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SEVENTH REPORT ON STATE RESPONSIBILITY

by

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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.

(1) Austria expresses the opinion that "the words 'ceases to be considered an internationally wrongful act if, subsequently ...' are by no means precise enough to prevent the occurrence of situations which, according to the commentary, the Commission intended to exclude". 1/

1/ Yearbook of the International Law Commission, 1980, vol. II (Part One), p. 92.

(2) Canada considers that the concept of retroactivity, as embodied in article 18 (2), "... should be circumscribed to the maximum degree possible". 2/

(3) Chile, in respect of article 18 (2), suggests "... to state expressly that it would apply only during the interval between the occurrence of the breach and the utilization of the mechanisms for 'implementing' the resulting international responsibility ...". 3/

(4) The Netherlands states: "An objection to the present wording of the second paragraph of article 18 is that it does not make it sufficiently clear that it is the primary norm of peremptory law itself which determines its effect: either retroactive force or immediate effect". 4/

(5) Yugoslavia suggests to "... include in paragraph 2" (of article 18) "some material from the commentary so that the proposed provisions would be clearer from a reading of the text itself". 5/

(6) Sweden considers article 18 (2) as "... not compatible with articles 64 and 71 of the Vienna Convention on the Law of Treaties" and remarks: "... it may be argued that paragraph 2 of article 18 deals with the existence or not of an obligation and that therefore it should not be included in a legal instrument aimed at codifying secondary rules only". 6/

(7) Mali points to the relationship between article 18 and articles 24 to 26 and consequently suggests "to emphasize that link, either by bringing those articles closer to article 18 or through cross-references". 7/

(8) Sweden expresses some doubts abut paragraphs 4 and 5 of article 18, considering the "difficult to understand" and dealing "with problems which could presumably be solved by using ordinary logic". 8/

(9) In the opinion of the present Special Rapporteur, it is clear that article 18 (2) deals with a question of so-called intertemporal law (i.c. of conflict between primary rules "in time"). Such questions arise in any legal

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2/ Ibid., p. 94.

3/ Ibid., pp. 98 and 99.

4/ Ibid., p. 103.

5/ Ibid., p. 106.

6/ Yearbook ... 1981, vol. II (Part One), p. 78.

7/ Yearbook ... 1980, vol. II (Part One), p. 101.

8/ Yearbook ... 1981, vol. II (Part One), p. 78.

system. Actually, if and when a rule is established, it is in the first instance up to those who establish the rule to indicate the intended scope of its force, including its force vis-à-vis other primary rules, past, present and future.

(10) In the international legal system we can take as a starting point that there are, possibly were, and hopefully will be, some rules of international jus cogens, formally defined in the 1969 Vienna Convention on the Law of Treaties as "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 53, second sentence; emphasis added).

(11) As regards the force of a norm of international jus cogens vis-à-vis norms laid down in treaties, the Vienna Convention contains special provisions in articles 53 (first sentence), 64, 71 and 66, under (a). All these provisions and the definition of jus cogens itself are "future-oriented" in the sense that they tell us what the legal relationships between States are from the moment a norm of jus cogens comes into force and up until the moment a later norm of jus cogens provides otherwise.

(12) Obviously, "the international community as a whole" is not itself bound by either the definition or the other provisions of the Vienna Convention on jus cogens. It is conceivable, for instance, that that community, while "accepting and recognizing" a particular norm, expressly derogates from the proviso in article 71 (2) (b), in fine, in determining that the particular norm does not affect (specific) rights, obligations, or legal situations created through the execution of a (specific) previous treaty prior to its termination by virtue of that norm.

(13) The same goes for article 18 (2) of the present articles on State responsibility. It is conceivable, for instance, that the international community as a whole, in creating a norm of international jus cogens, expressly determines that that norm shall not have the retroactive force provided for in article 18 (2). In this sense, the observation of the Netherlands 9/ is correct, although, in the opinion of the present Special Rapporteur, it does not require a change in the wording of that article.

