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The Notion of Consent in Part One of the Draft Articles on State Responsibility

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Abstract

For over three decades, it has been the International Law Commission's position that the circumstance of consent involves something other than the consent which, through the rule *pacta sunt servanda*, imparts objective force to international agreements. During the tenure of the second Special Rapporteur on the law of state responsibility, Roberto Ago, the Commission adopted the view that the former suspends the international obligations which are incumbent on states whereas the latter functions to create, modify, or extinguish the rules whence such obligations stem forth. However, as the result of the study carried out by its last Special Rapporteur, James Crawford, the Commission has now come to distinguish between the circumstance of consent defined as a justification for non-performance of subsisting obligations, and consent defined as a requirement for the application of obligations. In this contribution, it is argued that both analyses are problematic. The former gives succour to a mistaken view of the sources of international law. The latter is based on a misunderstanding of the primary-rule–secondary-rule terminology; it justifies itself by referring to an ill-conceived definition of the notion of peremptory norms, and no less importantly undermines the purposefully cumbersome mechanism envisaged in the 1969 Vienna Convention on the Law of Treaties for suspension of multilateral treaties as between certain of the contracting parties only.

Key words

circumstances precluding wrongfulness; consent; custom; law of treaties; legal relations; suspension of obligation

1. Introduction

For over three decades, it has been the International Law Commission's position that the notion of consent has two distinct functions. During the tenure of its second Special Rapporteur on the law of state responsibility, Roberto Ago, the Commission adopted the view that when operative as a circumstance precluding wrongfulness, consent suspends the international obligations which are incumbent on states, whereas when functional pursuant to the law of treaties, consent creates, modifies, or extinguishes the rules whence such obligations stem forth. However, as the result of the study carried out by its last Special Rapporteur on the topic of state responsibility, James Crawford, the Commission has now come to distinguish between, on the one hand, the circumstance of consent defined in terms of a justification for non-performance of subsisting obligations, and, on the other hand, consent defined in

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terms of a requirement for the application of obligations. In this article, the objective is to show that the ascription of such dual functions to the notion of consent has been a major mistake in the history of the codification of the law of state responsibility. To that end, the first part of the analysis begins with an outline of Ago's account of the circumstance of consent and proceeds by describing how it further developed during the first reading process. Next, it is argued that the claim that consent is occasionally a source for rules of international law properly so-called is of dubious validity and that consent, irrespective of whether it is within Part One of the Draft Articles on Responsibility of States[1] or in the Vienna Convention on the Law of Treaties,[2] operates solely to create new legal relations. The second part at the onset describes the attitude adopted by Crawford in respect of the notion of circumstances precluding wrongfulness in general. Next, it is demonstrated how the last Rapporteur came to endorse the distinction between consent to suspension of the application of obligations imposed by rules of conduct and consent to non-performance of such obligations and how he gave it prominence in the commentary to Draft Article 20. In that context, particular attention is given to his (mis)understanding of the primary-rule–secondary-rule terminology and his efforts to justify the duality in the meaning of the notion of consent in light of the element of non-derogation in the definition of the peremptory rule expressed in Article 2(4) of the United Nations Charter. Lastly, the implication of his peculiar conception of the circumstance of consent for the institution of treaty suspension, as between certain of the contracting parties only, is brought into light.

2. Ago's definition of the circumstance of consent

In the study of international law prescribing the various exceptional circumstances, the first question that arises is whether the wrongfulness of conduct is excluded if such conduct is consented to, in advance, by the state that has the subjective right to the converse thereof. In other words, is the principle *volenti non fit injuria* applicable to international law? For Roberto Ago, the answer had to be in the affirmative 'if only as a matter of simple logic'.[3] As he saw it, once a state consented to an otherwise unlawful act of another state, there formed an agreement wherewith the international obligation could no longer have effect as between those two subjects, or, at least, was suspended in relation to the particular case.[4] With the obligation of the latter subject thus pushed into abeyance, the conduct in question conformed with international law, or in other words, was devoid of any wrongfulness. This definition explained, on the one hand, that the effectiveness of international obligations can be temporarily or permanently dispensed with only by consent articulated at the level of international law. On the other hand, it threw light on an important exception to the principle expressed by the maxim *volenti non fit injuria*: just as peremptory rules

1 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 YILC, Vol. 2 (Part Two), at 26–30.
2 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.
3 R. Ago, Eighth Report, 1979 YILC, Vol. 2, 3 at 30.
4 Ibid., at 31, 37–8.

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of international law make no allowance for derogation or modification through conclusion of treaty, the binding effect of the obligations which they impose may not be suspended or terminated by consent as a circumstance precluding wrongfulness.[5]

To Ago's eyes, the *volenti* principle seemed most strongly upheld in international judicial practice. In those disputes where consent had been invoked as a justification against an allegation of wrongdoing, none of the parties or any of the judges or arbitrators whose opinion had been sought had doubted that consent given to a specific act prevented the characterization of that act as internationally wrongful. Instead, disagreement manifested itself as regards the question whether, in the particular case, consent had actually been given, and if so, whether it had been of such source and origin as to constitute a valid defence.[6] As regards state practice, Ago's analysis revealed numerous instances where consent had been invoked as justification for the sending of troops to the territory of another state in order to suppress civil disturbances, insurrections, or revolts.[7] Remarkably, the record of discussions which had taken place in that connection at the Security Council indicated that governments which challenged the legality of such military interventions did not per se rule out that consent given by a state is capable of rendering the dispatching and stationing of foreign troops on its territory in conformity with international law. They had instead made assertions to the effect that the consenting government was not the legitimate representative of the state concerned or that consent had been extracted by means of coercion. Consequently, they too had recognized the validity of the *volenti* principle. Similar findings obtained from the review of the positions adopted with respect to the continued stationing of troops in foreign territory in the immediate aftermath of the end of the Second World War,[8] as well as the various cases where troops had been dispatched to another country in order to rescue hostages taken by terrorists.[9] International legal literature also lent confirmation to the admissibility of the *volenti* principle in international law. This was particularly the case for those works dealing with the question of state responsibility in general.[10] But it also applied to those studies the specific objective of which consisted of examining the lawfulness of a particular kind of conduct adopted by the state.[11]

However, despite its conformity with the logic of the basic principles involved, Ago's definition of the circumstance of consent, as described in his study submitted to the Commission and summarized in the foregoing, also contained a deficiency. It

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5 This statement is criticized in 3.2.2., *infra*.

