CONSENT PRECLUDING STATE RESPONSIBILITY: A CRITICAL ANALYSIS

I. INTRODUCTION

Chapter V (Part 1) of the ILC's[1] Articles on State Responsibility[2] contains six circumstances which, when invoked justify, or excuse,[3] the commission of acts that are otherwise unlawful against another State.[4] The circumstances attenuate or remove responsibility entirely. These circumstances are namely: consent (Article 20), self-defence (Article 21), countermeasures (Article 22), force majeure (Article 23), distress (Article 24), and necessity (Article 25). Nonetheless, Article 26 of the ILCASR states that '[n]othing in this Chapter precludes the wrongfulness of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.'

It is trite that obligations arising from peremptory norms are non-derogable in international law. Article 53 of the 1969 Vienna Convention on the Law of Treaties (hereafter VCLT)[5] voids a treaty if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. Article 64 of the same Convention prospectively invalidates a treaty if it conflicts with a new peremptory norm. Although neither the VCLT nor the ILCASR identified such obligations as may constitute peremptory norms of general international law, there is ample mention of these elsewhere. The International Court of Justice (ICJ),[6] the General Assembly,[7] as well as

[1] The ILC was established in 1947 by the United Nations General Assembly. See GA Res. 174 (II), of 21 Nov, 1947. For an excellent chronicling of the formation of the ILC, see A Watts, *The International Law Commission, 1949–1998*, vols I, II, III (1999), particularly vol I at 1–20; *The Work of the International Law Commission* (UN Publication No E.95.V.6) (5th edn, 1996), at 121–41.

[2] For the text of the ILC Articles on State Responsibility, see J Crawford, *The International Law Commission's Articles on State Responsibility*: *Introduction, Text and Commentaries* (2001) (hereafter ILC's Commentary).

[3] Lowe states that by categorizing these circumstances as precluding wrongfulness, the ILC 'propose to characterize wrongful conduct in respect of which there exists exculpatory circumstances as "not wrongful".' Instead he suggested that the Commission could have 'characterized them as wrongful but excused'. See V Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses', (1999) 10 (2) EJIL 405. But see R Rosenstock, 'The ILC and State Responsibility', (2002) 96(4) AJIL 792, at 794.

[4] The circumstances also featured in the ILC's Draft Articles on State Responsibility adopted in 1996. See ILC's Report, 1996, GAOR, 51st Sess, Supp 10, 125.

[5] Text in UNTS, vol 1155, 331, entered into force 27 Jan 1980.

[6] See the *Reservations to the Genocide Convention* case (1951) ICJ Reports 15; The *Legality of the Threat of Use of Nuclear Weapon*, ICJ Reports (1996) 226, at 257 para 79. However, it must be noted that the ICJ's dealing with the issue of *jus cogens* so far is no more than a rendition of an *obita dictum* and has yet to deal with the issue directly. In fact, in the *Arrest Warrant* case (*Congo v Belgium*) 41 International Legal Materials 536, the Court avoided pronouncing on the existence of peremptory norms. See also D Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility', (2002) 96 AJIL 833, at 843.

[7] Art 5(3) of the General Assembly's Definition of Aggression Resolution 3314 (XXIX), 29(1) RGA 142 at 144 (1974).

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several national[8] and international tribunals,[9] have identified, to varying degrees of specificity, certain obligations as having evolved into peremptory norms. These include the prohibition against slavery and slave trade, genocide,[10] racial discrimination and apartheid[11] and the prohibition against torture as defined in Article 1 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.[12] The criteria governing peremptory norms are stringent.[13] As the ILC observed, '[o]ne State cannot dispense another from the obligation to comply with a peremptory norm'.[14]

Yet the limiting of the operation of the six circumstances by peremptory obligations in the ILCASR seems rather problematic, particularly concerning consensual intervention.[15] The ILC has, in the past, espoused the view that consent by one State to intervention by another State suspends the normal operation of the legal rules that would otherwise govern their relationship.[16] It reinforced this view in its commentary on Article 26 thus: 'one State cannot validly dispense another from the obligation to comply with a peremptory norm', but that 'in applying some 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'.[17] The question that arises for determination, then, is whether consensual intervention, which may involve the use of force on the consenting state's territory, is excused under Article 26?

Certainly, the prohibition of force under Article 2(4) of the UN Charter contains a peremptory obligation such that Article 26 forbids preclusion. As will be seen later, the growing tendency of regional organisations such as ECOWAS and African Union towards developing treaties and practice permitting consensual intervention make a re-examination of this topic within the framework of ILCASR cogent.

This article also considers certain fundamental issues arising from the provision of Article 20. These include an examination of which acts may be sufficient to constitute consent for the purpose of Article 20. Does consent need to be obtained prior to, during or after the commission of the internationally unlawful act in order to preclude wrongfulness? Who may validly give consent on behalf of a State which seeks to preclude

[8] The German Federal Constitutional Court in 1965 decided that certain elementary legal commands had to be considered as rules of customary international law from which no derogation is permitted. See (1965) 18 Entscheidungen des Bundesverfassungsgerichts 449; (1966–7) 13 Archiv des Völkerrechts, 122, at 126, cited by N Jørgensen, *The Responsibility of States for International Crimes* (2000), 88; see also the decision of a US court in *Filartiga v Pena-Irala*, (1984) 77 International Law Report 185; House of Lords decision in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3) [1999] 2 All ER 97, particularly at 108–9, and 114–15 (per Lord Browne-Wilkinson); US Court of Appeals, 2nd Ciruit, in *Siderman de Blake v Argentina*, 965 F 2d 699 (1992) International Legal Materials vol 103, 455, at 471.