(14) It should, on the other hand, be recalled that, under draft article 18 (2), the retroactive force of a norm of jus cogens is rather limited. One might even say that in a certain sense there is no retroactive force at all; the provision is rather directed at the situation of a procedure of settlement of a dispute between States, set in motion after the entry into force of a norm of jus cogens. In the settlement of such dispute the norm of jus cogens is to be taken into account to the extent that the conduct prescribed (not merely admitted) by that norm shall, as from the date of its coming into force, "cease to be considered an internationally wrongful act". In its commentary (para. 18) the Commission has made it perfectly clear that "... the act of the State is not

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9/ See supra, para. (4).

retroactively considered as lawful ab initio, but only as lawful from the time when the new rule of jus cogens came into force". What is perhaps less clear is that the application of the "intertemporal" rule of article 18 (2) must raise the question of the "moment and duration" of a breach of an international obligation, a question addressed in paragraphs 3, 4 and 5 of article 18 and in articles 24, 25 and 26.

(15) The normal (but see paras. 12 and 13 supra) implication of a norm of jus cogens prescribing a particular conduct is that, from the moment of coming into force of such norm, the prescribed conduct is not any more a breach of an international obligation. The "retroactive" force of article 18 (2) then is that, even if the newly prescribed conduct took place before the entry into force of the relevant norm of jus cogens, that conduct is no longer "considered" internationally wrongful after the entry into force. If one follows the construction of the Commission throughout its dealing with the topic, according to which an internationally wrongful act creates new legal relationships from the moment it occurs, there seems to be room for an analogy with a treaty creating (or: the execution of which creates) a new legal relationship between States. One would then turn to article 71 (2) (b), in fine, of the Vienna Convention for guidance. This rule is inspired by the well-known distinction, made by arbitrator Max Huber in the Island of Las Palmas (Miangas) Case, 10/ between "creation" of a legal situation and its "continued manifestation". Quite apart from the often remarked intrinsic difficulty of this distinction, 11/ there arises the difficulty that some of the legal consequences entailed by an internationally wrongful act in accordance with the draft articles of Part Two are not in themselves in conflict with the (new) rule of jus cogens. Thus, while it is clear that the State injured by the breach of an international obligation, committed before the entry into force of the norm of jus cogens, cannot, after that entry into force, claim a belated performance of that obligation, the substitute performance, consisting of the payment of a sum of money, is certainly not in itself "in conflict" with the norm of jus cogens. However, an international tribunal which, after the entry in force of the norm of jus cogens, decides that such claim is valid, at that time necessarily "considers" the past conduct to be an internationally wrongful act. Furthermore, if the States concerned arrive at an agreement according to which the State which, in the past, committed the then internationally wrongful act pays a sum of money by way of compensation to the then injured State, such agreement is presumably not void ab initio, even if concluded after the entry into force of the (new) norm of jus cogens.

(16) Actually, what draft article 18 (2) seems to intend to express is rather that, after the entry into force of a norm of jus cogens, States shall - to use the wording of article 71, paragraph 1, of the Vienna Convention - "eliminate ... the consequences" - in this context the legal consequences in the sense of draft

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10/ 22 A.J.I.L., p. 867 (1928).

11/ See, for example, P. Tavernier; Recherches sur l'application dans le temps des actes et des règles en droit international public (Paris) (1970).

article 1 of Part Two of the draft articles on State responsibility - of an act now prescribed by that norm, provided that the legal consequences already "executed" before the entry into force of that norm (such as a settlement arrived at through negotiations or otherwise) remain as they are.

(17) But the Commission's commentary seems to go less far inasmuch as it makes a distinction between the period of time before the entry into force of the norm of jus cogens and the period after that entry into force, irrespective of the date of settlement of the relevant claim of the injured State, the originally internationally wrongful act remaining an internationally wrongful act until the date of entry into force of the norm of jus cogens. This is presumably motivated by the consideration that a settlement usually takes a long time and that the original author State should not "profit" from the subsequent radical change of opinion of "the international community of States as a whole" as to the wrongfulness of certain conduct, by delaying the settlement of the original claim.