6 See Ago's discussion of the cases of *Savarkar (France v. Great Britain)*, Award of 24 February 1911, 11 RIAA 243; *Russian Claim for Indemnities (Russia v. Turkey)*, Award of 11 November 1912, 11 RIAA 421; and *Trial of the Major War Criminals before the International Military Tribunal* (1947), Vol. 1, 171.

7 Important cases were the dispatching of troops by the United Kingdom to the Sultanate of Muscat and Oman in 1957 and to Jordan in 1958; by the United States to Lebanon in 1958; by Belgium to the Congo in 1964; and by the Soviet Union to Hungary in 1956, and to Czechoslovakia in 1968.

8 Ago referred to the discussions held before the Security Council concerning the presence of British armed forces in Greece during 1946, the presence of French and British troops in Syria and Lebanon despite the termination of hostilities in Europe and in the Far East, and the stationing of British forces in Egypt in accordance with the Anglo-Egyptian Treaty of 1936. See Ago, *supra* note 3, at 32–3.

9 For Ago, illustrative examples were the actions taken by West German counterterrorism forces at Mogadishu in 1977 and by Egyptian commandos at Larnaca in 1978.

10 For a detailed bibliography see Ago, *supra* note 3, at 34, note 151.

11 For a comprehensive bibliography see ibid.

failed to define the correlation between consent qua a factual circumstance capable of precluding the wrongfulness of the act of the state and consent as basis for the existence of international agreements pursuant to the law of treaties. It was only during the first reading process that Ago made an attempt to address this outstanding question.

2.1. Ago's definition and the first reading process

When the Commission began to consider Ago's Eighth Report in plenary, the main objection raised against the proposed provision dealing with consent was that, in the cases which had been adduced to fortify its codificatory rank, the absence of wrongfulness was due to the existence of an agreement between two states by means of which a rule of international law had been set aside.[12] In other words, if the presence of troops belonging to one state in the territory of another state did not constitute a wrongful act, it was not because of the circumstance of consent. It was because the two states had entered into an international agreement with a view to creating a particular rule in derogation from the general rule that prohibited all states from sending troops into foreign territory. It did not matter whether this agreement permitted of the conduct in question for one day, ten years, or indefinitely.[13] The important fact was that there had formed an international agreement properly so called, albeit one governed by the customary rules on conclusion of conventions in the unwritten form.[14]

Ago's response was that the situation of consent always presupposed a rule of international law in force between two states, requiring one of them to exhibit a certain behaviour. If the duty-bound state wished to act differently, it could enlist the consent of the other state to its acting so. Since the consent was given in response to a request, it could be maintained that the two subjects were involved in an agreement.[15] Ago nevertheless found it wrong to say that as the result of such agreement, 'a new rule had been established and that the obligation had been modified'.[16] This was because the agreement related only to the commission or omission of a specific act and not a rule. As far as he was concerned, when a state approached another state with a view to amending or terminating a rule in force between them, it was not a question of state responsibility, but a question relating to the law governing the operation of treaties.[17]

In sum, Ago's detractors were of the view that consent, unless in the form of waiver of responsibility, is a source of substantive rules of international law, and therefore anterior to the law which specifies the conditions for the existence of a wrongful act

12 See the comments made by Ushakov, Summary Records of the Thirty-First Session, 1542nd Meeting, 1979 YILC, Vol. 1, 44, at 46.
13 Summary Records of the Thirty-First Session, 1543rd Meeting, 1979 YILC, Vol. 1, 49 at 53.
14 Art. 2, subpara. 1(a) of the Vienna Convention on the Law of Treaties excludes unwritten agreements from the scope of the Convention. However, pursuant to Art. 3, paras. (a) and (b), this exclusion should neither prejudice the binding force of such agreements nor preclude the application thereupon of those rules whose validity is independent of the 1969 Convention.
15 Summary Records, 1543rd Meeting, *supra* note 13, at 50.
16 Ibid., at 51.
17 Ibid., at 50.

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of the state. In response, the second Rapporteur ascribed to the notion of consent two distinct functions. In his view, consent could create not only specific legal relations but also rules of international law. It established the former when operative pursuant to the law of state responsibility and the latter when functioning pursuant to the law of treaties. But is it really that consent within the ambit of the Vienna Convention and the agreement which it materializes are capable of generating rules of international law in the proper sense of the term; that is, directives which apply automatically and *ipso facto* to all legal subjects or to a large and indefinite class of subjects and not merely to those who have their hands on any particular instrument?[18] This question will be tackled next.

2.2. Consent as a basis for rules of international law properly so called

To the question whether consent amounts to a source of international rules, some of the most prominent strands of international legal thinking reply in the affirmative. The Pure Theory does so by journeying beyond the enumeration of creative facts in Article 38 of the Statute of the World Court to discover a basic norm to the effect that 'states ought to behave as they have customarily behaved'.[19] It is said that by reason of this external and thus non-positive and juristically un-testable norm, custom becomes the original or primary law-creating legal fact.[20] An important function of this custom, itself a derivative of the hypothetical basic norm, is to anticipate and organize the next law-creating factor. This it accomplishes through the rule *pacta sunt servanda*, thereby making it the essential function of any treaty to make general or particular rules of international law.[21]

Of those who are unimpressed by the empty repetition of the fact that states treat certain standards of conduct as obligatory rules,[22] some regard international law as the emanation of parallel wills of sovereign powers, and nothing else. *Vereinbarung* and the fiction of common consent is the only true source of international legality. Its objectified manifestation, they argue, accrues once a formal treaty is entered upon whereas its partly objectified expression obtains when decisive acts of sovereign

18 This definition of the notion of a rule is endorsed in P. Corbett, 'The Consent of States and the Sources of the Law of Nations', (1925) 6 BYIL 20, at 27–8; G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in F. van Asbeck et al. (eds.), *Symbolae Verzijl* (1958), 153 at 158.

19 H. Kelsen, *Principles of International Law* (1952), 314, 417–18.

20 H. Kelsen, 'Théorie générale du droit international public: Problèmes choisis', (1932) 42 *Recueil des cours* 117, at 124–37.

21 'It is the essential function of any treaty to make law, that is to say, to create a legal norm, whether a general or an individual norm.' Kelsen, *supra* note 19, at 319. However, Kelsen contradicts himself when he says,

> [t]he term 'general International law' designates the norms of international law which are valid for all the states of the world, whereas the term 'particular international law' designates norms of international law valid only for certain states. General international law is, as a matter of fact, customary law. As treaties are in principle binding only upon the contracting parties, and there is no treaty concluded by or adhered to by all states of the world, there is only customary, not conventional general international law.