[9] See the decision of the International Criminal Tribunal for the former Yugoslavia in Case IT-95–17/1-T, *Prosecutor v Anto Furundzija*, judgment 10 Dec 1998 1998; (1999), International Legal Materials vol 38, 317.

[10] Adopted in 1948. See ST/HR/4/Rev 12, 1995.

[11] See for instance Security Council Resolution 569 (1985) 26 July 1985.

[12] *United Nations Treaty Series* vol 1460, 112.

[13] ILC's Commentary, 188.

[14] Ibid.

[15] See Shelton, above, n 6 at 842.

[16] See International Law Commission, Eighth Report on State Responsibility by Ago, 2YB Intl L Comm'n 1, 31–2 (1979), UN Doc A/CN.4/318 & Add 1–4 (1979).

[17] ILC's Commentary, at 188.

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responsibility for its internationally wrongful act? In addition, Article 45 of the ILCASR concerning waiver gives rise to many practical difficulties. What constitutes a waiver for it to amount to a valid, *ex post* consent? Do the decisions of international tribunals such as the Iran–US Claims Tribunals and the ICJ establish a systematic body of rules, from which trite principles of law can be derived, for the determination of valid consent in international law?

II. CONSENT AS A CIRCUMSTANCE PRECLUDING WRONGFULNESS

Article 20 of the ILCASR states that

> Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limit of that consent.

It is often said that consent[18] is a 'well-established, if not self-evident, principle'.[19] According to the ILC, Article 20

> reflects the basic international law principle [by which] conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.[20]

Although it is true that consent is a well-established principle of international law, its pedigree, so simplistically expressed, may very well be misleading in reality, at least insofar as its application to daily intercourse amongst States is concerned. There are no given rules of international law governing consent and international tribunals always treat the matter on the basis of facts and materials of cases appearing before them. The ILCASR contain no provisions for these issues. As Professor Crawford rightly observed, 'the [A]rticles are not a repository for all possible secondary rules'.[21] In the section below, I consider the legal requirements of consent for the purpose of Article 20.

III. THE LEGAL PREREQUISITES OF CONSENT FOR THE PURPOSE OF PRECLUDING WRONGFULNESS

A State claiming exoneration from responsibility on the basis of consent must demonstrate that it has complied with the requirements of a valid consent. As the ILC suggested, 'whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility'.[22]

[18] Some of the few works on 'consent' within the context of circumstances precluding wrongfulness are to be found in H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989' (1995) 56 BYIL 1, at 73; N Ronzitti, 'Use of Force, Jus Cogens and State Consent' in A Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986), 147; Verosta, 'Zur Anwendung der Regel' 'volenti non fit injuria' im Völkerrecht', Jus Humanitatis, Festschrift zum 90. Geburstag von Alfred Verdross, 1980, 689; G Gaja, 'Jus Cogens Beyond Vienna Convention' (1981) 172 Hague Recueil, 293 et seq; Alaimo, 'Nature del consens nell'illecito internazionale' (1982) 65 Rivista di Diritto Internazionale 257 et seq.

[19] Thirlway, above n 18 at 73.

[20] ILC's Commentary, 163.

[21] J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96(4) AJIL 874, at 878.

[22] Ibid, at 842.

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International law principles governing the validity of consent include whether a state agent acts lawfully on behalf of the State, whether the organ or person granting consent in a particular situation is competent to do so, or whether acts done by certain actors within a State can be attributed to that State itself.[23] In this respect, Articles 4–11 of the ILCASR will be crucial, depending on the particular circumstances of the case at hand, when an international tribunal is to decide whether the conduct of a State amounts to an endorsement of acts undertaken on its behalf. Thus, a lot will depend on State practice and customs in establishing what constitutes valid consent in different circumstances.[24]

IV. WHAT CONSTITUTES CONSENT IN INTERNATIONAL LAW?

To preclude wrongfulness, it must be established that an injured State (1) freely gives its consent, and (2) that the responsible State operates within the ambit of the consent. The question is when can a State be said to have given its consent to an act? Although the type of consent which international tribunals daily deal with—consent in respect of their jurisdiction—differs to the kind that Article 20 speaks to, it is submitted that similar principles of international law govern validity of consent in general.

In *Qatar* v *Bahrain*,[25] the issue in contention before the ICJ concerned the status of the minutes of a meeting signed by the Foreign Ministers of both countries (popularly known as the Doha Minutes) in December 1990.[26] The main issue was whether the Doha Minutes manifested an agreement between the parties to accept the Court's jurisdiction. The ICJ held that they constituted an agreement under international law.[27] The Court implied consent to its jurisdiction 'through a somewhat unusual process of interpretation . . . that the parties had agreed to the possibility of a unilateral application and held that Qatar had submitted the dispute to the Court'.[28] Clearly, from the circumstances of the case, it is difficult to justify an inference by the Court that Qatar freely gave its consent to the Court's jurisdiction. Thus, questions remain 'with regard to the extent of the consensual principle after the decision'.[29]