(18) In the opinion of the present Special Rapporteur all depends on the object and purpose of the particular norm of jus cogens involved in the case. In itself, on the international plane, it does not seem very likely that conduct that was considered unlawful all of a sudden comes to be considered not only as permitted but even as compulsory. It seems much more likely that there is an intermediary stage (of gestation, so to speak) in which the original wrongfulness becomes dubious. After all, the resolution of a "conflict" between the requirements of a regulation of relationships between States as such and the interests of humanity as a whole is, more often than not, the raison d'être of the emergence of a norm of international jus cogens. Accordingly, a residual rule of intertemporal law in this field, while on the one hand not interfering with claims already settled, should perhaps at the same time reserve the possibility of compensation for damage caused by an act, previously considered internationally wrongful and subsequently considered compulsory.

(19) In this way the normal force of the emergence of a norm of international jus cogens, making a specific conduct compulsory, would be rather in the nature of a "circumstance precluding wrongfulness" of that specific conduct in the past, while nevertheless - by analogy with draft article 35 of Part One - not prejudging "... any question that may arise in regard to compensation for damage caused by that act".

(20) Mitigated in this way - and without prejudice to its place in the final draft - the wording of the rule at present contained in article 18 (2) could, it would seem, be maintained as it stands, though, of course, the commentary should be modified. Actually, the present commentary is - as remarked in the written comments of Austria 12/ and Yugoslavia, 13/ not fully reflected in the text itself.

12/ See para. (1), supra.

13/ See para. (5), supra.

(21) The reservation suggested in paragraph 19 above would go in the direction of the written comments of Canada. 14/

(22) The suggestion contained in the written comments of Chile, 15/ in the opinion of the present Special Rapporteur, would not solve the problem. There are indeed three relevant dates: (a) the date of "the occurrence of the breach"; (b) the date of the entry into force of the norm of international jus cogens; and (c) the date of "utilization of the mechanism for implementing the resulting international responsibility". If date (c), in "serial time", appears before date (b) there seems to be no problem; normally it cannot be presumed that the establishment of a rule of international jus cogens should wish to interfere with a settlement of the original claim, or even a settlement, the procedure of which is formally commenced. Nor is there, of course, any problem if date (a) appears after date (b). The only problem arises if and when dates (a) and (b) appear before date (c).

(23) The written comments of Sweden 16/ seem in themselves correct. Indeed, draft article 18 (2) intends to describe the force - in terms of time - of particular primary rules. But it seems inevitable to do so in the context of the draft articles on State responsibility. The concept of international jus cogens having been accepted, one cannot ignore its impact on the rules of State responsibility. As a matter of fact, the Commission has recognized the special position of jus cogens in various other contexts of State responsibility.

(24) The written comments of Mali 17/ are correct 18/ and raise the question of the place to be given to draft article 18 (2) and its suggested mitigation 19/ in the final total set of draft articles. The present Special Rapporteur is fully convinced of the close relationship between draft article 18, paragraphs (1), (3), (4) and (5), and draft articles 24 to 26; the force of the obligation and the legal determination of the "moment and duration" of its breach are certainly two sides of the same coin. This might lead the Commission finally to put the all-important draft article 19 immediately after draft article 17 and to put draft article 18 (2) and its suggested mitigation, as dealing with a special aspect of the intertemporal problem, immediately after draft article 26.

14/ See para. (2), supra.

15/ See para. (3), supra.

16/ See para. (6), supra.

17/ See para. (7), supra.

18/ Compare para. (14), supra.

19/ Compare para. (19), supra.

(25) The doubts expressed by Sweden 20/ relate to paragraphs 4 and 5 of article 18 only; apparently, no such doubts are raised by paragraphs 1 and 3. In the opinion of the present Special Rapporteur, paragraphs 1, 3, 4 and 5 of article 18 should be read in conjunction with articles 24 to 26, which articles in their turn are linked with articles 20, 21 and 23, inasmuch as they introduce a typology of "obligations" and of the corresponding "acts of the State". It is, therefore, proposed to deal with the written comments on all these provisions at the same time.

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

When the result 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.

20/ See para. (8), supra.

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.

