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Circumstances Precluding Wrongfulness

Helmut Philipp Aust
Humboldt-Universität zu Berlin

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Chapter 6: Circumstances Precluding Wrongfulness

Helmut Philipp Aust[*]

1. Introduction

'There is behaviour that is right; and there is behaviour that, though wrong, is understandable and excusable. The distinction between the two is the very stuff of classical tragedy. No dramatist, no novelist would confuse them. No philosopher or theologian would conflate them.'[1] With these remarks, Vaughan Lowe criticised the International Law Commission (ILC) for having failed to translate adequately the differing degrees of wrongfulness and responsibility into its system of 'defences' for violations of the law. As is well known, the ILC has labelled these defences as 'circumstances precluding wrongfulness'. It thus aspired to introduce a measure of conceptual clarity and uniformity into a field that was previously characterised by considerable diversity – justifications, excuses, defences, circumstances precluding responsibility – all these categories could be found in the works of scholars as well as in judicial practice.[2] What these categories meant to cover was a diverse field of different grounds which could exculpate, or 'defend', states from claims for wrongful behaviour. These grounds included notions that are quite characteristic for the international legal order, such as 'self-help' and 'self-defence', but also concepts frequently found in domestic private law, such as *force majeure*, distress, and necessity.

The provisions on 'circumstances precluding wrongfulness' (Articles 20 to 27 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the Articles on Responsibility of International Organizations (ARIO), respectively) have found widespread acceptance in international practice.[3] This practice, however, is essentially limited to 'bilateral' situations, i.e. the classic scenario in which one state advances a claim against another state (or

[*] Dr. iur., Senior Research Fellow, Faculty of Law, Humboldt University Berlin. I would like to thank the editors and the other participants at the authors' seminar for useful comments and suggestions. Any errors are mine. The research leading to this Chapter has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013)/ERC grant agreement n° 249499, as part of the research project on Shared Responsibility in International Law (SHARES), carried out at the Amsterdam Center for International Law (ACIL) of the University of Amsterdam.

[1] V. Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) 10 EJIL 405–411, at 406.

[2] S. Szurek, 'The Notion of Circumstances Precluding Wrongfulness', in J. Crawford, A. Pellet and S. Olleson (eds.), *The International Law of Responsibility* (Oxford: OUP, 2010), pp. 427–437, at p. 428.

[3] Ibid., at pp. 428–29. For an overview of judicial practice see the 'Materials on the Responsibility of States for Internationally Wrongful Acts', compiled by the UN Secretariat, UN Legislative Series, UN Doc. ST/LEG/SER.B/25 (2012), at 154 et seq.

other bilateral settings such as investment claims). In contrast, it is mostly uncharted territory as to how these circumstances come to be applied in situations of 'shared responsibility'.[4] In more concrete terms, how can the circumstances set forth in Articles 20 to 27 of the ARSIWA and the ARIO cope with situations in which a plurality of states and/or international organisations are implicated in the commission of a wrongful act, and one or more of them try to rely on the circumstances?[5] Could it be that the circumstances are characterised by an emphasis on 'bilateral' situations and, hence, cannot adequately deal with the complexity of 'shared responsibility'?

These questions have so far not received a lot of attention. Although there is only a limited amount of practice on which we can draw, it is worthwhile to expound these questions further. Several grounds have been noted for the growing number of cases that create situations of 'shared responsibility', amongst which one can find the growing interdependence of today's world, the greater heterogeneity of actors, and an increasing 'moralization' of international relations which leads to a greater emphasis on questions of responsibility and accountability.[6] If this assessment is correct, it will most likely only be a matter of time until a state and/or an international organisation will rely on one of the circumstances precluding wrongfulness in a case in which multiple responsible actors are involved.[7]

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[4] For a definition of the concept of shared responsibility as used for this volume see the 'Introduction' to this volume as well as P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) MIJIL 359–438.

[5] This Chapter does not, in general, deal with the reverse situation in which a state/international organisation invokes a circumstance precluding wrongfulness against a plurality of states acting together. This scenario does not pose particular problems for all of the circumstances set forth by the ILC in the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA), Articles 20–27. For example, with respect to consent, it is clear that consent given by a state/international organisation can only authorise conduct *vis-à-vis* that state. With respect to self-defence, the determining factor for the question against which states' measures of self-defence can be taken depends entirely on the applicable primary rules of the *jus ad bellum*. The notions of *force majeure*, distress, and necessity are generally indifferent towards the conduct of the state/international organisation which is affected by the relevant conduct. Therefore, it is difficult to envisage problems that are specifically related to issues of shared responsibility in this context. The only circumstance where particular problems arise in this reverse scenario is Article 22 of the ARSIWA and the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO), Article 22 (countermeasures). On the problems related to the taking of countermeasures against a multitude of responsible states see the contribution in Chapter 10 of this volume, C.J. Tams, 'Countermeasures against Multiple Responsible Actors', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. __.

[6] See generally Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 4.

[7] Although one should note the general reluctance of states to rely on circumstances precluding wrongfulness which, as P. Okowa argues, is due to the fact that such reliance constitutes a *prima facie* acknowledgement of wrongful conduct. See 'Defences in the Jurisprudence of International Tribunals', in G.S. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law – Essays in Honour of Ian Brownlie* (Oxford: Clarendon Press, 1999), pp. 389–411, at p. 389.