The ICJ sometimes infers consent from circumstances that would ordinarily not constitute consent by a party to appear before it. Under the doctrine of *forum prorogatum*,[30] the ICJ is able to infer consent where one State submits a matter to it and the other State takes steps or does some acts which can be regarded as submission to the Court's jurisdiction. In the *Rights of Minorities in Polish Upper Silesia* (1928),[31] Poland argued the merits of the case in its first written pleadings (counter-memorial)

[23] See *US v Iran* (*Yaeger v Iran*) (1987) 17 Iran–US CTR 92.
[24] See *US v Mexico* (Massey case) 4 RIAA 155, at 157.
[25] ICJ Reports (1994) 112.
[26] Ibid.
[27] Ibid, at 121; 102 International Law Reports 18.
[28] See J Collier and V Lowe, *The Settlement of Disputes in International Law*: *Institutions and Procedures* (1999) 135.
[29] See M N Shaw, *International Law* (4th edn 2001), 756.
[30] See CHM, Waldock, '*Forum Prorogatum* or acceptance of a unilateral summons to appear before the International Court' (1948) 2 ICLQ 377; Collier and Lowe, above, n 28 at 136 et seq; 200 et seq.
[31] PCIJ, Ser A, No 15 (1928).

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but later, in its rejoinder (second written pleadings), contested the jurisdiction of the Court. The ICJ held that Poland had consented to its jurisdiction by arguing the merits of the case in its first pleadings without objecting to its jurisdiction. In contrast, the mere appearance of Iran in *Anglo-Iranian Oil Co* (1952)[32] to contest the Court's jurisdiction was held not to amount to consent by *forum prorogatum*.

The fact that a State has consented to an act, however, does not imply that *any* kind of acts may be committed against it, or that the consent is without operative limits.[33] In the following section, I examine certain conditions which must be met by the responsible state in order to establish that the injured State intended to preclude its internationally unlawful act.

V. WHO HAS AUTHORITY TO GIVE CONSENT ON BEHALF OF A STATE?

A State that seeks to justify an internationally wrongful act on the basis of consent must demonstrate that such consent emanates from competent authorities of the injured State. Such a State must show that a person or organ in authority gave the consent on behalf of the injured State and that the latter cannot validly refute such authority.

The author of consent need not be a high-ranking official of the injured State. An injured State cannot deny that it gave its consent to the commission of an internationally wrongful act merely because the consent emanated from a very junior official in its administrative cadre. In *US v Mexico* (*Massey* case),[34] Commissioner Nielsen, presiding, stated the principle thus:

> To attempt by some broad classification to make a distinction between some 'minor' or 'petty' officials and other kinds of official must obviously involve practical difficulties. Irrespective of the propriety of attempting to make any such distinction at all, it would seem that in reaching conclusions in any given case with respect to responsibility for acts of public servants, the most important considerations of which account must be taken are the *character* of the acts alleged to have resulted in injury to persons or to property, or the *nature* of functions performed whenever a question is raised as to their proper discharge.[35]

From this statement, it is clear that the validity of an act done on behalf of a State is determined by the character of the act and whether the official operates within the scope of his authority. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each state and general principles of actual or ostensible authority.[36]

In *Schering Corp v Iran*,[37] the Iran-US Claims Tribunal stated that those who can bind the State are those who 'function as part of the State machinery'. The 'state machinery' test, laid down in this case, was endorsed in another decision of the Iran-US Tribunal. In *Flexi-Van Leasing Inc v Iran*[38] the breaches of contract committed by a private Iranian company were held not to be acts done by the State on the same basis as the *Schering* case. These two cases may be contrasted to *Foremost Tehran Inc v Iran*.[39] Here, a decision not to pay dividends to the company's shareholders, including the claimant American Company, was attributable to the Iranian State. The *ratio decidendi*

[32] ICJ Report, 1952, 93.
[33] Fleming, *The Law of Torts* (8th edn 1993), 75; G Kodilinye, *Commonwealth Caribbean: Tort Law* (2nd edn 2000), 19–20.
[34] *US v Mexico* (1927) RIAA 155.
[35] Ibid at 157.
[36] ILC's Commentary, 164.
[37] (1984) 5 Iran–US CTR 361, at 370.
[38] (1986) 12 Iran–US CTR 335.
[39] (1986) 10 Iran–US CTR 228.

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of the tribunal was based on the disclosed fact that the State of Iran was represented on the company's board of directors and these representatives had influenced the board of directors' meeting which took that decision.

Similarly, the European Commission of Human Rights (ECmHR) has also decided that to amount to acts done on behalf of a State, such acts must have been exercised by someone in authority. In *MN v Bulgaria* (Admissibility)[40] the First Chamber of the ECmHR stated that

> there is no State interference where the facts complained of are not the product of an *exercise of governmental authority* but concern exclusively relationships of a contractual nature between private individuals.[41]

In coming to this conclusion the Commission had referred to a similar principle it expounded in *Gustafson v Sweden*.[42]

With regards to treaties, the position is that a government is deemed to act on behalf of a State when it consents to a treaty.[43] Hence, the State and its inhabitants are responsible for the acts of the government and the commitments it makes, even after the government has been displaced or overthrown.[44] There is controversy, however, about whether sub-national groups within a State or peoples clamouring for self-determination can give consent on behalf of the State. The more persuasive view is that subnational groups cannot validly bind the State by their acts until they have successfully established a control over the territory of their own.[45]