(1) Canada considers that "these three draft articles" (articles 20, 21 and 23) "should be ... reviewed to ensure that the distinction they outline is necessary and practical". 21/

(2) The Federal Republic of Germany considers "these provisions" (articles 20 to 26) "very abstract and theoretical" and, in particular, considers it necessary "to clarify the relationship between articles 20 and 23". 22/

(3) Austria, in respect of article 23, notes the absence of the qualifying phrases in the Commission's commentary from the text itself. 23/

21/ Yearbook ... 1980, vol. II (Part One), p. 94.

22/ Yearbook ... 1981, vol. II (Part One), p. 75.

23/ Yearbook ... 1980, vol. II (Part One), p. 92.

(4) The Netherlands is of the opinion that the difference between the rules stated in article 21 (1) and article 23 is "too slight to justify separate treatment". 24/

(5) Mali considers the present wording of article 23 "too categorical" and is of the opinion that "the relationship between this article and paragraph 1 of article 21 must be defined". 25/

(6) Canada wonders "whether there is a need for the detail and complexity of these three rules ..." (articles 24 to 26). 26/

(7) In the opinion of the present Special Rapporteur, there were two main reasons for the Commission to embark upon a typology of "obligations" and of "breaches" thereof. One reason is connected with article 22 (exhaustion of local remedies) and will be dealt with under that heading. The other reason is the time factor ("moment and duration") and its legal relevance for a number of questions arising within the context of Part Two and Part Three of the draft articles on State responsibility. The latter reason is underlined in paragraph (5) of the Commission's commentary on article 24. The time factor is, of course, also relevant in connection with the time limits of the "force" of the rule of international law imposing the obligation breached. 27/

(8) It should be recalled that draft articles 3 (b) and 16 put the "objective element" of an internationally wrongful act in terms of breach of an international obligation of the State. Obviously, what is "required" of a State by an international obligation is a matter of (interpretation of) the primary rule. One can distinguish various types of "requirements", but the relevance of such distinctions for the various questions, indicated in the foregoing paragraph, needs to be tested for each of those questions. Thus, e.g., as already remarked above in the context of draft article 18 (2), the force of a rule of international law is not necessarily limited to acts or facts which took place, or situations which began and ceased to exist within the time period between the entry into force and the termination of that rule.

(9) The Commission has distinguished three types of "requirements" (adoption of a particular course of conduct; achievement of a specified result; prevention of the occurrence of a given event) and four types of "acts of the State" (act not extending in time; act having a continuing character; composite act; complex act). Actually, in so far as the articles adopted in first reading of Part One, and the articles adopted in first reading, or proposed for Part Two and Part Three, are concerned, the legal relevance of these distinctions is of a rather limited scope.

24/ Ibid., p. 103.

25/ Ibid., p. 101.

26/ Ibid., p. 94.

27/ See article 18.

(10) On the other hand, there is bound to exist a large variety of obligations under international law. In particular, the obligations of conduct imposed by a rule of international law are normally explicitly or implicitly linked to a protection of particular interests of another subject of international law, possibly through the "object and purpose" of the rule. 28/ The "particularity" of the course of conduct, as well as the "specificity" of the result required, are often not of a per se character. Hence, e.g., the objections raised 29/ against the wording of article 23.

(11) Furthermore, as to the four types of "acts of the State", it should be recognized that, in reality, there is no such a thing as "an act not extending in time". Surely, there may exist legal obligations, which can only be fulfilled, or breached, by a series of acts or omissions, which are situated at different points of (serial) time, in order to constitute a particular course of conduct or to achieve cumulatively a specified result. On the other hand, there surely may exist per se obligations, for which the "effects" (being a "result") of conduct, not in conformity with its requirement, are irrelevant. Whether or not, in such cases, acts or omissions, or (final) results, situated in time beyond the period of "force" of the obligation, should be taken into account in assessing the existence or non-existence of a breach of the obligation, is a difficult question, which, it is submitted, does not necessarily have to receive the same answer in respect of all the legal consequences of a breach. 30/