Scenarios for the individual defences set forth in the ARSIWA and the ARIO that involve issues of 'shared responsibility' can be easily imagined: consider the case of state A expressing its consent to the deployment of the military forces of state B on its territory. Would the 'defence' of consent under Article 20 of the ARSIWA also cover the conduct of a state C that deploys military advisors for the troops of state B? How does 'self-defence' under Article 21 of the ARSIWA accommodate situations of collective self-defence? Which states can rely on the exculpatory effect of Article 22 of the ARSIWA when they take collective countermeasures in order to induce a wrongdoing state to cease its wrongful conduct? How can *force majeure* (Article 23 of the ARSIWA) preclude the wrongfulness of a 'joint organ' of two states if, for instance, the two states have set up joint border patrols and an aeroplane deployed in this context is carried by heavy wind into the airspace of a third state? Can distress (Article 24 of the ARSIWA) exculpate both an international organisation and a troop-contributing member state if – in a situation of dual attribution – a soldier of a peacekeeping force can only save his life by the commission of an act prohibited by international humanitarian law? And might several member states of an international organisation rely on 'necessity' under Article 25 of the ARSIWA in order to justify a humanitarian intervention in a third state?

These examples may highlight that circumstances precluding wrongfulness might well come to apply in situations of shared responsibility. It is the purpose of this Chapter to critically analyse how well the ILC's work is equipped for dealing with such situations. To this end, the next section will first give a brief overview of the conceptual background for this discussion (section 2). Thereafter, we will turn towards the individual defences codified by the ILC with a view to their suitability for situations of shared responsibility (section 3). The fourth section will summarise the various challenges we will have come across in this discussion. Section 5 will offer some considerations as to how these shortcomings could be remedied. In particular, it will be argued that the conceptual basis of the circumstances regime should be reconsidered. A differentiation between circumstances that truly preclude wrongfulness and other defences that merely 'excuse' state or international organisation behaviour might help to remedy some of the deficiencies that we will come across in the course of this Chapter. Finally, a brief conclusion will be given.

2. The conceptual background

2.1 'Shared responsibility'

According to the definition underlying this volume, responsibility is shared when multiple actors are responsible for their contribution to a single harmful outcome.[8] A specific manifestation of such shared responsibility arises when multiple actors are responsible for their contribution to a single harmful outcome and the contributions cannot causally be attributed to individual actors.[9] The following remarks will assess the impact of several modes of shared responsibility on the application of the circumstances precluding wrongfulness. Preceding this discussion, it is useful to briefly set out what these modes are and thereby also to clarify the terminology employed in this Chapter. The Chapter will concentrate on three dimensions of shared responsibility. First, by 'joint conduct', a situation is referred to in which two or more states and/or international organisations act together 'on the same footing'. This category therefore signals that all those actors would incur responsibility for violating a given obligation. Second, by 'multiple attribution', a situation is envisaged in which one form of conduct or omission is attributed to two or more states and/or international organisations.[10] Thirdly, 'complicity' situations deal with what is set out in Article 16 of the ARSIWA, i.e. aid or assistance rendered by one state and/or international organisation to another state and/or international organisation for the commission of a wrongful act. These three modes are not exhaustive of the concept of 'shared responsibility'. However, they may suffice so as to give examples for the present purposes.

In situations of attribution of responsibility (as to which see in more detail Chapter 4 of this volume), it would seem to be highly unlikely that the circumstances could apply to the benefit of the state which is, for instance, directing or controlling another state in the commission of an internationally wrongful act (Article 17 of the ARSIWA), or even coercing another state (Article 18 of the ARSIWA). In particular, structural considerations militate in this regard. The concept of attribution of responsibility presupposes that the two elements of an internationally wrongful act under Article 2 of the ARSIWA are already met by the state that has engaged in

[8] Chapter 1 of this volume, P.A. Nollkaemper, 'Introduction', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ____; see further Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 4, at 366–368.
[9] Ibid.
[10] See Chapter 3 of this volume, F. Messineo, 'Attribution of Conduct', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___.

wrongful conduct, and not necessarily by the state to which responsibility is attributed.[11] In the most likely scenarios, circumstances precluding wrongfulness would thus intervene on the first level, i.e. pertaining to the conduct of the state which was directed, controlled, or coerced by another state, and not on the second level of the state to which responsibility is attributed. That said, there may be exceptional scenarios in which a state organ might have been forced to coerce the organ of another state to commit an internationally wrongful act in a situation of distress. Such 'chains' of justification are conceivable but are, apparently, of a rather theoretical nature.

2.2 General features of the circumstances precluding wrongfulness

The list of defences set forth in Articles 20 to 27 of the ARSIWA cover quite a large ground, and has accordingly been labelled a 'grab bag'.[12] Hence, one is well-advised to be cautious about identifying overarching structural principles for these very diverse defences. Nonetheless, the work of the ILC is characterised by some considerations which need to be kept in mind when we discuss the application of these defences in situations of shared responsibility.