VI. TIME OF CONSENT TO PRECLUDE WRONGFULNESS

The ILCASR does not stipulate the time when the responsible State must obtain consent from the injured State in order to commit an internationally wrongful act. This vacuum raises the question whether consent must be obtained before, after, or in the course of the commissioning of an internationally wrongful act.[46]

It has been suggested that 'consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring'.[47] Whilst it is desirable that consent to an internationally wrongful act precedes the commission of that act, States rarely consent in advance to unlawful acts against themselves. Even in domestic law where advance consent is highly probable, the view has nevertheless been expressed that there is 'an understandable reluctance, however, to conclude that a

[40] Application No 29785/96 (First Chamber) 4 Sept 1996.
[41] Ibid.
[42] Decision on 25 Apr 1996, at para 60.
[43] See Arts 12–15, VCLT. See also the Restatement of Foreign Relations, para 203 comment b (1987) stating that 'there is a duty to treat as the government a regime that is the government in fact' and this includes 'accepting its acts as creating international rights and obligations'.
[44] David Wippman, 'Treaty-Based Intervention: Who Can Say No?' (1995) 62 University of Chicago Law Review 607, at 624–5.
[45] See TM Franck, 'Postmodern Tribalism and the Right to Succession', in C Brölmann, R Lefeber, and M Zieck (eds), *Peoples and Minorities in International Law* (1993), at 3.
[46] See the First Report of the Special Rapporteur submitted at the 21st session of the ILC in 1969, YrbkILC, 1969, vol II, document A/CN.4/ Add. 1, 125–56, where Chapter V has used the phrase *prior* consent. See also United Nations, *The Work of the International Law Commission* (5th edn 1996), 126.
[47] ILC's Commentary, 163.

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defendant has been licensed in advance to commit a tort'.[48] Advance consent is all the more problematic because, as Lord Diplock once observed, 'if the consent precedes the act of negligence, the plaintiff cannot at that time have full knowledge of the extent as well as the nature of the risk which he will run'.[49] For instance, the principle of *volenti non fit injuria* will not excuse the commission of an act which the consenting party could not have in all probability foreseen.

The next question that arises for determination, therefore, is what happens where the injured State does not give its consent in advance, or explicitly, or the responsible State exceeds the scope of its consent? What if the injured State did not clearly foresee the extent of damage that it is likely to suffer at the time it gives its consent, but nevertheless chose to discount an aggravated injury for a reasonable length of time after the commission by the responsible State? Will consent cover such unforeseeable cases for the purpose of precluding international responsibility?

VII. WAIVER OF WRONGFULNESS: ARTICLE 45 OF THE ILCASR

The problem of unforeseeable actions and unpredictable response by an injured State may arise from two circumstances. The first is where the responsible State exceeds the consent given it by the injured State. The second is where the injured State has not given consent to the responsible State at anytime before the completion of an internationally wrongful act against it, but nevertheless, its conduct in the aftermath of the act discloses no definite course of action to register its disapproval of the act. The approach of the ILC towards resolving this difficulty is to lay down different rules to govern ambiguous 'responses' by the injured State to the unlawful acts of responsible State in Article 45.[50] This article states that the responsibility of a State may not be invoked if (a) the injured State has validly waived the claim; (b) the injured State is to be considered as having, by reason of its conducts, validly acquiesced in the lapse of the claim. This article thus recognizes two types of waiver: first, the one that could be said to be an explicit waiver and, secondly, an implied waiver or waiver by lapse of time.

VIII. ARTICLE 45 (A)—AN EXPLICIT WAIVER OF CLAIM BY THE INJURED STATE

Article 45(a) precludes a claim by an injured State against the responsible State, not on the basis of an antecedent consent by the former to the commission of the internationally wrongful act by the latter, but on the subsequent acts of the injured State. Under this paragraph, a waiver consists in explicit acts of the injured State. These acts must indicate in the circumstances that, although it did not consent to the commissioning of the act *ab initio*, the injured State has not manifested an intention to challenge the breach or any consequences thereto. What is waived under this provision is not only the breach committed by the responsible State, but also the 'consequences in terms of

[48] MA Jones, *Textbook on Torts* (4th edn 1993), 390. See generally *Smith v Charles Baker & Sons* (1891) AC 325, at 355, *Nettleship v Weston* (1971) 2 QB 691, and *Waldick v Malcolm* (1991) 83 DLR (4th) 114.

[49] *Wooldrige v Summer* [1963] 2 QB 43, at 69.

[50] The provision of Art 45 of the ILCASR is analogous to Art 45 of the VCLT governing the loss of the right to invoke a ground for invalidating or terminating a treaty. See also ILC's Commentary 266.

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responsibility'.[51] As noted by the ILC, 'a valid waiver or settlement of the responsibility dispute between the responsible State and the injured State, or if there is more than one, all the injured States, may preclude any claim for reparation'.[52] A major problem with this kind of waiver is ascertaining the *ex post* actions of the injured State that may constitute a valid waiver.