(12) In this respect, article 18, paragraphs (1), (3), (4) and (5), dealing with "acts" seem to be not quite in conformity with articles 24 to 26, dealing with "breaches". While the former set of provisions seem to permit only the taking into account of "facts" situated within the period of (serial) time, during which the obligation was in force for the State concerned, the latter set of provisions is construed differently and assigns a moment of "beginning" and a moment of completion to the breach. In the case of article 24, those two moments are supposed to coincide (indeed, in the examples given - death, destruction - the "act", legally speaking, is the "result"); in the case of article 25 (1), only the moment of the first act is relevant, though the "duration" of the breach cannot exceed the period of force of the obligation ("... and remains not in conformity with the international obligation"); in the case of article 25 (2), only the moment of "completion" is relevant, though the "duration" of the breach extends backwards to the point of time of the first act or omission (irrespective of the moment of entry into force of the obligation?); in the case of article 25 (3), the same solution applies as in the case of article 25 (2); finally, in the case of article 26, the "result required" being the absence of a given "event", only the first moment of the event is relevant, though the "duration" of the breach extends forward (again: irrespective of the moment of termination of the force of the obligation?) to the moment of termination of the event.

28/ Compare, for example, article 31 of the Vienna Convention on the Law of Treaties.

29/ See paras. (3) and (5), supra.

30/ Compare para. (7), supra. and para. 14, infra.

(13) In the opinion of the present Special Rapporteur the fact that (a) the "force" of the obligation (article 18); (b) the content of the obligation (articles 20, 21 and 23); (c) the moment and duration of the breach (articles 24, 25 and 26); and (d) the legal consequences of the breach (Commission's commentary, paragraph (5) on article 24) are treated as separate groups of legal questions (both separate as groups and "unified" within each group) fails to take into account the interrelationship of those phases in the total process of the law and, consequently, is bound to create confusion and artificialities in its application, even if the residual character of the provisions is admitted (as, e.g., in article 28 of the Vienna Convention on the Law of Treaties). This may account for the - admittedly rather vague - misgivings expressed in the written comments of Governments. Incidentally, in the literature on the topic the misgivings are much more substantiated. 31/

(14) An example may illustrate the above. A first question relates to the meaning of the words "moment" and "duration" of a breach. At first sight one might be inclined to think that "duration" is a continued sequence of moments, in particular when those words are coupled with such words as "begins", "continues", "accomplished", "initiated" and "completed", and together related to what is called "time of commission" (in articles 24, 25 and 26). The necessary consequence of this view would be that any "moment" falling within the "time of commission" would be a "moment" on which the breach "occurs". This conclusion is, however, incompatible with differentiation made in articles 24 to 26. Apparently, then, "moment" and "duration" of a breach are not in an "equivalence relation". Indeed, "moment" then seems rather to refer to the time period of force of the obligation, while "duration" seems rather relevant for one of the legal consequences of a breach, to wit (in the words of paragraph (5) of the Commission's commentary on article 24) "... the determination of the extent of the injury caused by a given internationally wrongful act and, consequently, of the amount of reparation owed by the State that has committed the act in question". In the latter respect, however, under article 24, an act of a State "not extending in time" has no "duration" at all; nevertheless the "effects" of such act are clearly relevant for the determination of the amount of reparation and, such effects have to be evaluated inter#alia in terms of the "duration" of the interest permanently affected by the breach. On the other hand, as is stated in the same paragraph of the Commission's commentary, "the determination of the moment and duration of the breach of an obligation will always affect the determination of the moment (sic) from which the period of prescription will begin to run ...". But which moment is that: the first or the last moment of the (extended) "time of commission", or somewhere in between? And, to take still another phase in the total process of the law, in the words of the same paragraph, the moment and duration of a breach may be decisive " ... with regard to the determination of the existence or non-existence of the competence of an international tribunal to deal with a dispute arising out of the breach by a State of an international obligation where the agreement concluded by the parties to the dispute includes a clause limiting the jurisdiction established