Ibid., at 188.

22 This is Hart's criticism of Kelsen's vain attempts to fashion a basic norm for international law. See H. Hart, *The Concept of Law* (1994), 236.

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powers are accompanied by the wish for those acts to be regarded as the demand of positive law.[23]

The remainder, emboldened by the undemonstrable hypothesis of legal science,[24] and unable to accept the inevitable implication of the consent theory – that states are not bound by rules which they have not expressly or tacitly accepted as binding – rush to repair the long-severed link between the science of international law and the world of metaphysics. For the naturalist representation, it is the assumption of the will of the international community that international law shall be obeyed which constitutes the ultimate source of validity for all positive international law.[25] Having thus answered why international law is valid, the naturalist school proceeds to define treaties as instruments by means of which directives that are expressly adopted by states are laid-down and customary rules as the emanation of the implied consent of the community of states. It nevertheless maintains that 'it is not necessary – or, normally, possible – to show that a rule, asserted to represent a customary rule, has been followed (i.e. consented to) by all States' and that '[t]he element of consent is satisfactorily met by the circumstance that a rule has been generally followed, that it has been generally consented to'.[26]

From a realistic vantage point, however, things appear differently. The validity of a given rule is simply an observable social fact, consisting of the regular behaviour of the subjects, the courts, and other law-administering organs with respect to the directive contained in that rule. Consequently, positive law is not coterminous with law laid down by a particular law-making legal fact. It is broader, in the sense that it also encompasses those rules which, despite their not having any definite normative origin or source, are doubtless in existence.[27] Positive law thus consists of all law in force, of each and every rule which specifies some state of affairs or behaviour as justification for certain legal effects and consequences and which is moreover imbued with the ability to bring about those conditioned effects and consequences. Of this law, the most fundamental part consists of custom. Customary rules are spontaneously or even unconsciously developed, and only by reason of their

23 H. Triepel, 'Les rapports entre le droit interne et le droit international', (1923) 1 *Recueil des cours* 73; Corbett, *supra* note 18, at 23; D. Anzilotti, *Corso di Diritto Internazionale* (1928), 73–6; K. Strupp, *Eléments du droit international public universel, Européen et Américain* (1930) and 'Les règles générales du droit de la paix', (1934) 47 *Recueil des cours* 259, at 263; G. Tunkin, 'Remarks on the Judicial Nature of Customary Norms of International Law', (1961) 49 *California Law Review* 419, at 422–3; B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" Customary Law?', (1965) 5 *Indian Journal of International Law* 23; P. Weil, 'Towards Relative Normativity in International Law?', (1983) 77 AJIL 413, at 420. See also *SS Lotus Case (France v. Turkey)*, 7 September 1927, PCIJ Rep Series A No. 10, at 18: 'The rules of law binding upon States … emanate from their own free will'.

24 See H. Lauterpacht, *The Function of Law in the International Community* (2011), 426, 429–31.

25 H. Lauterpacht, *International Law: Collected Papers*, Vol. 2 (1970), at 92. Verdross too succumbs to transcendentalism when he holds that the basic norm of international law must be based on the universe of values and reason, on natural law. A. Verdross, *Völkerrecht* (1955), 23–5.

26 Lauterpacht, ibid., at 65–6.

27 A. Ross, *A Textbook of International Law* (1947), 95; R. Ago, 'Positive Law and International Law', (1957) 51 AJIL 691, at 716.

structure and functioning are recognized in the human intellect as part of a definite normative order. Consequently, their existence is to be inferred

> from a convincing series of external manifestations, whereby it is proved beyond doubt that they live and function as legal norms within the order of that society and that they produce those effects which the science of law recognizes and characterizes as legal effects.[28]

The remainder of the rules are enacted, in the sense that they are created by resolutions or judgments made by certain individuals or entities whose legislative competence is, in the last analysis, determined by one of the fundamental rules of the system; that is, the rules which per se cannot be regarded as enacted by any authority whatsoever.

When applied to the international legal order, which as such has no instrument akin to legislation, this means that only customary rules equal rules in the proper sense of the term, meaning that it is only they which apply *ipso facto* to all states and that it is they which lay down common standards of conduct with a view to promoting the basic interests of the community of states as a whole.[29] This customary framework in turn anticipates the establishment of legal relationships which provide for exchange of benefits or attainment of particular objectives as between certain subjects. More specifically, it permits two or more subjects to take advantage of the principle expressed by the maxim *pacta sunt servanda* so as to conclude international treaties or agreements, thereby establishing new legal relations *inter se* and, with them, new situations of right, privilege, power, or immunity that are strictly *in personam*. Consequently, by concluding a bilateral or multilateral treaty which provides only for exchange of benefits, the contracting parties merely apply a fundamental rule of international law – the rule *pacta sunt servanda* – and in so doing create rights and obligations that take effect only as between themselves. What they do not do is directly partake in the creation of any new obligation which would bind a non-party irrespective of its consent.[30] It is certainly not a rule of international law that state A and state B shall jointly construct and operate a system of locks on a certain river. The rule of international law is that if state A and state B enter upon an agreement, then they must comply with the terms of that agreement whatever they may be.[31]

This position is equally true with respect to the so-called normative treaties; that is to say, the category of multilateral treaties where the contracting parties are numerous and where their wills appear to be of the same content and in pursuit of

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28 Ago, ibid., at 720.

29 To the claim that international customary rules apply *ipso facto* to all states one may object by referring to the World Court's analysis of the existence of special custom in *Case Concerning Right of Passage over Indian Territory (Portugal v. India)*, Judgment of 12 April 1960, [1960] ICJ Rep. 6; and in *Asylum Case (Colombia v. Peru)*, Judgment of 20 November 1950, [1950] ICJ Rep. 266. True, in the mentioned cases, claims of a local or regional custom were considered and ultimately answered by the Court. But a closer look reveals that in those instances, the element of consent on the part of the state against which the existence of such a rule had been invoked played a vital role in the Court's reasoning. Thus, in those disputes, the Court erroneously applied the term *local custom* to situations which actually bore the hallmark of implicit agreement.

30 Fitzmaurice, *supra* note 18, at 157.

31 Corbett, *supra* note 18, at 28.

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similar ends. Such treaties and agreements, it is true, may at times appear to elicit compliance from non-parties. But such compliance is a deceiving impression of what is really the observance of equivalent obligations under customary law, obligations which have either pre-existed the instruments in question or have metamorphosed into customary law as the direct result of their entry to force and accordingly have assumed binding force independently of the *pacta* rule. Where the opposite is asserted, there is simply an unconscious attachment to the myth of the sovereign power, to the false idea that in the imperfectly organized society governed by international law, at least some rules must be the produce of the will of the state.