International tribunals have often determined the question of whether a conduct amounts to a waiver on the basis of factual and legal circumstances ensuing between the parties. In *International Schools Services, Inc, v The Islamic Republic of Iran*[53] (hereafter the *International School Services* case) one of the main issues before the Iran–US Tribunal was to decide whether a Memorandum of Understanding (MOU) concluded between the parties on 19 October 1981 prevented the claimants from bringing a claim of damages for breach of a 1976 contract between the parties. Article VI (2) of the MOU had stated that

> After payment of the amount agreed to in Article IV . . . the Parties agree that they will stop and terminate all claims filed, or which could be filed, by either Party against the other. Any pursuance of the claims and counterclaims shall however be subject to the provisions of the Algerian Declaration and none of the Parties in any way waived any kind of right in this connection.[54]

The majority of the tribunal held that

> [r]atification of the MOU does not prevent the bringing of a claim for breach of the 1976 contract . . . [but] that after the MOU was executed and became 'binding', the Respondent was precluded from demanding that the Claimant assume liability vis-à-vis claims by third persons.

The rationale for this decision lies in the 'execution' of the MOU and not the mere ratification of it by the parties. This approach followed the tribunal's similar decision in *Computer Sciences Corporation v Government of the Islamic Republic of Iran*.[55] Here the tribunal considered a settlement agreement which provided for a mutual release of claims between the parties 'upon execution' of the agreement. Interpreting 'execution' as used there to mean 'signing', the tribunal held that 'execution of the agreement had extinguished all claims arising from underlying dispute and limited the Claimant to remedies for breach of the Settlement agreement itself'.[56] However, it must be noted that in the *International Schools Services* the inability of the respondent to invoke the waiver contained in the agreement was solely due to the fact that they had prevented the payment of the settlement monies. This, according to the tribunal, means that the 'claimant's obligation to "stop and terminate" all claims never arose'.[57]

Similarly, in *Sohio-Iran Trading Inc v National Iranian Oil and the Government of the Islamic Republic of Iran*[58] the settlement agreement between the parties had contained a waiver. The parties agreed that

> The sum of one million three hundred thousand United States Dollars (US $1,300,000) (the 'Settlement Amount') shall be paid to Sohio in full and complete and final settlement of all claims and disputes existing or capable of arising between the Parties to the Agreement and an Agreement in connection with the Claim No 79, a Purchase Agreement and an Agreement of 29 October 1954 or any agreement related thereto.

[51] ILC's Commentary 266.
[52] Ibid, at 266.
[53] (1986–I) 6 Iran–US CTR 6.
[54] Ibid, at 13.
[55] 8 Iran–US CTR 99, Interlocutory Award No ITL 49–55 18 Apr 1985.
[56] Ibid, at 10.
[57] Ibid.
[58] (1986–II) 6 Iran–US CTR 33.

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The tribunal held that the '[s]ettlement is hereby recorded as an Award on Agreed Terms binding on all the Parties. Consequently the parties are bound to fulfil the conditions set forth in the Settlement Agreement.'[59]

In the *Russian Indemnity* case, the fact that the Russian embassy demanded from Turkey a certain sum corresponding to the capital amount loan, without any reference to the interest or damages for delay, led Turkey to argue that the specificity of that demand evidenced the abandonment of claims in respect of other claims arising from the loan.[60]

What needs to be added to the provision contained in Article 45(a) is that, pursuant to such *ex post* action of the injured State, if the responsible State can show that it has relied on the waiver of the injured State, the latter shall be estopped from impugning its own waiver. In all these cases, the tribunals seemed to lay down the principle that where a claimant has undertaken some acts that suggest a foregoing of its right to bring action, such acts shall be deemed to constitute a waiver.

IX. ARTICLE 45 (B)—IMPLIED WAIVER OF CLAIM BY THE INJURED SATE: THE LAPSE RULE

With respect to the provisions of Article 45(b) matters are not as easy as the provisions appear. This paragraph speaks of the conduct of the injured State amounting to a valid waiver of the unlawful act.

It seems plausible to suggest that Article 45(b) of the ILCASR entail an implied waiver. An implied waiver may emerge from the conduct of the injured State subsequent to the commission of the wrongful act against it. The effect of such a waiver is that it manifests an intention to set aside certain rules between the parties, save for what may not be permitted by the Vienna Convention on the Law of Treaties related to multilateral treaties.[61] The inclusion of an implied waiver in the provisions of the ILCASR is a particularly commendable step in the light of the extreme legal complexities that often characterize states' relations, such that may not make explicit acts of waiver feasible at the material time. Nonetheless, Article 45(b), unlike the provision of Article 45(a) conceives this kind of waiver as arising only from lapse of the claim. This phrase must be taken to mean the period ensuing between the commission of the internationally wrongful act and the taking of definitive steps towards proceeding against the responsible State.

The importance of restricting implied waiver to the lapse of time is threefold. First, it is by limiting the application of implied waiver to lapse that one can distinguish between Article 45(a), which also infers waiver from conducts of the injured State, and Article 45(b) which implies waiver from such conducts. Secondly, lapse of time affects the competence of the injured State to bring an action for an internationally wrongful act against the responsible State. For instance, if the internationally unlawful act is one that must be redressed within a specified time, it does mean that failure to act within the given time prevents an action against the responsible State. In the context of domestic law, for instance, the doctrine of lapse operates to preclude a legal claim and can only be varied by specific legal regulation such as the 1925 Law of Property Act

[59] Ibid, at 34.
[60] RIAA, XI, 421 (1912), at 446, ILC's Commentary, 266.
[61] For instance, the limitations placed by Arts 41 and 48 of the VCLT and Arts 53 and 64 relating to the peremptory norm of general international law.