2.2.1 The development of the circumstances regime

With respect to the historical development of the defences of international law, it can be noted here that ever since international law had begun to comprise a distinct field of international responsibility, defences have formed part of this field of the law.[13] This becomes apparent from the work of the Preparatory Commission for the 1930 Hague Conference for the codification of international law, which formulated a number of bases of discussion for 'circumstances under which states can decline their responsibility'. The concrete grounds mentioned by the Commission were self-defence, reprisals, provocative attitudes of an injured person, and acts of

[11] See Chapter 4 of this volume, J.D. Fry, 'Attribution of Responsibility', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___.
[12] R. Rosenstock, 'The ILC and State Responsibility' (2002) 96 AJIL 792–797, at 794.
[13] See, with further references, F. Paddeu, 'A Genealogy of *Force Majeure* in International Law' (2012) 82 BYIL 381–494, at 405. On the historical reasons for the absence of a law of state responsibility before the end of the 19th century see C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 RCADI 9–438, at 269.

the armed forces in the suppression of a riot or insurrection.[14] Just as with the later work of the first ILC Special Rapporteur on this topic, F.V. García Amador,[15] these bases of discussion were still characterised by the initial focus of the law of state responsibility on the question of reparations for injuries to aliens.[16]

When the ILC recalibrated its work under the stewardship of Roberto Ago, its second Special Rapporteur on the topic, towards drafting a general framework for the legal consequences attached to wrongful conduct,[17] the question of the defences became particularly important. Now the codification was not 'only' about finding common ground for justifying violations of the law in an important, but relatively narrow, specific field of international law. According to the approach proposed by Ago and ultimately adopted by the ILC, the defences would now apply across the whole range of international legal obligations.[18] This generalising approach has been criticised for various reasons.[19] Why should, potentially, the same defence of 'distress' – a highly personalised notion – be able to justify the violation of a bilateral commercial treaty just as well as rules that are more closely related to issues of global public policy, such as the obligation to prevent genocide? To be fair, the ARSIWA set forth that none of the defences 'preclude 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'.[20] As the Commentary makes clear, '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.'[21] In addition, the ILC has included the general disclaimer that a *lex specialis* may exist that would then dispense with the application of the general rules laid down in its two sets of Articles.[22] It would exceed the scope of this Chapter to discuss specific emanations of the *lex specialis*.[23] It suffices to mention here that in the context of human rights law, several modifications apply. In order to justify conduct that *prima facie* infringes upon human rights

[14] Cf. Szurek, 'The Notion of Circumstances Precluding Wrongfulness', n. 2, pp. 427–28.
[15] F.V. García Amador, 'First Report on State Responsibility', ILC *Yearbook* 1956/II, 203 et seq.; 'Third Report on State Responsibility', ILC *Yearbook* 1958/II, 50 et seq.
[16] On the development of the ILC's codification work see generally J. Crawford, 'Introduction', in J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility* (Cambridge: CUP, 2002), pp. 1–60, at pp. 1–4.
[17] R. Ago, 'Working Paper', ILC *Yearbook* 1963/II, 251, at 253.
[18] Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary), reprinted in Crawford, *The International Law Commission's Articles*, n. 16, introduction to Chapter five of part one, para. 2.
[19] For general critique of the approach see A. Pellet, 'Can a State Commit a Crime? Definitely, Yes!', (1999) 10 EJIL 425–434.
[20] Article 26 ARSIWA, n. 5.
[21] ARSIWA Commentary, n. 18, Article 26, para. 6.
[22] Article 55 ARSIWA, n. 5.
[23] Cf. Okowa, 'Defences in the Jurisprudence of International Tribunals', n. 7, p. 390.

guarantees, states generally have to argue within the bounds of what the relevant human rights agreement prescribes. The argument of necessity, for instance, is already factored into the general principle of proportionality, which needs to be respected when state action infringes upon human rights. In addition to this test, it would not seem that states could additionally also rely on the principle of necessity as provided for by Article 25 of the ARSIWA.[24]

2.2.2 Preclusion of wrongfulness

With respect to the general rules as laid down by the ILC, a number of structural features stand out. It was Roberto Ago who introduced the notion of 'circumstances precluding wrongfulness'.[25] How this notion operates can only be understood with reference to the cornerstone of the ILC codification, to be found in Article 1 of the ARSIWA. According to this provision, '(e)very internationally wrongful act entails the international responsibility of that State.' Article 2 of the ARSIWA further defines the notion of 'internationally wrongful act' by stipulating that there is such an act 'when conduct consisting of an action or omission (a) is attributable to the State under international law' (the subjective criterion) and '(b) constitutes a breach of an international obligation of the State' (the objective criterion).[26] The defences laid down in the ARSIWA are said to dispense with the objective element, i.e. the breach of an international obligation. Accordingly, if a defence is successfully relied upon by a state or international organisation, the conduct in question is no longer wrongful in character.

The ILC has been criticised for this construction of the defences.[27] The major criticism in this regard is that only some of the grounds for justification would effectively preclude wrongfulness. This would be the case for the defences of consent, self-defence, and, according

[24] See further C. Ryngaert, 'State Responsibility, Necessity and Human Rights' (2010) 41 NYIL 79–98.

[25] At the same time, one should note that there have been some variations to Ago's work on defences over time. In particular, as Andrea Gattini has meticulously argued, it can be established from his early writings on issues of fault in the law of state responsibility that, according to Ago, *force majeure* was a defence which related to a lack of fault on the part of the respective state. Only later as Special Rapporteur did these differentiations disappear, arguably for the reason that Ago did not wish to see the question of fault openly discussed in the ILC. Instead, the inclusion of *force majeure* and – at the time – fortuitous event would have served as a reintroduction of fault into the law of state responsibility, albeit in a disguised and negative form. See with further references A. Gattini, 'La notion de faute à la lumière du projet de convention de la Commission du droit international sur la responsabilité internationale' (1992) 3 EJIL 253–284, at 271–272.

[26] On the questionable terminology with respect to the objective and subjective elements see A. Gattini, *Zufall und force majeure im System der Staatenverantwortlichkeit anhand der ILC-Kodifikationsarbeit* (Berlin: Duncker & Humblot, 1991), p. 44.