To the foregoing analysis it may nevertheless be objected that Ago's reference to rule-making by virtue of recourse to the law of treaties concerns the creation of special rules, i.e. rules which are intended to be binding as between a definite number of legal subjects and which take precedence over customary law through the generally recognized principle of normative conflict resolution expressed by the maxim *lex specialis derogat lege generali*. However, this objection is wide of the mark. For one thing, it assumes that treaties, to the extent that they are not codificatory, conflict with and ultimately abrogate customary international law. In this connection, it is important to bear in mind that any effective legal order is a cohesive whole, in the sense that its constituent elements function in general harmony with one another. In each and every effective legal order, therefore, there is a strong presumption against normative conflict.[32] Where normative conflict is indeed discerned, it is an occasion of serious crisis, an occasion that requires a decision that would alter the legal landscape in some dramatic way. From this it follows as a matter of course that the body of rules enforceable upon each and every legal subject simply cannot be taken to anticipate and promote the deliberate creation of special rules which are inconsistent with it and which render it invalid with respect to a particular group of persons. For another, the objection proceeds from a bizarre understanding of what constitutes a situation of normative conflict. The treaty provisions which entitle states A and B to fly their military aircraft through each other's airspace do not contradict the customary rule which commands every state to abstain from military overflight. This is because the treaty provisions and the rule in question are not applicable to the same situation and the same set of facts. The former clearly have the force of an exception to the latter. They thereby add a new element to the complete definition of the obligation which the rule imposes upon states A and B. The validity of the rule as such remains unaffected and the rule reinstates the original content of the obligation as between A and B the moment the treaty permitting of overflight by military aircraft suspends or terminates.

With this having been said, the question posed earlier, namely whether consent is a source of rules of international law, must be answered in the negative. Insofar as it is not expressed by all the members of the community of states, consent functions

32 M. Akehurst, 'Hierarchy of Norms in International Law', (1974–75) 47 BYIL 273, at 275–6; R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, Vol. 2 (1996), at 1275; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), 240–4; A. Tzanakopoulos, 'Collective Security and Human Rights', in E. de Wet and J. Widmar (eds.), *Hierarchy in International Law* (2012), 42 at 51.

solely to create new legal relations. Consequently, the notion of consent in the Vienna Convention and the notion of consent in Part One of the Draft Articles ought to be regarded as two sides of the same coin: the former as a circumstance precluding wrongfulness in respect of treaty relations as well as non-conventional relations, and the latter as a circumstance precluding wrongfulness with respect to those legal relations which are of non-conventional source and origin.[33]

3. Crawford's account of consent

In the foregoing analysis, it was said that once a state expresses its consent to an otherwise unlawful act of another state, there emerges an agreement whereby the corresponding obligatory relation ceases to have effect as between those two subjects in the particular case, or in other words, is replaced with a non-obligatory legal relation of the same content. Put in more concrete terms, consent that is validly given by subject A to the setting aside of a customary or a treaty obligation incumbent on subject B and demanding of it φ translates into a legal situation of privilege or *faculté* for B to conduct himself in $\sim\varphi$ in relation to A; or – and this really amounts to the same thing – it precludes the wrongfulness of $\sim\varphi$ to the extent envisaged by the terms of the consent expressed by A. It does not matter whether A's consent is expressed orally or in writing, far in advance or just before the commission of $\sim\varphi$.[34] There is in any event an international agreement between A and B permitting of $\sim\varphi$ on the part of the latter subject, an agreement despite which the rule demanding φ subsists.[35]

In the remainder of this article, the aim is to examine a competing proposition which has been advanced by James Crawford. This proposition is that the circumstance of consent does not as such cancel out the binding force of international obligation, thereby resulting in a situation of legal privilege to adopt a course of conduct which is generally prohibited, but that it merely indicates that conduct which is carried out in contravention of a subsisting obligation is devoid of its wrongful character. However, in order to bring this conception of the circumstance of consent fully into light and to point to its flaws, it is well to first describe how the last Special Rapporteur defined the correlation between the notion of breach and the circumstances enumerated in Chapter V to Part One of the Draft Articles.

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33 This conclusion, which follows, in the first place, from considerations of principle, is confirmed by the fact that the precepts which are pertinent to determining the validity of treaties also apply to the question of validity of consent to conduct which, in the absence of such consent, would amount to an internationally wrongful act of the state. In both contexts, consent has to be *valid*, *clearly established*, *really expressed*, and *attributable* to the state.

34 Parties to a bilateral treaty may at any time agree to suspend or terminate the treaty. Likewise, a multilateral treaty can be suspended or terminated at any time by the consent of all the parties. Things are different when two contracting parties to a multilateral treaty seek the suspension of treaty relations as between themselves only. In such cases, for consent to operate as a circumstance precluding wrongfulness, it is required that certain procedures are followed. As to what these procedures are see 3.2.3., *infra*.

35 In the context of treaties, the rule which demands the adoption of certain conduct, in the last analysis, is always the *pacta sunt servanda* rule.

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3.1. The question of the correlation between the notion of breach and circumstances precluding wrongfulness during the second reading process

During the second reading of Chapter III of Part One, the last Rapporteur observed that none of the provisions that specified the conditions for determining the existence of a breach of obligation made a reference to Chapter V. Draft Article 16 (first reading) which formed the backbone of Chapter III merely provided that '[t]here 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'.[36] The appended commentary apparently did not take the matter much further. It merely recalled that the Commission had employed the words 'not in conformity with what is required of it' so as to accurately express 'the idea that a breach may exist even if the act of the State is only partially in contradiction with an international obligation incumbent upon it'.[37] For the last Rapporteur, this meant that in the text adopted on first reading, the question of the correlation between the criteria for the existence of breach and the circumstances precluding wrongfulness had not been given due consideration.[38]

When the discussion resumed in the framework of Chapter V, the last Rapporteur argued that the conditions for determining the existence of an obligation and defining its scope are expressed or implied in the relevant primary rule whereas the secondary rules expressing the exceptional circumstances effectively presume the existence of obligation and instead enquire whether the state has a right to withhold performance.[39] On this basis, he concluded that:

> Chapter V is only relevant for so long as the obligation, the conduct inconsistent with it and the circumstance precluding the wrongfulness of that conduct coexist. Rather than saying that a circumstance precluding wrongfulness renders the obligation 'definitively or temporarily inoperative', it is clearer to distinguish between the existence of the primary obligation, which remains in force for the State concerned unless otherwise terminated, and the existence of a circumstance precluding the wrongfulness of conduct not in conformity with that obligation. This also avoids the oddity of saying that conduct, the wrongfulness of which is precluded by, say, necessity, is 'in conformity' with the primary obligation. The conduct does not conform, but if the circumstance precludes the wrongfulness of the conduct, neither is there a breach.[40]

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36 Introductory Commentary to Chapter III and Text of Draft Articles 16 and 19 with Commentaries thereto, adopted by the Commission at Its Twenty-Eighth Session, 1976 YILC, Vol. 2 (Part Two), 75 at 78.

