22] See, for example, the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, I.C.J. Reports 1993,* p. 325, at pp. 439-440; *Counter-Claims, I.C.J. Reports 1997,* p. 243; the District Court of Jerusalem in *Attorney-General of the Government of Israel v. Eichmann, I.L.R.,* vol. 36, p. 5 (1961).

[23] *U.N.T.S.,* vol. 1460, p. 112

[24] Cf. the U.S. Court of Appeals, 2nd Circuit, in *Siderman de Blake v. Argentina,* (1992) *I.L.R.,* vol. 103, p. 455, at p. 471.; the United Kingdom Court of Appeal in *Al Adsani v. Government of Kuwait,* (1996) *I.L.R.,* vol. 107, p. 536 at pp. 540-541; the United Kingdom House of Lords in *R. v. Bow Street Metropolitan Magistrate, ex parte Pinochet Ugarte (No. 3),* [1999] 2 W.L.R. 827, at pp. 841, 881. Cf. the U.S. Court of Appeals, 2nd Circuit *Filartiga v. Pena-Irala,* (1980) *I.L.R.*, vol. 77, p. 169, at pp. 177-179.

description of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory.[25] Finally, the obligation to respect the right of self-determination deserves to be mentioned. As the International Court noted in the *East Timor* case, "[t]he principle of self-determination ... is one of the essential principles of contemporary international law", which gives rise to an obligation to the international community as a whole to permit and respect its exercise.[26]

(6) It should be stressed that the examples given above may not be exhaustive. In addition, article 64 of the Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole, as referred to in article 53. The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53.

(7) Apart from its limited scope in terms of the comparatively small number of norms which qualify as peremptory, article 40 applies a further limitation for the purposes of the Chapter, viz. that the breach should itself have been "serious". A "serious" breach is defined in paragraph 2 as one which involves "a gross or systematic failure by the responsible State to fulfil the obligation" in question. The word "serious" signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach and it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable. But relatively less serious cases of breach of peremptory norms can be envisaged, and it is necessary to limit the scope of this Chapter to the more serious or systematic breaches. Some such limitation is supported by State practice. For example, when reacting against breaches of international law, States have often stressed their systematic, gross, or egregious nature. Similarly, international complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, e.g. in terms of the non-applicability of the rule of exhaustion of local remedies.[27]

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[25] *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996,* p. 226, at p. 257, para . 79.

[26] *East Timor (Portugal v. Australia), I.C.J. Reports 1995,* p. 90, at p. 102, para. 29.

[27] See *Ireland v. United Kingdom, E.C.H.R., Series A, No. 25* (1978), para. 159; *cf.* e.g. the procedure established under ECOSOC resolution 1503 (XXVIII), which requires a "consistent pattern of gross violations of human rights".

(8) To be regarded as systematic, a violation would have to be carried out in an organised and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations, and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.[28]

(9) Article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the Articles to establish new institutional procedures for dealing with individual cases, whether they arise under Chapter III of Part Two or otherwise. Moreover the serious breaches dealt with in this Chapter are likely to be addressed by the competent international organizations including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter.

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[28] In 1976 the Commission proposed the following examples as cases of serious breaches of fundamental obligations:

> "(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
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> (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."

(*Yearbook... 1976*, vol. II, Part 2, p. 95).

Article 41

Particular consequences of a serious breach of an obligation under this Chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

Commentary

(1) Article 41 sets out the particular consequences of breaches of the kind and scale referred to in article 40. It consists of three paragraphs. The first two prescribe special legal obligations of States faced with the commission of "serious breaches" in the sense of article 40, the third takes the form of a saving clause.

(2) Pursuant to paragraph 1 of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could be envisaged, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organised in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalised cooperation.

(3) Neither does paragraph 1 prescribe what measures States should take in order to bring an end to serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation.[29]
It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether international law at present already prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international

[29] See also article 54 and commentary.

organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make at least some response to serious breaches in the sense of article 40.

(4) Pursuant to paragraph 2 of article 41, States are under a duty of abstention, which comprises two obligations, first, not to recognize as lawful situations created by serious breaches in the sense of article 40, and, second, not to render aid or assistance in maintaining that situation.

(5) The first of these two obligations refers to the obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches in the sense of article 40.[30] The obligation applies to "situations" created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.

(6) The existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in decisions of the International Court of Justice. The principle that territorial acquisitions brought about by the use of force are not valid and must not be recognized found a clear expression during the Manchurian crisis of 1931-1932, when the then US Secretary of State, Henry Stimson, declared that the United States - joined by a large majority of members of the League of Nations - would not …

> "admit the legality of any situation *de facto* nor ... recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the ... sovereignty, the independence or ... the territorial or administrative integrity of the Republic of China; ... [nor] recognize any situation, treaty or agreement which may be

[30] This has been described as "an essential legal weapon in the fight against grave breaches of international law": C. Tomuschat, "International Crimes by States: An Endangered Species?", in K. Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (The Hague, Nijhoff, 1998), at p. 259.

brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928."[31]

The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations affirms this principle by stating unequivocally that States shall not recognize as legal any acquisition of territory brought about by the use of force.[32] As the International Court of Justice held in *Military and Paramilitary Activities*, the unanimous consent of States to this declaration "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves."[33]

(7) An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990. Following the Iraqi declaration of a "comprehensive and eternal merger" with Kuwait, the Security Council in Resolution 662 (1990), decided that the annexation had "no legal validity, and is considered null and void", and called upon all States, international organizations and specialized agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as a recognition of it, whether direct or indirect. In fact no State recognised the legality of the purported annexation, the effects of which were subsequently reversed.