[27] See Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses', n. 1; T. Christakis, 'Les "Circonstances excluant l'illicéité: une illusion optique?"', in *Droit du pouvoir – pouvoir du droit. Mélanges en l'honneur de Jean Salmon* (Bruxelles: Bruylant, 2007), pp. 223–270; A. de Hoogh, *Obligations Erga Omnes and International Crimes* (The Hague: Kluwer, 1996), pp. 221–224.

to most commentators,[28] also reliance on the right to take countermeasures. However, for the other three grounds set forth in the ILC's work, conceptual reasons as well as an analysis of international practice would instead speak for the view that *force majeure*, distress, and necessity cover conduct that is still wrongful, yet in some form is excused or leads to attenuated forms of responsibility.[29] This can be seen, for instance, in the international practice of states that assumes that some form of compensation is owed if a state relies on the state of necessity.[30]

For Special Rapporteur Ago, it was impossible to conceive of a wrongful act that would not entail the 'disadvantageous consequences' that usually ensue.[31] According to Ago, '(i)t is difficult to see what would be the point of making such a characterization. Imposing an obligation while at the same time attaching no legal consequences to breaches of it would in fact amount to not imposing the obligation in question at all.'[32] To hold otherwise would have required Ago and the ILC to change the formulation of what was to become Article 1 of the ARSIWA. Until the very end of the work of the Commission on the ARSIWA, such a reformulation was not a realistic option. Likewise, when the ILC worked on the ARIO, its decision to model those rules as closely as possible on the ARSIWA 'precluded' it from revisiting this conceptual question. While this approach can, of course, be criticised for a lack of imagination, it is also understandable that, in light of the meagre available practice on the responsibility of international organisations, the ILC did not want to re-invent the wheel in this regard.[33]

[28] See H. Lesaffre, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Countermeasures', in J. Crawford, A. Pellet and S. Olleson (eds.), *The International Law of Responsibility* (Oxford: OUP, 2010), pp. 469–473, at p. 469. This is also the view of the ICJ: see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 7, para. 82.
[29] Such a distinction was also considered by J. Crawford, 'Second Report on State Responsibility', UN Doc. A/CN.4/498/Add.2 (1999), paras. 228–229, but was not adopted by the Commission.
[30] Cf. Christakis, 'Les "Circonstances excluant l''illicéité: une illusion optique?"', n. 27, p. 265.
[31] R. Ago, 'Eighth Report on State responsibility', ILC *Yearbook* 1979/II(1), 28, para. 52.
[32] Ibid.
[33] For a critical assessment of the ILC's approach in this regard see C. Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations – An Appraisal of the "Copy and Paste" Approach' – (2012) 9(1) IOLR 53–66. An advance version is available as SHARES Research Paper 13 (2012), ACIL 2012-14 at www.sharesproject.nl.

2.2.3 The distinction between primary and secondary rules

For various reasons, the inclusion of the circumstances precluding wrongfulness in the ILC's codification work is at odds with the conceptual decision to include only the so-called 'secondary rules' of international law, i.e. only to deal with those questions that concern the consequences of the commission of a wrongful act.[34] As the defences would effectively render the conduct in question lawful, they could be regarded as operating on the level of the primary rules which, by definition, cannot be concerned with the consequences of wrongful conduct, as there is none in the light of their intervention. While the distinction between primary and secondary rules may be useful for heuristic purposes, its importance should not be overstated. The ILC's codification work also features other examples of rules which are not easy to categorise into one or the other domain and nevertheless fulfil useful functions for the regime of international responsibility.[35]

Nonetheless, this critique touches upon an important issue for the questions that interest us here and which, as we shall see immediately below, makes the application of the circumstances somewhat unpredictable in situations of shared responsibility. States cooperate in all kinds of conceivable scenarios and a large part of international law is in place to precisely enable cooperation.[36] Frequently, it is difficult to distinguish between lawful and thus socially welcome forms of cooperation, on the one hand, and, on the other, situations in which aspects of this cooperation exhibit elements of wrongfulness. At times, the motives and the factual basis for one state or international organisation among a group of actors to take a given form of action will not be readily apparent to all the actors involved. Whether or not circumstances precluding wrongfulness can be relied upon by one or more states or international organisations in such a group may thus change the legal assessment on the basis of which those actors committed themselves to the collective endeavour. Put differently, the circumstances precluding wrongfulness may operate as a kind of 'magic touch',[37] rendering wrongful conduct lawful.

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[34] Cf. P. Malanczuk, 'Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility' (1983) 43 ZaöRV 705–812, at 709.
[35] An example is the provision on complicity in Article 16 ARSIWA, n. 5.
[36] *Drozd and Janousek v. France and Spain*, App. No. 12747/87 (ECtHR, 26 June 1992), para. 110; see also G. Nolte and H.P. Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law' (2009) 58 ICLQ 1–30, at 12; C. Chinkin, 'The Continuing Occupation? Issues of Joint and Several Liability and Effective Control', in P. Shiner and A. Williams (eds.), *The Iraq War and International Law* (Oxford: Hart, 2008), pp. 161–183, at p. 182.
[37] Christakis, 'Les "Circonstances excluant l'illicéité: une illusion optique?"', n. 27, p. 223.

The problems associated with this state of affairs are exacerbated by the fact that most situations in which circumstances precluding wrongfulness will be relied upon will not be adjudged in forms of judicial dispute settlement. Rather, the involved states and/or international organisations will have to determine for themselves whether the conditions for the applicability of a circumstance precluding wrongfulness have been met.