37 Ibid.

38 J. Crawford, Second Report, 1999 YILC, Vol. 2, 3 at 12.

39 This line of reasoning is influenced by Fitzmaurice's circuitous comments on the distinction between suspension of treaty obligations and justified non-observance of treaty obligations. See G. Fitzmaurice, Fourth Report, 1959 YILC, Vol. 2, 37 at 46.

40 Crawford, Second Report, *supra* note 38, at 60 (references omitted). In agreement with Crawford, the following authors draw a line, as regards normative quality, between what they consider to be acts that are completely lawful and acts the wrongfulness of which is precluded pursuant to Chapter V in Part One of the Draft Articles: D. Alland, 'Countermeasures of General Interest', (2002) 13 EJIL 1221, at 1224, notes 13 and 1233; O. Spiermann, 'Humanitarian Intervention as a Necessity and the Threat or Use of *Jus Cogens*', (2002) 71 *Nordic Journal of International Law* 523, at 526 and note 12 therein; U. Linderfalk, 'State Responsibility and the Primary–Secondary Rules Terminology: The Role of Language for an Understanding of the International Legal System', (2009) 78 *Nordic Journal of International Law* 53, at 66–8. A similar trend can be observed in the works of George Fletcher, the man credited with rediscovering the importance of the distinction between justification and excuse in modern Anglo-American criminal law. According to Fletcher, '[j]ustified conduct in violation of the definition [of an offence] is not wrongful, but neither is it perfectly legal, as it is conduct that falls outside the scope of the definition'. *Rethinking Criminal Law* (2000), 576–7. In the

The first attempt to ground this peculiar approach in international judicial practice was to conjure up the dictum of the Arbitration Tribunal in *Rainbow Warrior* – that 'determination of the circumstances that may exclude wrongfulness (and *render the breach only apparent*) and the appropriate remedies for breach, are subjects that belong to the customary Law of State Responsibility'.[41] However, what most decisively contributed to reconceptualization of Chapter V was the declaration of the World Court in *Gabčíkovo-Nagymaros*. In that dispute, the Court said that:

> when it invoked the state of necessity ... Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, *its conduct would have been unlawful*. The state of necessity claimed by Hungary – supposing it to have been established – thus could not permit of the conclusion that, in 1989, it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary *would not incur international responsibility by acting as it did*.[42]

As far as Crawford was concerned, the refusal to consider Hungary's obligations non-existent even under a genuine state of ecological necessity and the simultaneous references to that circumstance as a negative requisite for illegality and as a ground-precluding responsibility meant that from the Court's perspective too, conduct the wrongfulness of which is precluded is conduct that neither conforms with the international obligation of the state nor constitutes a real breach thereof.

Not surprisingly, the circumstance of consent provided a formidable challenge to this definition.

3.2. The distinction between consent to non-performance of obligation and consent to suspension of obligation

When reviewing the provision dealing with consent as a circumstance precluding wrongfulness, the Rapporteur submitted that consent is a constituent of primary rules of international law, that situations where consent is expressed in advance

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following works, however, justified conduct is considered to be conduct which is perfectly lawful: A. Ross, *On Guilt, Responsibility and Punishment* (1975), 4, 107; G. Williams, 'Offences and Defences', (1982) 2 *Legal Studies* 233, at 239; R. Bonnie et al., *Criminal Law* (1997), 324; M. Berman, 'Justification and Excuse, Law and Morality', (2003) 53 *Duke Law Journal* 1, at 29; H. Hart, *Punishment and Responsibility* (2008), 13–14. In the international context, the same conclusion is drawn in M. Pinto, 'Reflections on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law', (1985) 16 NYIL 17, at 20; S. Jagota, 'State Responsibility: Circumstances Precluding Wrongfulness', (1985) 16 NYIL 249, at 254; M. Kohen, 'The Notion of "State Survival" in International Law', in L. Boisson de Chazournes and P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999), 293 at 308–10; V. Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses', (1999) 10 EJIL 405, at 406 (while recognizing that the circumstances in Chapter V are situations of negation of obligation, Lowe goes on to argue that it is preferable to maintain the binding pull of obligation and instead excuse its breach).

41 Summary Records of the 2567th Meeting, 1999 YILC, Vol. 1, 4 at 6–7. *Case Concerning the Difference between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 between the two States and Which Related to the Problems Arising from the Rainbow Warrior Affair*, Award of 30 April 1990, 20 RIAA 215, at 251 (emphasis added).

42 *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, [1997] ICJ Rep. 7, at 39, para. 48 (emphasis added).

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'do not involve, even prima facie, conduct not in conformity with the international obligation', and that they therefore 'fall outside the scope of chapter V, and indeed outside the scope of the draft articles as a whole'.[43] On this basis, he then proposed that Draft Article 29 (first reading) be deleted.[44] After the Commission decided to the contrary, he ensured to draw a distinction between, on the one hand, consent as an intrinsic condition for the application of obligations and as a part of the primary rules, and, on the other hand, consent as an extrinsic general justification for what would otherwise be wrongful conduct and as a part of the secondary rules of responsibility. As the result, the second paragraph of the commentary to what is now Draft Article 20 reads:

> It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between *consent in relation to a particular situation or a particular course of conduct*, and *consent in relation to the underlying obligation itself*. In the case of a bilateral treaty, the States parties can at any time agree to *terminate or suspend the treaty*, in which case obligations arising from the treaty will be terminated or suspended accordingly. But quite apart from that possibility, States have the right to *dispense with the performance of an obligation* owed to them individually, or generally to permit conduct to occur which (absent such permission) would be unlawful so far as they are concerned. In such cases, the primary obligation continues to govern the relations between the two States, but it is displaced on the particular occasion or for the purposes of the particular conduct by reason of the consent given.[45]