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(section 130(1), the 1837 Wills Act (sections 32 and 33) as substituted by section 19 of the 1982 Administration of Justice Act.[62] Thirdly, lapse as a legal term connotes failure of legitimacy.[63] Therefore, a waiver of the right to sue under Article 45(b) may only be inferred from the loss of legitimacy to pursue such an action. In contrast, failure of legitimacy does not have to result from the conducts of the injured State in order to imply a waiver under Article 45(a). Thus, Article 45(b) leads to an inference of a waiver where there is no advance consent under Article 20 or explicit conducts amounting to waiver under Article 45(a). This seems to be one of the most effective primary rules of conducts developed by the ILC in its articles on State responsibility.

Unlike explicit waiver under Article 45(a), it may be more difficult to discern which conduct of the injured State constitutes an implied waiver. According to the ILC, no matter what a particular waiver might consist of, the conduct must be unequivocal.[64] It is doubtful if unequivocality, which clearly applies to Article 45(a), should apply to Article 45 (b). It should be pointed out that Article 45(b) of the ILCASR does not give a right to infer waiver from all conducts of the injured States, but such conducts as may be implied from acquiescence. The whole essence of implying waiver from the acquiescence or conducts of the injured state is because such conducts do not unequivocally indicate its precise intention. If an act can be so unequivocal as to clearly manifest an intention by the injured State to waive its rights, the provision of Article 45(b) will be redundant. Article 45(b) is narrower than Article 45(a) as it concerns only lapse of time amounting to a waiver. To seek to imply a waiver from unequivocal conduct of the injured State is contradictory in terms and blurs the distinction between paragraphs (a) and (b) of Article 45.

It is submitted that an implied waiver under Article 45(b) is inferable from the conduct of an injured State if such conducts can reasonably be shown to have led the responsible State to conclude that the injured State intended to dispense with its right to claim for responsibility, and that the responsible State has relied on such a conduct. It is the combination of the leading-on conduct of the injured State and the reasonable-reliance on it by the responsible State, in the face of acquiescence of the former, that should be the acid test of an implied waiver under Article 45(b). In this regard, time is of the essence with the implied waiver. The pivotal question should be; can it be said that, in the circumstances subsequent to the commission of internationally wrongful act, there has been an undue delay on the part of the injured State to reproach the responsible State's act?

In *Certain Phosphate in Nauru*[65] the ICJ

> recognizes that, even in the absence of any applicable treaty provisions, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.[66]

The principle governing waiver in State relations was aptly restated by the Iran–US tribunal in the *Boeing Company and its subsidiaries*, *Logistics Support Corporation*,

[62] For a discussion of this doctrine see *Re Sinclair* [1984] 1 Weekly Law Reports 772.
[63] See L B Curzon, *Dictionary of Law* (4th edn 1994) 218.
[64] ILC's Commentary 267.
[65] *Certain Phosphate in Nauru* (*Nauru v Australia*), Preliminary Objections (1992) ICJ Reports 240.
[66] Ibid, 253–4, para 32; see also ILC's Commentary 267.

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Boeing Technology International Incorporated, *Boeing Construction Equipment Company v The Government of the Islamic Republic of Iran*, *the Iranian Air force*[67] (hereafter *Boeing* case). The tribunal stated that

> It is established that a State may waive its rights or be estopped from asserting them in particular cases. The history of the Iran-Boeing litigation in the United States . . . dictates the conclusion that in this case Iran has waived, or is estopped from asserting, any rights which it may have under the Algiers Declarations to be free of litigation in the United States . . . If Iran seriously desired to be protected from litigation, it had ample opportunity to seek interim relief as the proceeding advanced through its various stages. Iran's tardiness in seeking such relief—until 3 years after the Algiers Declarations—must be considered a waiver of any rights which Iran might have had to such relief in this case.[68]

As with the *International Schools Services* case, the tribunal placed much emphasis on the conduct of the parties as regards the expeditiousness of their actions. In the jurisprudence of international arbitration, the one instance where this rule appeared to have been relaxed was the ICJ's decision in the *LaGrand* case.[69] The facts of the case related to the trial and sentencing to death of two German nationals and brothers, Karl and Walter LaGrand by the authorities of Arizona State in the US for a murder they allegedly committed in 1982. The trial and conviction were held in breach of the Vienna Convention on Consular Relations (of 24 April 1963). Germany brought an action before the court to indicate an interim measure *proprio motu* on 2 March 1999, a few hours before the Arizona state was due to execute Walter LaGrand, whose brother was executed on 24 February for the same offence. The court had noted that

> [t]he sound administration of justice requires that a request for the indication of provisional measures founded on Article 73 of the Rules of the Court be submitted in good time.[70]

Nevertheless, the court indicated provisional measures, as sought by Germany under Article 41 of the ICJ Statute. The basis of this unanimous decision of the court was to be founded on grounds that lay well beyond the ordinary jurisdiction of the court. As Judge Oda noted in his separate declaration,

> I voted in favour of the Court's Order with great hesitation as I considered that the request for the indication of provisional measures of protection submitted by Germany to the Court should have been dismissed. However, in the limited time—only several hours—given to the Court to deal with this matter, I have regrettably found it impossible to develop my points sufficiently to persuade my colleagues to alter their position . . . I can, on humanitarian grounds, understand the plight of Mr Walter LaGrand and recognize that owing to the fact that Germany filed this request as late as yesterday evening (namely, at 7.30 p.m. on 2 March 1999), his fate now, albeit unreasonably, lies in the hands of the Court.[71]

In his separate opinion, the President of the Court, Judge Schwebel stated, that

> Germany could have brought its Application years ago, months ago, weeks ago, or days ago. Had it done so, the Court could have proceeded as it had proceeded since 1922 and held hearings on the request for provisional measures. But Germany waited until the eve of the execution and then brought its Application and request for provisional measures, at the same time arguing that no time remained to hear the United States and that the Court should act *proprio motu*.[72]

[67] (1986–II) 6 Iran–US CRT 43.
[68] Ibid, at 50.
[69] (*Germany v United States of America*) (1999) ICJ Reports 9.
[70] Ibid, at 14.
[71] Ibid, at 18 et seq.
[72] Ibid, at 22.