This is a general problem with the law of international responsibility.[38] But when a state or international organisation invokes a circumstance precluding wrongfulness, there is an additional 'entry point' for the problem of self-judgment, since not only does compliance with the original obligation need to be assessed, but also the conduct of the state and/or international organisation that relies on a defence. If we then take into account that situations of shared responsibility are by definition characterised by the involvement of more than just two actors, it becomes apparent that there is growing potential for disagreement.

While one might say that this is a factual problem pertaining to the ascertainment of legal rules in international law, it nonetheless characterises the environment in which the application of the circumstances precluding wrongfulness takes place, even more so when a multitude of actors is involved. Therefore it is understandable that the ILC formulated some limits to the circumstances precluding wrongfulness.[39] For instance, it is affirmed that 'a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in Chapter V operate as a shield rather than a sword.'[40] By their character as exceptions, the circumstances precluding wrongfulness all share a potentially intricate relationship with the ideal of an international rule of law.[41] They are escape routes from responsibility and, for this reason, deserve to be interpreted narrowly.

[38] See, with further references, H.P. Aust, 'The Normative Environment for Peace – On the Contribution of the ILC's Articles on State Responsibility', in G. Nolte (ed.), *Peace through International Law? The Role of the International Law Commission* (Berlin: Springer, 2009), pp. 13–45, at pp. 23–28.

[39] One explicit limit set forth by the ARSIWA and ARIO respectively is the affirmation that the peremptory norms of general international law (*jus cogens*) form the outer boundary of what the circumstances can preclude in terms of wrongfulness. See Article 26 ARSIWA and ARIO, n. 5; on the evolution of this provision see M. Forteau, *Droit de la sécurité collective et droit de la responabilité internationale* (Paris: Pedone, 2006), pp. 395 et seq.

[40] ARSIWA Commentary, n. 18, Introduction to Chapter V, para. 2.

[41] Rosenstock, 'The ILC and State Responsibility', n. 12, at 794: 'They [the circumstances precluding wrongfulness, HPA] demonstrate the related view of most states that freedom to look out for themselves should have, or as a fact of life does have, at least equality with, if not outright priority over, community mechanisms or concerns.'

3. Testing the circumstances precluding wrongfulness

With these general observations in mind, it is now time to turn to the individual defences set forth in Articles 20 to 27 of the ARSIWA and the ARIO and to test how well they are equipped for application in situations of shared responsibility.

3.1 Consent

The defence of consent is an expression of the concept of state sovereignty and 'lies at the very foundation of international law'.[42] The idea behind including consent as a defence in the ILC's work is that consent given to a certain course of conduct 'precludes the wrongfulness of that act in relation to the consenting State'.[43] In order to preclude wrongfulness, the consent must be 'valid', which refers to a number of conditions pertaining to the modalities of its expression. For instance, the consent must be 'freely given and clearly established'.[44] For our purposes, it is important to note that Article 20 'is concerned with the relations between the two States in question.'[45] The ILC included this clarification in its Commentary in order to stress that where more than one state needs to consent to given conduct in order to make it lawful, the consent of only one state would not suffice to preclude the wrongfulness of the act. Arguably, this clarification works the other way too. If state A consents to the stationing of troops by state B, it is to be assumed *prima facie* that this consent only covers troops by state B and that state B is not authorised, for example, to 'sub-contract' other states. In general, the limits of the expressed will determine what forms of conduct, and by whom, will be susceptible to falling within the scope of application of Article 20 of the ARSIWA and the ARIO.[46] At least with respect to the provision in the ARSIWA, the reason for this limitation can ultimately be seen in the connection of consent with state sovereignty. When the expressed will is the outer limit for the determination of consent, it is not to be presumed lightly that a state that has been authorised to engage in certain conduct via consent can jointly implement this authorisation together with other actors. The giving of consent towards another state may, irrespective of the

[42] A. Abass, 'Consent Precluding State Responsibility: A Critical Analysis' (2004) 53 ICLQ 211–225, at 225; see also G. Nolte, *Eingreifen auf Einladung. Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung* (Berlin: Springer, 1999), pp. 133–40.
[43] ARSIWA Commentary, n. 18, Article 20, para. 1.
[44] Ibid., para. 6.
[45] Ibid., para. 9.
[46] A. Ben Mansour, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Consent', in J. Crawford, A. Pellet and S. Olleson (eds.), *The International Law of Responsibility* (Oxford: OUP, 2010), pp. 439–447, at p. 444.

form in which it finds expression, resemble the conclusion of a bilateral agreement. Also in this case, the beneficiary of such an agreement would not be entitled to extend the reach of the agreement towards third parties without the consent of the partner with which it entered into the agreement. While this reasoning appears to be relatively straightforward at first sight, it raises a number of questions for situations of shared responsibility.