For the last Rapporteur, the intrinsic–extrinsic dichotomy in the function of consent also accounted for the fact that with respect to some of the so-called peremptory norms such as that contained in Article 2(4), consent may be expressed validly and render what would otherwise amount to a breach in conformity with international law:

> In accordance with Article 26, circumstances precluding wrongfulness cannot justify or excuse a breach of a State's obligations under a peremptory rule of general international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in Chapter V. One State cannot dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, whether by treaty or otherwise. But *in applying some*

43 Crawford, Second Report, *supra* note 38, at 61–2. The same position is endorsed in A. Abass, 'Consent Precluding State Responsibility: A Critical Analysis', (2004) 53 ICLQ 211, at 224; T. Christakis and K. Bannelier, 'Volenti Non Fit Injuria? Les effets du consentement à l'intervention militaire', (2005) 50 *Annuaire Français de droit international* 102, at 107 et seq.; T. Christakis, 'Les "circonstances excluant l'illicéité": Une illusion optique?', in *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (2007), 223 at 244–51; O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (2010), 250–1; A. Ben Mansour, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Consent', in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility* (2010), 439 at 440; S. Szurek, 'The Notion of Circumstances Precluding Wrongfulness', in ibid. 427 at 430.

44 Crawford, Second Report, *supra* note 38, at 63.

45 Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, adopted by the Commission at Its Fifty-Third Session, 2001 YILC, Vol. 2 (Part Two), 31 at 72–3 (references omitted and emphasis added).

> *peremptory norms the consent of a particular State may be relevant.* For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose.[46]

As will be shown in the following, however, the last Rapporteur's conception of the circumstance of consent is problematic in three respects. In the first instance, it gravely misunderstands the primary-rule–secondary-rule terminology which Ago introduced into the study of state responsibility, and as the result, contradicts the commonly accepted and logically unassailable notion that all acts to which consent has been validly given in advance are lawful *ab intra*. In the second instance, it fails to satisfactorily rationalize itself by referring to the need to reconcile the peremptory character of the prohibition on the use of force and the possibility, observed in the practice of states and confirmed in doctrine, of derogating from that obligation by means of consent. Last but not least, the last Rapporteur's thesis effectively undermines the institution of treaty suspension enshrined in Article 58 of the Vienna Convention on the Law of Treaties.

3.2.1. The primary-rule–secondary-rule terminology

The primary-rule–secondary-rule terminology by means of which Ago delimited the orbit of the study of the law of state responsibility denotes two conceptually distinct but indissolubly linked norm fragments which constitute a complete norm of conduct.[47] The primary or substantive fragment consists of a rule which simply defines a certain objective course of behaviour as the necessary but not sufficient condition for application of sanction or any other unfavourable legal situation which can be placed under the common denomination of responsibility. The secondary or sanctioning fragment consists of three distinct sets of rules. Rules of the first kind determine the link between a person and a particular event on the basis of juridical data – as opposed to those connections which take hold by virtue of natural or material causality – so that the event in question can be attributed to that person as his deed or act and consequently become subject to the application of the law. Rules of the second type determine whether an event which is attributable to a subject of the law and which can therefore be considered his conduct constitutes a failure by that subject to comply with the obligation made incumbent upon him by the primary rule. More specifically, these rules establish whether or not the customary source,

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46 Ibid., at 85 (references omitted and emphasis added).

47 For some time now, it has been fashionable to ascribe the primary-rule–secondary-rule terminology in the Commission's study of the law of state responsibility to Herbert Hart's *The Concept of Law*. See, e.g., I. Scobbie, 'Assumptions and Presumptions: State Responsibility for System Crimes', in A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (2009), 270 at 272; E. David, 'Primary and Secondary Rules', in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility* (2010), 27 at 28; T. Ruys, *Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010), 489; J. d'Aspremont, *Formalism and the Sources of International Law* (2011), 51. The Hartian principle of rule classification, however, is not analogous with the scheme by means of which Ago defined the orbit of the study of the law of state responsibility. The inspiration for the latter is the writings of Alf Ross. See Ross, *supra* note 27, at 77, 241–2, 271–3. See also A. Ross, *On Law and Justice* (1958), 207–11 and *Directives and Norms* (1968), 113–15. This has been acknowledged in L. Goldie, 'State Responsibility and the Expropriation of Property', (1978) 12 *International Lawyer* 63, at 65–6; J. Dugard, Second Report, 2001 YILC, Vol. 2, 97 at 101; O. Spiermann, 'A National Lawyer Takes Stock: Professor Ross' Textbook and Other Forays into International Law', (2003) 14 EJIL 675, at 697.

contractual, statutory, or other, of the obligation has a bearing on the conclusion that that obligation has been breached. They also determine whether the fact that the obligation is in force at the time when the subject engages in conduct contrary to it is an essential condition for concluding that a breach has been committed. Most importantly, however, they lay down a number of reservations or limitations to the obligation arising from the primary rule. In other words, they define certain precise factual conditions or circumstances which, if present, have the effect of suspending or terminating the binding force of obligation and rendering its breach logically impossible. For their part, rules of the third type describe the legal consequences appending to conduct which is characterized as a breach of duty by the secondary rules of the first and second type and ultimately specify the modality in which those consequences are to be enforced. They establish, in particular, that when a legal subject breaches its obligation under the primary rule and in so doing impairs the subjective right of another subject, there emerge new legal relations, characterized by subjective legal situations distinct from those in place before the commission of the act of breach. They then specify that of these secondary legal relationships, the obligatory kind finds expression in the duty of reparation for the wrongdoing subject, and the non-obligatory kind, in the injured subject's privilege or *faculté* of applying a countermeasure, a defensive measure, or another coercive action.

The fact that comes into light by virtue of these observations is that in accordance with Ago's rule taxonomy, circumstances precluding wrongfulness are expressed by the secondary rules of the second type; that is, the rules which determine whether or not conduct that is attributable to a legal subject pursuant to the general rules of attribution constitutes a failure by that subject to conform with a duty made incumbent on him by a primary rule. Consequently, the circumstances are not extrinsic to the content of obligations. Neither do they presuppose the binding force of obligations and merely ask whether there is a right to engage in conduct that constitutes a contravention thereof. Being intrinsic to the definition of the greater majority of international obligations,[48] they instead require that in certain exceptional or de facto situations, the binding pull of such obligations should be considered non-existent and their breach logically impossible.