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31/ See, for example, Combaceau "Obligations de resultat et obligations de competent" in Mélanges offerts à Paul Reuter, 1981, and the same writer in a soon to be published contribution to a Workshop held in The Hague, 14-16 January 1985; Salmon "Le fait étatique complexe; une notion contestable" in Annuaire Français de droit international (1982).

under or mentioned in the agreement to disputes concerning "acts" or "situations" subsequent to a specific date, provided that the parties in question have not expressly laid down special criteria for the interpretation of that clause". Incidentally, the last words just quoted underline the residual character of the draft articles dealt with here. In any case, the Commission, in paragraph (10) of its commentary on article 24, considers the analysis of the Phosphates in Morocco Case 32/ "particularly instructive" for the distinction between instantaneous acts producing continuous effects and continuing acts of a lasting nature. But this case turns on the interpretation of the words "... with regard to situations or facts subsequent to such ratification" in the relevant instrument. Furthermore, within the context of the application of the European Convention on Human Rights, the tendency - quoted in the Commission's commentary on article 18, note 436 - has been rather to accept the competence of the relevant (quasi-) judicial body even if the government act, curtailing or taking away in respect of a particular private person one of his (otherwise continuing) fundamental freedoms, dated from before the Convention entered into force in respect of the State(s) involved in the dispute. No doubt the object and purpose of the system instituted by that Convention is germane to this tendency.

(15) In view of the foregoing observations, the present Special Rapporteur is of the opinion that the Commission should reconsider whether the time factor should be addressed at all in the draft articles on State responsibility. No doubt the problem as such exists and has to be solved in practice. The question is only whether it is feasible to elaborate sufficiently clear and unambiguous rules for the solution of the problem. The present Special Rapporteur is doubtful about this. Actually, in the field of the domestic legal systems of several countries jurisprudence has shown that general legislative provisions in this field seldom yield easily applicable guidelines which do justice to the wide variety of norms and situations. This is not surprising; as remarked by the famous Argentine writer Jorge Luis Borges, time is an indocile subject.

(16) Any legal norm, legal relationship, legal status or legal obligation has its limits in serial time: it enters into force and terminates. This does not mean that facts occurring beyond those limits in serial time are a priori irrelevant for the contents of that norm, relationship, status or obligation. But the extent to which, and the manner in which 33/ they are relevant is a matter of choice to be made by those who establish the norm, relationship, status or obligation. Often such a choice is not made, or is left more or less ambiguous. But such rules - or rather meta-rules - are inevitably more abstract and more given to the use of fiction than the choice made by those who establish the actual norm, relationship, status or obligation. Such meta-rules tend to become either too "revolutionary" or too "conservative". This is particularly true for modern international law, because of its characteristic of trying to reconcile the coexisting of sovereign States and the dictates of humanity.

32/ P.C.I.J., Series C, Nos. 84 and 85 (1936).

33/ Compare, for example, Yearbook ... 1976, vol. II, (Part Two), p. 92, note 433.

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.

(1) Austria considers it "advisable not to limit the application of article 22 to the obligations mentioned in article 21, but to include obligations demanding the adoption of a particular course of conduct in the introductory sentence of article 22". 34/

(2) Canada considers that draft article 22 should be reformulated to take into account the exception to the rule of exhaustion of local remedies for cases "of injury to foreign individuals or to their property that has been caused outside the territory of the State concerned ...". 35/

(3) Mali is of the opinion that "... the article should reflect the fact that the breach of an obligation may occur when the local remedies process drags on indefinitely". 36/

(4) The Netherlands considers that the requirement of exhaustion of local remedies should be restricted to those cases where the breach took place within the jurisdiction of that State. 37/

(5) The Federal Republic of Germany "has always understood this rule as a procedural condition for the assertion of claims arising out of the breach of an already substantively defined international obligation ...". 38/

(6) Spain, in connection with article 22 remarks that this article does not cover the situation where - as is the case under the Spanish Constitution of 1978 - the central government, on its own initiative, may prevent or make good the injury when a territorial governmental entity commits a breach of international law. 39/

34/ Yearbook ... 1980, vol. II (Part One), p. 92.

35/ Ibid., p. 94.

36/ Ibid., p. 101.

37/ Ibid., p. 103.