Consider, for instance, the case of complicity, as laid down in the provision on 'aid or assistance' in Article 16 of the ARSIWA.[47] According to the concept of complicity underlying this provision, responsibility for complicity can only arise when aid or assistance has been given to the commission of a wrongful act. If the effect of consent under Article 20 of the ARSIWA is to preclude the wrongfulness of the given conduct, it would accordingly not be unlawful for state C to assist state B in the above-mentioned example. Following this reasoning, it would be conceivable that state C could assist state B with military advice or the provision of military equipment. A problem which is raised by such a scenario is the distinction between complicity-based responsibility and joint responsibility (i.e. where two states act more or less on the same footing).[48] In other words, where does responsibility for complicity end, and joint responsibility begin? Would the presence of those military advisors on the territory of state A still be covered by the consent of state A? The logic behind Article 20 of the ARSIWA seems to imply that state B could avail itself of the support of other states. The effects of the consent of state A would extend to merely 'supporting states'. However, state B would not be free to join hands with third states contributing to the conduct in question to the extent that they could no longer be regarded as mere 'accomplices', but rather as main actors themselves. Accordingly, we are faced here with problems that are primarily due to uncertainties surrounding the concept of complicity in international law. Nonetheless, the suitability of the circumstances precluding wrongfulness is tested by such a borderline case between complicity and joint responsibility.

While it is certainly possible to distinguish cases on this basis, this construction might lead to considerable uncertainty for all actors involved. The state that expresses its consent will not know with absolute certainty what forms of the conduct to which it has consented may be 'contracted out' to third states. Conversely, state B may not know how far it can go in securing

[47] See generally H.P. Aust, *Complicity and the Law of State Responsibility* (Cambridge: CUP, 2011); see also Chapter 5 of this volume, V. Lanovoy, 'Complicity in an International Wrongful Act', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp.___.

[48] I. Brownlie, *State Responsibility* (Oxford: OUP, 1983), p. 191; Lanovoy, 'Complicity in an Internationally Wrongful Act', n. 47, this volume at pp. ___.

the support of other states for the conduct for which it has been authorised by state A. Finally, state C must make careful considerations as to whether it can take the risk of supporting state B without becoming responsible for conduct which goes beyond mere aid or assistance.

These uncertainties may, of course, be remedied by a previous agreement between all actors involved. State A may clearly establish that it is giving consent only to state B and that no other states may become involved. It may also express its consent to states B and C together in the first place. However, in how many situations will states actually conclude such agreements before these thorny questions arise?[49]

That these questions may have great practical relevance becomes apparent in the light of the 2013 military intervention by France in Mali. Upon the expression of an invitation to intervene militarily in the state, in order to support the interim government of Mali in its fight against insurgents and alleged terrorists, France launched an armed intervention on 11 January 2013. In this context, it has enjoyed the support of various other states. Algeria, for example, has opened its airspace for over-flights of French military aircraft and has thus substantially supported the French intervention in Mali. It is uncontroversial that this act of support by Algeria is covered by the invitation from Mali expressed to France. Depending on the concrete facts of the case, it might be more difficult to judge whether the consent of the government of Mali also extends to the several other African states that have announced their support of France in its intervention, and to European allies of France, such as the United Kingdom and Germany, which have announced – to varying degrees – their support of the French intervention.[50] Similar questions arise with respect to the purported support of the United States with regard to intelligence matters and targeting. From a political perspective, it appears highly unlikely that the government of Mali would object to such forms of support, but the case may highlight the potential for disagreements over the reach of the consent expressed.

An example relied upon by Special Rapporteur Giorgio Gaja in the course of the preparation of the ARIO may show that forms of *clearly* expressed consent towards a plurality of actors can also be found in international practice. In 2005, the government of Indonesia invited the European Union, five member states of the Association of Southeast Asian Nations (ASEAN),

[49] See also Abass, 'Consent Precluding State Responsibility: A Critical Analysis', n. 42, at 216.
[50] See UN Doc. S/RES/2085 (2012) on the planned deployment of the 'African-led International Support Mission in Mali' (AFISMA).

and Norway and Switzerland to deploy the 'Aceh Monitoring Mission'[51] which had the mandate to supervise the peace process in the Indonesian province of Aceh. Accordingly, it was clearly determined which actors could rely on the Indonesian consent – a situation that is different from the early phases of the Mali intervention, in which consent was expressed solely to the French government, which then relied on the support of other states.

In the absence of such a clear and specific agreement of the Aceh Monitoring Mission type, several uncertainties that are related to the defence of consent make it difficult for all actors involved to assess reliably whether their conduct will be covered by Article 20 of the ARSIWA or the ARIO, or whether they may potentially be faced with a claim for reparation.

3.2 Self-defence

For some, it was a questionable decision to include self-defence in the list of circumstances precluding wrongfulness, as self-defence would not fall into this category. Rather, it would be a right, pure and simple, and, for that matter, even an 'inherent right', as Article 51 of the United Nations (UN) Charter stipulates.[52] Accordingly, self-defence would operate on the level of the primary rules of international law and could not simultaneously belong to the category of secondary rules that the ILC was purporting to codify.[53] The eventual inclusion of self-defence in the set of Articles was justified on the basis that, as the ILC Commentary formulates, 'self-defence may justify non-performance of certain obligations other than that under Article 2(4) of the Charter provided that such non-performance is related to the breach of that provision.'[54] Although self-defence as set forth in Article 21 of the ARSIWA and the ARIO thus operates as a separate defence, the conditions for its exercise remain those which are laid down in Article