This finding is not upset by the fact that in the Draft Articles, the circumstances appear outside the chapter which specifies the positive conditions for the existence of breach of obligation. That division is in fact completely unconnected with the question of the correlation between the notion of breach and the concept of circumstances precluding wrongfulness. It is in place, first, to preserve the conceptual distinction between the general or de jure situations in law and the exceptional or de facto legal situations which obtain whenever one of the circumstances precluding wrongfulness is present. In other words, it throws light on the fact that conduct which the rules of Chapter III define as lawful is *generally lawful* whereas conduct that the rules in Chapter V qualify as lawful is only *exceptionally lawful*. Another reason

48 There are international obligations, particularly in the field of humanitarian law, whose complete definition excludes the possibility of invoking any of the circumstances precluding wrongfulness. The prohibitions on genocide, torture, and apartheid can be given as prime examples of such obligations.

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for the bifurcated representation of the conditions for the existence of breach is maintenance of a basic evidentiary principle – that a party who asserts a fact ought to carry the burden of establishing its existence.[49] On the existing arrangement within Part One of the Draft Articles, the state which alleges legal injury is expected to prove the performance of some factually injurious action by another state. For its part, that second state is required to establish that its conduct, even though matching the general description of breach under Chapter III, has materialized in a circumstance which precludes its characterization as conduct inconsistent with the international obligations of that state. It goes almost without saying that any attempt to incorporate the positive and negative elements of the notion of breach risks being taken to mean that a state alleging another state's responsibility must also bear the persuasive burden of establishing that the conduct thus complained of has not been accompanied by any factual situation capable of negating its unlawful character.

3.2.2. The question of derogation from the peremptory rule expressed in Article 2(4) of the United Nations Charter by means of consent

In accordance with Draft Article 26, none of the circumstances enumerated in Chapter V is capable of precluding the wrongfulness of any act which is not in conformity with an obligation arising under a peremptory norm of general international law. The question which the said provision raises immediately is how the peremptory character of the rule prohibiting the use of force can be reconciled with the possibility, objectified in the practice of states and accepted in international legal doctrine, of derogation from that rule by means of consent. For the last Rapporteur, the answer to this question had to refer to the intrinsic–extrinsic distinction in the function of the notion of consent. He argued in particular that in relation to certain rules such as that banning the indiscriminate use of force, consent acts as an intrinsic element of the primary rule. In his view, therefore, in such cases it is immaterial whether or not it is permissible to invoke a circumstance precluding wrongfulness as no wrongfulness can be observed, even a priori. If a state validly consents to another state's use of armed force in its territory, the effect of consent is rather to rule out the conclusion that there has been a breach of obligation as such or that the rule is applicable in the particular case.

This chain of reasoning is nonetheless vulnerable to two objections. First, the distinction between the issue of consent as an element in the application of a rule and the issue of consent as a basis for precluding the wrongfulness of conduct inconsistent with the obligation which that rule imposes is theoretically untenable. The analysis of the primary-rule–secondary-rule terminology, above, showed that the circumstances precluding wrongfulness operate as reservations or limitations to the scope of most rules which impose substantive obligations on the state, and

49 Draft Articles with Commentaries, *supra* note 45, at 72. The centrality of this rule in international judicial proceedings is confirmed in M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (1996), 221–3; R. Wolfrum, 'Taking and Assessing Evidence in International Adjudication', in T. Ndiaye and R. Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (2007), 341 at 344–5.

that for this reason, they ought to be regarded as being intrinsic to the definition of all such obligations. Second, even with the assumption that such a distinction is not collapsible, the fact remains that the underlying rationale for Draft Article 26 derives from the definition of a rule in the nature of *jus cogens* 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'.[50] This definition, however, is circular and in a rather obvious way. It therefore has no meaning and must be discarded. If certain rules of international law have come to be accepted as rules of a peremptory nature, it is because by virtue of the content of those rules, breach of obligation will result in secondary legal relations between the author of the breach and the totality of the other subjects of international law. This involvement occurs in two distinct modalities, a fact which is highlighted by the existence of two mutually exclusive grounds for invocation of international responsibility. The first modality concerns the state whose subjective right is thereby infringed; that is to say, the state which is the interest subject as well as the proceedings subject as regards the duty in question. It consists of two secondary relationships of which one is obligatory and finds expression as a subjective right to obtain reparation. The other relationship is non-obligatory and translates into the situation usually envisaged when the term 'punitive sanction' is used; that is, the *faculté* of taking coercive measures, immediately and thus independently of the claim to reparation, to repress the wrongful act, and punish its author. The second modality concerns states other than the state directly injured. Thus, where responsibility is invoked in such manner, it is not on the account of an infringement of a subjective right inhering in the invoking subject. Rather, the power of invocation arises from the content of the underlying rule which demands that in cases of breach, states other than the state with a direct legal interest in performance should also be subjects of proceedings. For this reason, its exercise engenders a single legal relationship. By virtue of this relationship, which is non-obligatory in nature, the invoking state becomes entitled, within the strength at its command, to adopt measures which would be unlawful were their application not warranted by the fact of their having the objective of repressing the particularly serious wrongful act and punishing the particularly serious wrongful act.

That having been said, the question that remains to be answered is why precisely consent is capable of rendering armed intervention in conformity with international law but not the commission of genocide. In order to answer this question, it is necessary to bear in mind that there is a single rule which requires of state A not to exhibit force when conducting its international relations with other states, whereas there are in effect two customary rules demanding from that state not to carry out certain acts with the intent to destroy any ethnic, racial, or religious group. One rule prohibits state A from committing genocide against the individuals or groups of individuals under de jure or de facto control of states B, C, D, and so forth and specifies that each one of the latter should be the interest subject as well as the

50 Art. 53, Vienna Convention on the Law of Treaties.

proceedings subject. The other rule prohibits state A from committing genocide against the individuals or groups of individuals both within and without its own domain of control. At the same time, it identifies the interest subject as individuals or groups of individuals while stipulating that states B, C, D, and so forth should be the proceedings subjects. The same goes for the general ban against the imposition and maintenance by force of a policy of apartheid as well as the majority of other international obligations of humanitarian character. In each example, two rules are involved. One rule gives rise to a typical right–duty relationship whereby it is the duty of state A not to commit $\sim\varphi$ and it is the subjective right for state B or another state not to have the population under its control exposed to $\sim\varphi$. The other rule, though very similar in content, creates an atypical legal relationship by means of which the duty incumbent on A to conduct itself in φ makes the individuals both inside and outside A's jurisdiction the holders of the advantageous position in law, in other words, interest subjects. At the same time, it empowers B, or any other state, to invoke the responsibility which arises from the performance of $\sim\varphi$ by A and to attach to that act a sanction for its author.