(8) As regards the denial by a State, of the right of self-determination of peoples, the International Court's advisory opinion on *Namibia* is similarly clear in calling for a non-recognition of the situation.[34] The same obligations are reflected in Security Council and

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[31] Secretary of State's note to the Chinese and Japanese Governments, in Hackworth, Digest, vol. I, p. 334; endorsed by Assembly Resolutions of 11 March 1932, *League of Nations Official Journal,* March 1932, Special Supplement No. 101, p. 87. For a review of earlier practice relating to collective non-recognition see J. Dugard, *Recognition and the United Nations* (Cambridge, Grotius, 1987), pp. 24-27.

[32] GA Resolution. 2625 (XXV), first principle, para. 10.

[33] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986,* p. 14, at p. 100, para. 188.

[34] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971,* p. 16, at p. 56, para. 126, where the Court held that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of

General Assembly resolutions concerning the situation in Rhodesia[35] and the Bantustans in South Africa.[36] These examples reflect the principle that where a serious breach in the sense of article 40 has resulted in a situation that might otherwise call for recognition, this has nonetheless to be withheld. Collective non-recognition would seem to be a prerequisite for any concerted community response against such breaches and marks the minimum necessary response by States to the serious breaches referred to in article 40.

(9) The obligation of non-recognition applies to all States, including the responsible State. There have been cases where the State responsible for a serious breach has sought to consolidate the situation by its own "recognition" of it. Under article 41 (2), "[n]o State" shall recognize the situation created by the serious breach as lawful. Accordingly, even the responsible State itself is under an obligation not to sustain the unlawful situation, an obligation consistent with article 30 on cessation and reinforced by the peremptory character of the norm in question.

(10) The obligation of non-recognition is, however, not unqualified. In the *Namibia* advisory opinion the Court, despite holding that the illegality of the situation was opposable *erga omnes* and could not be recognised even by States not members of the United Nations, said that:

> "the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the territory."[37]

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barring *erga omnes* the legality of a situation which is maintained in violation of international law".

[35] Cf. SC Resolution 216 (1965).

[36] See e.g. GA Resolution 31/6A (1976), endorsed by SC Resolution 402 (1976); GA Resolution 32/105N (1977); GA Resolution 34/93G (1979); see also the statements issued by the respective presidents of the UN Security Council in reaction to the "creation" of Venda and Ciskei: S/13549, 21 September 1979; S/14794, 15 December 1981.

[37] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 16, at p. 56, para. 125.

Both the principle of non-recognition and this qualification to it have been applied, for example, by the European Court of Human Rights.[38]

(11) The second obligation contained in paragraph 2 prohibits States from rendering aid or assistance in maintaining the situation created by a serious breach in the sense of article 40. This goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act, which are covered by article 16. It deals with conduct "after the fact" which assists the responsible State in maintaining a situation "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law"[39] It extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one. As to the elements of "aid or assistance", article 41 is to be read in connection with article 16. In particular, the concept of aid or assistance in article 16 presupposes that the State has "knowledge of the circumstances of the internationally wrongful act". There is no need to mention such a requirement in article 41 (2) as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.

(12) In some respects, the prohibition contained in paragraph 2 may be seen as a logical extension of the duty of non-recognition. However, it has a separate scope of application insofar as actions are concerned which would not imply recognition of the situation created by serious breaches in the sense of article 40. This separate existence is confirmed, for example, in the Security Council's resolutions prohibiting any aid or assistance in maintaining the illegal *apartheid* regime in South Africa or Portuguese colonial rule.[40] Just as in the case of the duty of non-recognition, these resolutions would seem to express a general idea applicable to all situations created by serious breaches in the sense of article 40.

(13) Pursuant to paragraph 3, article 41 is without prejudice to the other consequences elaborated in Part Two and to possible further consequences that a serious breach in the sense of

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[38] *Loizidou v. Turkey, Merits, E.C.H.R. Reports* 1996-VI, p. 2216; *Cyprus v. Turkey* (Application no. 25781/94), judgment of 10 May 2001, paras. 89-98.

[39] *I.C.J. Reports 1971,* p. 16, at p. 56, para. 126.

[40] *Cf.* e.g. SC Resolution 218 (1965) on the Portuguese colonies and SC Resolutions 301 (1971), 418 (1977) and 569 (1985) on South Africa.

article 40 may entail. The purpose of this paragraph is twofold. First, it makes it clear that a serious breach in the sense of article 40 entails the legal consequences stipulated for all breaches in Chapters I and II of Part Two. Consequently, a serious breach in the sense of article 40 gives rise to an obligation, on behalf of the responsible State, to cease the wrongful act, to continue performance and, if appropriate, to give guarantees and assurances of non-repetition. By the same token, it entails a duty to make reparation in conformity with the rules set out in Chapter II of this Part. The incidence of these obligations will no doubt be affected by the gravity of the breach in question, but this is allowed for in the actual language of the relevant articles.

(14) Secondly, paragraph 3 allows for such further consequences of a serious breach as may be provided for by international law. This may be done by the individual primary rule, as in the case of the prohibition of aggression. Paragraph 3 accordingly allows that international law may recognise additional legal consequences flowing from the commission of a serious breach in the sense of article 40. The fact that such further consequences are not expressly referred to Chapter III does not prejudice their recognition in present-day international law, or their further development. In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.