[51] G. Gaja, 'Fourth Report on the Responsibility of International Organizations', UN Doc. A/CN.4/564 (2006), para. 13.
[52] See, with further references, Forteau, *Droit de la sécurité collective et droit de la responabilité internationale*, n. 39, pp. 405 et seq.; for the view that also self-defence under Article 51 constitutes a circumstance precluding wrongfulness, see L.-A. Sicilianos, *Les reactions décentralisées à l'illicite – Des contre-mesures à la légitime défense* (Paris: Presses Universitaires de France, 1990), p. 43.
[53] See T. Christakis and K. Bannelier, 'La légitime défense en tant que "circonstance excluant l'illicéité"', in R. Kherad (ed.), *Légitimes défenses* (Paris: LGDJ, 2007), pp. 233–256; J.-M. Thouvenin, 'Circumstances Precluding Wrongfulness: Self-Defence', in J. Crawford, A. Pellet and S. Olleson (eds.), *The International Law of Responsibility* (Oxford: OUP, 2010), pp. 455–467, at p. 460.
[54] ARSIWA Commentary, n. 18, Article 21, para. 2; Christakis and Bannelier argue that the inclusion of Article 21 of the ARSIWA was not necessary as the right to take countermeasures would effectively deal with the situation envisaged by the ILC. See Christakis and Bannelier, 'La légitime défense en tant que "circonstance excluant l'illicéité"', n. 53, pp. 253–54. Only with respect to self-defence affecting third states do they envisage a separate meaning of Article 21 ARSIWA: ibid., pp. 255–56.

51 of the UN Charter, as the proviso 'in conformity with the Charter of the United Nations' makes clear.[55]

This connection between UN Charter law and the law of international responsibility will accordingly determine how the defence of Article 21 of the ARSIWA and the ARIO has to be applied in situations of shared responsibility. Article 51 of the UN Charter guarantees the individual as well as the *collective* right of self-defence: the latter deals exactly with the situation in which one or more states come to the rescue of a state that has had to endure an 'armed attack' in the sense of Article 51. Accordingly, collective self-defence potentially brings about situations of shared responsibility, whether in the form of joint conduct or of complicity type situations. In any case, it involves a plurality of states acting together and relying collectively on the specific circumstance of self-defence.

It is therefore worthwhile to look more closely at the requirements for the exercise of collective self-defence as they have developed in international judicial practice. In this respect, guidance can be obtained from the *Nicaragua* judgment of the International Court of Justice (ICJ or Court), where it is stipulated that

> it is also clear that it is the State which is the victim of the armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack. (…) There is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack.[56]

This finding of the Court is an important guideline also for the application of Article 21 of the ARSIWA and the ARIO in situations of shared responsibility. It is clear that in order to rely on this defence, the relevant state must have been asked by the attacked state to do so. Accordingly, of a group of states seeking to rely on Article 21 of the ARSIWA/ARIO, only those that were specifically authorised to join the efforts of self-defence may successfully do so. It has been a matter of controversy whether the Court was right in this regard,[57] especially with respect to the customary international law form of self-defence (as the ICJ was precluded

[55] ARSIWA Commentary, n. 18, Article 21, para. 6.
[56] *Military and Paramilitary Activities In and Against Nicaragua*, (*Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, 14, paras. 196 et seq.
[57] Ibid., Dissenting Opinion by Judge Jennings, pp. 544–45.

from applying Article 51 directly for jurisdictional reasons).[58] However, as Christine Gray has observed, 'any other approach would allow the third state to pronounce on the existence of an armed attack and to decide that it was going to use force even against the wishes of the victim state.'[59] The requirement of a request for assistance has the same underlying rationale as the defence of consent in Article 20 of the ARSIWA. It serves to protect the autonomy, and thereby the sovereignty, of the attacked state, which shall not be forced into a coalition with other states against its will.[60]

In this regard, the problematic questions are ultimately not rooted in the domain of international responsibility. Due to its *renvoi* to the UN Charter system,[61] the law of international responsibility will follow the results obtained by the interpretation of Article 51 of the UN Charter. Likewise, the potentially difficult interplay between self-defence and the law of neutrality will have to be addressed by the primary rules[62] whose effects will only be translated into the domain of the secondary rules concerning responsibility.[63] For instance, the concept of 'benevolent neutrality' (or 'non-belligerency') may be understood as a special rule concerning aid and assistance for states lawfully defending themselves against an armed attack.[64] Originally developed in the course of the Second World War as a means to justify the so-called 'Destroyer Deal' between the United States and the United Kingdom,[65] it has been criticised for undermining the traditional law of neutrality, and being an inadmissible 'half-way house' between neutrality and belligerency.[66] It is true that benevolent neutrality is not recognised in situations in which no authoritative determination of wrongfulness has been