38/ Yearbook ... 1981, vol. II (Part One), p. 76.

39/ Yearbook ... 1982, vol. II (Part One), pp. 16 and 17.

(7) In the opinion of the present Special Rapporteur all these written comments reflect misgivings in regard to the construction of the rule of exhaustion of local remedies, as adopted in draft article 22, in connection with article 21 (2) and with the notion of "complex act" (articles 18 (5) and 25 (3)). Indeed, draft article 22 is construed as a special case of application of articles 21 (2) and the "succession of actions or omissions by the same or different organs of the State in respect of the same case" as may occur in the course of exhaustion of local remedies is the main example of the notion of a "complex act".

(8) Obviously, it is again a matter of (interpretation of) the primary rule itself, whether the obligation it imposes - in the words of articles 21 (2) and 22 - "... allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State". According to draft article 22, it is only in the case of a "result required ... by an international obligation concerning the treatment to be accorded to aliens ..." that the alien concerned should himself take the initiative to exhaust the ("effective") local remedies ("available to him"). And the breach is then "completed" only if and when such exhaustion of local remedies fails to bring about the required (or an "equivalent") result; according to draft article 18 (5), nevertheless, there is a breach even if the "complex act" is completed only after the period of serial time, during which the obligation is in force for the State concerned. There is no mention in this provision of the situation in which, after the termination of the force of the obligation, the "complex act" is not completed, the (not any more required) result (or an equivalent result) having then be achieved through the final exhaustion of local remedies or otherwise by acts proprio motu of the State.

(9) All this seems to raise the question why a special treatment should be given to "international obligations concerning the treatment to be accorded to aliens". Is the ratio of the local remedies rule to be found in the statement that "the State" has not acted until all its competent organs have finally and definitely taken a stand? Or is the non-exhaustion of local remedies a sort of "contributory negligence" on the part of the alien? In the first case there seems to be no reason for a special treatment of obligations concerning the treatment to be accorded to aliens, it being sufficient that any obligation of result allows that this or an equivalent result may be achieved by subsequent conduct of the State. In the second case, there is room for the requirement of an initiative of the alien himself, but then this requirement is rather in the nature of a condition for the attribution of his interests to "his" State on the internationl plane, and should be qualified. Actually, such qualifications are in essence suggested both in the written comments of the Federal Republic of Germany 40/ and those of Canada, Mali and the Netherlands. 41/

(10) It may be noted that, if draft article 6 (1) (b) of Part Two were to be adopted by the Commission, the construction of an obligation of result, which is not really an obligation of result, but one to achieve alternatively an equivalent final result at some indefinite moment of time, would seem to be unnecessary.

40/ See para. (5), supra.

41/ See paras. (2), (3) and (4), supra.

Indeed, the only reason for such construction would seem to suspend the application of "countermeasures", or the submission of a claim to an international tribunal by the "injured" State, for a reasonable period, during which the "author" State can, by way of (an "equivalent") substitute performance, "legalize" the situation. The requirement of an initiative of the alien himself (exhaustion of local remedies) is based on an entirely different reason, to wit: that the situation is within the jurisdiction of the alleged author State.

(11) For the above reasons the present Special Rapporteur suggests for the consideration of the Commission:

(a) The deletion of paragraph 2 of article 21; and

(b) The redrafting of article 22 as follows:

"When the conduct of a State within its jurisdiction is not in conformity with what is required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, there is a breach of the obligation only if the alien concerned has exhausted the effective local remedies available to him without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment."

(12) The suggested new formulation of article 22 would also go in the direction of the written comment of Austria. 42/ The remark made by Spain 43/ does not require another formulation of article 22. The mere possibility for the central government to "prevent or make good the injury" on its own initiative does not put the alien under an obligation to request such a measure. Actually article 7 (1) and article 10 apply in the case mentioned by Spain; an internationally wrongful act has been committed and if the central government intervenes it fulfils the requirement mentioned in draft article 6 (1) (b) of Part Two, as proposed by the present Special Rapporteur.

42/ Para. (1), supra.

43/ Para. (6), supra.