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It seems reasonable therefore to conclude this section by submitting that the categories of situations that will constitute waiver are not closed. A court or an arbitral tribunal may sometime invoke extraordinary jurisdiction in order to deal with such issues. In *LaGrand* the court certainly did not think that the undue delay by Germany should not have affected its competence to institute an action for interim measures. That was not in doubt. Some of the judges agreed that Germany had unduly delayed and that, on sound principles of law, affected the legitimacy of its action. However, in *LaGrand*, the court was prepared to allow humanitarian consideration to influence its decision. It was the first time the court had invoked Article 75(1) of its Rules permitting *proprio motu* actions, directly decided such a case *ex parte*, and had decided a case without conforming to the principle of *audi alteram patem*.[73] The court can only hope, as Judges Oda[74] and Schwebel prayed, that 'this case will not set a precedent in the history of the Court'.[75]

Having considered the place of consent as a circumstance precluding wrongful in the ILC Articles on State Responsibility, I now turn to the examination of whether Article 26 ILCASR applies to consensual interventions.

X. LIMITATIONS ON CONSENT AS CIRCUMSTANCE PRECLUDING WRONGFULNESS

Article 26 states that

> Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

This provision does not identify the peremptory norms, the breach of which cannot be excused by consent as a circumstance precluding wrongfulness in international law. The ICJ has not explicitly pronounced on such norms as may have become peremptory under general international law although its jurisprudence is replete with nuanced references to such norms.

In the *Barcelona Traction* case (second phase), the ICJ, supported by twelve judges, identified such norms as including 'acts of aggression, and of genocide [and] principles and rules concerning the basic rights of the human person, including the protection from slavery and racial discrimination'.[76] The ILC identified self-determination as one of these norms and cited the pronouncement of the ICJ in the *East Timor* case.[77] However, this latter classification seems a little problematic. The ICJ undoubtedly agreed with Portugal's 'irreproachable' argument that the issue in contention between it and Australia (the right to self-determination of East Timorese people), was a right *erga omnes*. However, it is doubtful whether all the norms identified by the ICJ in the East Timor case—especially self-determination and racial discrimination—constitute *jus cogens* rule. If it is assumed that all *jus cogens* obligations are *erga omnes*, the

[73] 'Hear the other side.' The court did not hear the United States in granting the interim measures to Germany. For the tenets of the principle of natural justice, see *Local Government Board v Arlidge* [1915] AC 120; *Ridge v Baldwin* [1964] AC 40.

[74] Ibid, at 19.

[75] Ibid, at 21.

[76] ICJ Reports (1970), 3 at 32. See also *In re Koch*, 30 International Law Reports 496, at 503; *Assessment of Aliens* case, 43 ILR, 3 at 8; *Tokyo Suikosha* case 13 Japanese Ann of IL (1969) 113, at 115.

[77] See ILC's Commentary 188.

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converse is certainly not the case.[78] As Alain Pellet has argued, there are many *erga omnes* obligations which 'could hardly be seen as deriving from peremptory norms'.[79] An example is the right of passage in international straits or international canals. However blatant a breach of such a right might be, it may not still be perceived as an internationally wrongful act of the magnitude of *jus cogens*.[80]

XI. IS CONSENSUAL INTERVENTION EXCUSED UNDER ARTICLE 26 ILCASR?

States taking part in the Vienna Conference on the Law of Treaties specifically listed the prohibition of the use of force as a peremptory norm.[81] It somewhat lies beyond questioning today that the prohibition of the use of force is a peremptory norm.[82] However, as Ronzitti has argued, 'the precise content of the ban remains a moot point'.[83] Wippman also thought that 'it is possible to debate whether all of these principles [non-use of force, self-determination, sovereign equality] qualify as *jus cogens*'.[84] For our purpose however, it suffices to say that the prohibition on the use of force in Article 2(4) of the Charter is widely accepted as a peremptory norm.

Examples of consensual intervention are seen in the practice of ECOWAS and African Union. Article 10 of the protocol adopted by ECOWAS in 1999 provides that:

> the Mediation and Security Council shall take decision on issues of peace and security in the sub-region on behalf of the Authority. It shall also implement all the provisions of this Protocol.

Paragraph 2 of this Article provides that pursuant to the provisions of Article 7 of this Protocol and paragraph 1 the Mediation and Security Council shall:

> (a) decide on all matters relating to peace and security
> (b) decide and implement all policies for conflict prevention, management and resolution, peace-keeping and security
> (c) authorise all forms of intervention and decide particularly on the deployment of political and military missions.

A legal analysis of this protocol can be found elsewhere.[85] Suffice to note that Article 10 (2) (c) of the protocol empowers ECOWAS to undertake military actions in respect of conflicts in Member States.