On the arrangement that is proposed here, state B is in abstract free to consent to suspension of the first obligation, i.e. the obligation which demands that state A should adopt conduct φ with respect to B. It is only with respect to the second obligation, namely the obligation which prohibits A from $\sim\varphi$ in respect of individuals inside and outside A's control or jurisdiction, that B's consent is without any effect whatsoever. This is because in respect of that obligation, it is the individual whom international custom and conventions recognize as the subject of interest. However, since the two obligations are linked in the sense that breach of the first obligation always presupposes the breach of the second, consent given by B, in the last analysis, cannot have the effect of absolving A's commission of $\sim\varphi$ under any circumstances. This also explains why, in accordance with Draft Article 45, the international responsibility arising from conduct inconsistent with humanitarian norms of peremptory character cannot be waived. True, when seen in isolation, the act of breach by state A which is transboundary in nature could amount to infringement of a subjective right possessed by state B, in which case the resultant responsibility might be waived by the latter. But as was mentioned earlier, such an act on the part of A will concomitantly infringe a legal interest which customary law or a treaty accords to human persons independently of the consent of any individual state. It is indeed the responsibility which ensues from the breach of duty towards the individual which cannot be extinguished by any unilateral act on the part of B or any other state.

3.2.3. The implication of the distinction in the function of consent for the institution of treaty suspension in Article 58 of the Vienna Convention on the Law of Treaties

The untoward intrinsic–extrinsic dichotomy which has been drawn in the function of the notion of consent and the misguided attempts to contrast release from performance of obligation from release from the obligation itself also entail a practical difficulty. They essentially propose that the burden of remaining bound by an obligation which arises from a multilateral treaty can be avoided in two distinct

and independent modalities. In one, state A would express its consent to state B in accordance with Draft Article 20, and in so doing, would dispense with the performance of the treaty obligation linking it with the latter subject. In the other, A would express its consent to B pursuant to Article 58 of the Vienna Convention on the Law of Treaties; that is to say, it would conclude an agreement as between itself and B alone, to suspend the operation of that obligation. That which makes this construct particularly troublesome is that the conditions for action envisaged in the second modality go much further than merely requiring that the state to which the legal relation ascribes a situation of right must validly express its consent prior to the commission of the act. More to the point, resort to Article 58 of the Vienna Convention requires that suspension is not prohibited by the multilateral treaty itself, is compatible with its object and purpose, and does not adversely affect the enjoyment by the other parties of their rights, or the performance of their obligations thereunder. Adding to these oppressive but purposeful constraints is the procedural requirement that the states interested in suspension *inter se* of one or more of the treaty relations should notify the other parties not only of their intention to conclude the agreement for suspension but also of the provisions the operation of which will be pushed in abeyance therewith. Now, if the applicability, in a given case, of Draft Article 20 or of Article 58 of the Vienna Convention is not determined by considerations concerning the source and origin of obligation, the former provision will always be the preferred avenue. For, what would be the reason, from the perspective of the state, for surrendering to the markedly more onerous procedure of Article 58 when all that is sought is that a particular act not become tainted with wrongfulness and not incur adverse normative consequences? This question endures regardless of the fact that, according to Article 42 of the Vienna Convention, suspension, termination, or denunciation of a treaty may take place only as a result of the application of the provisions of the treaty itself, or of the provisions of the Vienna Convention. This is because, on the approach adopted by the last Rapporteur, Draft Article 20 deals with the question whether the performance of a subsisting obligation can be rightfully dispensed with and not with the distinct question whether that obligation itself can be validly suspended.

4. Conclusion

It was Ago's constant position that the presence of any circumstance precluding wrongfulness is co-extensive with temporary or indefinite suspension of an international obligation. In line with this proposition, the second Rapporteur then defined the circumstance of consent as a situation of mutual agreement between two states whereby the obligation imposed by a primary rule is suspended in the particular case with respect to the consenting state. In his analysis, Ago nevertheless endorsed the idea that such consent is fundamentally different from the consent in the Vienna Convention on the Law of Treaties. His reasoning was that, in the former context, a state enlists the consent of another state so that conduct adopted by that first state cannot be characterized as internationally wrongful, whereas in the latter context, both states agree to amend or terminate a rule in force between them.

In significant departure from this definition, Crawford asserted that the obligation, the conduct inconsistent with it, and the circumstance precluding the wrongfulness of that conduct coexist. From this he concluded, albeit reluctantly,[51] that it is only after having established that a certain course of behaviour is contrary to the terms of a prohibition that it becomes possible to ask whether the actor may invoke consent as a circumstance precluding the wrongfulness of its conduct. If affirmative, the conduct in question is to be considered conduct which neither conforms with the international obligation nor constitutes a breach thereof. If negative, then the act amounts to a breach and is accordingly liable to the full range of disadvantageous normative consequences envisaged by the law of international responsibility. To reconcile the peremptory character of the Charter prohibition and the possibility of derogation therefrom by consent, the last Rapporteur then argued that in certain cases, consent operates as a constituent part of the primary rule and not as a secondary rule of responsibility.

As the foregoing analysis showed, the sole error in Ago's thesis was the distinction which it eventually drew between consent in Part One of the Draft Articles and consent in the Vienna Convention and its recognition of the latter as a basis for creation of international rules in the proper sense of the term. In that connection, it was argued that in both contexts, consent, when given to non-performance of obligations, operates solely to generate new legal relations which are non-obligatory in nature; or – and this amounts to the same – it precludes the wrongfulness of the conduct of the state. Analysis of Crawford's account of the circumstance of consent revealed far more difficulties. More specifically, it was shown that in accordance with the last Rapporteur's thesis, acts which are accompanied by the circumstance of consent are not lawful *ab intra*. It was also demonstrated that his distinction between consent as an intrinsic requirement for the application of certain obligations, such as the prohibition on the use of force, and consent which is extrinsic to the definition of other obligations and functions as a circumstance precluding wrongfulness in relation thereto is theoretically untenable. Finally, it was shown that the last Rapporteur's understanding of the circumstance of consent effectively deprives Article 58 of the Vienna Convention of any purpose in the practice of states.

51 It is recalled from 3.2., *supra*, that Crawford tried but ultimately failed to bring about the deletion of the provision dealing with consent as a circumstance precluding wrongfulness.