Similarly, the Constitutive Act of the AU[86] empowers the organisation to undertake any action its highest body might deem fit. In 2002, the AU established what it calls the Peace and Security Council (PSC) which it declares shall have the full powers of

[78] See Alain Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10 EJIL 1, at 5.

[79] Ibid. [80] Ibid.

[81] These States include Poland, Sierra Leone, Cyprus, Italy, Ecuador, Czechoslovakia, Bielorussia, Nepal, and so on. See UN Conference on the Law of Treaties. First and Second Sessions, Vienna, 26 Mar–24 May 1968, Official Records, UN A/CONF 39/11, at 294, para 3.

[82] See Ronzitti, above n 18, at 150.

[83] Ibid at 150. [84] Above, n 44 at 619.

[85] See A Abass, 'The New Collective Security of ECOWAS: Innovations and Problems', (2000) 5(2) JCSL 211; id, 'The Implementation of ECOWAS' New Protocol and Security Council Resolution 1270 in Sierra Leone: New Development in Regional Intervention' (2002) 10 (Special Issue) University of Miami International and Comparative Law Review 177.

[86] *Council of Ministers Seventy-fourth Ordinary Session/Ninth Ordinary Session of the AEC*, 2–7 July 2001. CM/2210 (LXXIV).

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the United Nations Security Council, except that the veto power has no place in its decision making process.[87] Article 4 of the AU Act provides for the 'right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.[88] The issue is whether Article 10(1) (c) of ECOWAS' protocol and Article 4(h) of AU Act preclude the operation of Article 26 of ILCASR.

It is submitted that consensual intervention can preclude the operation of Article 26 of ILCASR. Where States, by practice or through treaties, give consent to international organisations or other States to intervene in conflicts occurring on their territories, such intervention, even when it involves a use of force, is excused by Article 26 ILCASR. A consensual use of force cannot be viewed as a coercive use of force, which Article 2(4) of the UN Charter must be understood to prohibit.[89] Surely, Article 2(4) of the UN Charter does not take away the sovereign right of States to permit other states to use force on their territory.[90] States have the power to consent to limitations on their independence,[91] and may surrender their independence altogether to merge with other states. Therefore, 'it would seem strange if a [S]tate could not consent to a less drastic curtailment of its sovereignty by releasing its right of non-intervention'.[92]

An international tribunal should give effect to agreement reached by States in respect of obligations owed to each other. Opponents of this view may argue that the prohibition of the use or threat of force is a peremptory obligation in international law. Such arguments would be flawed insofar as consensual use of force is not procured by fraud, coercion or error, and it is not directed towards aggressive purposes. Since a peremptory norm cannot be derogated by consent, it follows therefore that consent, or its absence, is integral to the definition of such norms in international law.[93] The ILC would seem to endorse this reasoning when it advised that the consent of a particular State might be relevant in applying some peremptory norms.[94]

XII. CONCLUSION

The ILCASR undoubtedly makes a significant contribution to certain primary rules of conducts in international law. As yet, it is difficult to anticipate how international tribunals or States may interpret the provisions contained in Articles 20 and 26.

Article 26 attempts to restrict the sovereign right of States to preclude wrongfulness

[87] First Ordinary Session: Protocol relating to the Establishment of the Peace and Security Council of the African Union <http://www/au2002.gov.za/docs/summit_council/secropt.htm> (Assembly of the African Union).

[88] See A Abass and M Baderin, 'Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union' (2002) XLIX Netherlands International Law Review 1.

[89] Wippman, above n 44 at 622.

[90] Oscar Schachter argued that 'in the absence of a civil war, recognized governments have a right to receive external military assistance and outside States are free to furnish such aid . . . [intervention] is allowable at the request of the government of a State'. See O Schachter, 'The right of States to Use Armed Force' (1984) 82 MLR 1620, at 1645.

[91] An instance of this is the dispatch of the UK troops to Muscat and Oman in 1957. See House of Common (HC) Debates, col 872.

[92] A Van Wynen Thomas and AJ Thomas, Jr, *Non-Intervention*: *The Law and Its Import in the Americas* (1956), at 92.

[93] See Wippman, above n 44, at 622.

[94] ILC's Commentary 188.

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for breach of certain obligations in international law. International tribunals have a responsibility to strike a realistic balance between the preservation of the most fundamental norm in the international legal order—*jus cogens* rule—and the seemingly inalienable right of states to permit certain activities on their territories.

It is by no means suggested here that the prohibition of the use of force is not a peremptory norm, even if doubts continue to exist as to the exact content of that provision. Nor is it the view canvassed that States should inordinately preclude the operation of Article 26 of the ILCASR by relying on consent under Article 20. The position of this writer is that consent lies at the very foundation of international law and as such, care must be taken when precluding its operation in respect of certain international obligations. Whereas such obligations as torture, slavery, and genocide cannot generally be precluded by consent, it is submitted that the prohibition of the use of force does not *invariably* fall into this category. A consensual intervention to commit aggression cannot be regarded as excused under Article 26 of ILCASR. However, the same cannot be said of consent given by States to other States or international organisations to help them defeat, for instance, insurrections by soldiers attempting to forcibly overthrow democratic governments on their territory. Such a use of force must be seen as an incident of State sovereignty such that it cannot be regarded as having been surrendered under any provision of the UN Charter or general international law. If Article 2(4) of the UN Charter contains peremptory obligations, not every obligation under Article 2(4) is peremptory under general international law.

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