[58] See, with further references, A. Randelzhofer and G. Nolte, 'Article 51', in B. Simma, D.-E. Khan, G. Nolte and A. Paulus (eds.), *The Charter of the United Nations – A Commentary*, 3rd ed. (Oxford: OUP, 2012), para. 48.
[59] C. Gray, *International Law and the Use of Force*, 3rd ed. (Oxford: OUP, 2008), p. 184.
[60] Similar considerations apply to the form with which the UN Security Council sometimes authorises only member states 'co-operating' with a certain government to 'use all necessary means'. Thereby, the Security Council preserves the autonomy of the victim of an armed attack (as in the case of the Iraqi invasion of Kuwait: see UN Doc. S/RES/687 (1991), or of a state engulfed in the fight against piracy (as in the case of the authorisations to fight piracy off the coast of Somalia: see UN Doc. S/RES/1816 (2008), op. para. 7). Although not included in the defences as codified by the ILC, acting on behalf of an authorisation of the UN Security Council can also be seen as a circumstance precluding wrongfulness: see Forteau, *Droit de la sécurité collective et droit de la responabilité internationale*, n. 39, p. 392.
[61] Forteau, *Droit de la sécurité collective et droit de la responabilité internationale*, n. 39, p. 406.
[62] Crawford, 'Second Report on State Responsibility', n. 29, para. 300.
[63] Cf. Thouvenin, 'Circumstances Precluding Wrongfulness: Self-Defence', n. 53, pp. 460–61.
[64] Cf. S. Neff, *The Rights and Duties of Neutrals – A General History* (Manchester: Manchester University Press, 2000), p. 193; H.P. Aust, 'Article 2(5)', in B. Simma, D.-E. Khan, G. Nolte and A. Paulus (eds.), *The Charter of the United Nations – A Commentary*, 3rd ed. (Oxford: OUP, 2012), paras. 25–27.
[65] See R.H. Jackson, 'Address to the Inter-American Bar Association, Havana, Cuba, 27 March 1941' (1941) 35 AJIL 348–359; on the background influence of Hersch Lauterpacht see E. Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge: CUP, 2011), pp. 177–78.
[66] See, among others, Y. Dinstein, *War, Aggression, and Self-Defence*, 5th ed. (Cambridge: CUP, 2011), p. 180; for contemporaneous critique see E.M. Borchard, 'War, Neutrality and Non-Belligerency' (1941) 35 AJIL 618–25.

made with respect to an ongoing armed conflict between two states. For the rather seldom-found situation in which the UN Security Council has made a determination as to which state has committed an aggression or is responsible for a breach of the peace,[67] benevolent neutrality becomes an option. It then allows third states to support victims of unlawful uses of force while allowing them to retain the benefits of neutrality. Arguably, self-defence under Article 22 of the ARSIWA could help to integrate those normative concepts into the law of international responsibility which are part of the normative environment of self-defence under the UN Charter.[68] To hold otherwise would potentially sow a seed of fragmentation between these two fields of international law – something that Article 59 of the ARSIWA ('[t]hese articles are without prejudice to the Charter of the United Nations') seeks to prevent.[69] The *renvoi* to the primary rules on the matter is of course no panacea. In few questions are opinions as divided as with respect to the conditions of the exercise of the right of self-defence.

A special form of shared responsibility may arise if collective self-defence is carried out in the framework of an international organisation that was founded to organise the self-defence of its members, such as the North Atlantic Treaty Organization (NATO). In this regard, it is questionable whether the organisation also could rely on the right to self-defence with respect to the attack on one of its members.[70] The Commentary adopted by the ILC remains obscure in this regard and only notes that this question will have to be addressed by the applicable primary rules.[71] In general, it would appear that the relevant international organisation would benefit from the right of self-defence of its member states which have, through the founding of the organisation, transferred certain of their powers to it, which the international organisation could then exercise in the name of its members. Guidance on these questions will ultimately also depend on the provisions on the responsibility of international organisations in connection with wrongful acts of a state and/or international organisation. These are set forth in Articles 14 to 17 of the ARIO, which will help to determine whether or not the conduct of an international organisation in connection with the exercise of self-defence by one of its member states triggers responsibility.

[67] See, for instance, UN Doc. S/RES/660 (1990) on the Iraqi invasion of Kuwait.
[68] See also Thouvenin, 'Circumstances Precluding Wrongfulness: Self-Defence', n. 53, at p. 461, stating that 'certain actions in self-defence can be carried out by States who are formally at peace'.
[69] ARSIWA Commentary, n. 18, Article 59, para. 2: 'The articles are in all respects to be interpreted in conformity with the Charter of the United Nations.'
[70] G. Gaja, 'Fourth Report on the Responsibility of International Organizations', n. 51, para. 19.
[71] Commentary to the Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO Commentary), Commentary to Article 21(3).

3.3 Countermeasures

The inclusion of countermeasures in the Chapter on circumstances precluding wrongfulness was another controversial decision of the ILC.[72] It was generally a matter of debate whether the sets of Articles should include provisions on countermeasures in the first place. Critics argued that doing so would legitimise this – in their view – rather primitive means of enforcing international law.[73] The ILC decided to retain the provisions on countermeasures and defined them as 'measures which would otherwise be contrary to international obligations of the injured State *vis-à-vis* the responsible State if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation.'[74] In addition, however, the ILC pointed out that like 'other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States.'[75]

If countermeasures are already controversial in their own right, it was the subject of a major debate that continues to the present day whether states that are not directly injured states in the sense of Article 42 of the ARSIWA should also have the right to adopt countermeasures.[76] Although they are not the only conceivable scenario for the taking of countermeasures in the context of 'shared responsibility', collective countermeasures are arguably the best test case in this regard. The ILC opted for a differentiated and vague compromise solution. It first made mention of the possibility of the invocation of responsibility by a state other than the injured state in Article 48 of the ARSIWA. In a second step, the ILC was more circumspect in allowing such non-injured states to adopt countermeasures. The question is ultimately left hanging in the air by the saving clause of Article 54 of the ARSIWA and Article 57 of the ARIO, which stipulates that the Chapter on countermeasures

> does not prejudice the right of any State, entitled under Article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

By referring to 'lawful measures', the ARSIWA do not take a position on the question of whether or not countermeasures in the collective interest are sanctioned by the international legal order. This equivocation was ascribed by Special Rapporteur James Crawford to the

[72] See also Chapter 10 of this volume, Tams, 'Countermeasures against Multiple Responsible Actors', n. 5, pp. ___.
[73] See, with further references, D.J. Bederman, 'Counterintuiting Countermeasures' (2002) 96 AJIL 817–832.
[74] ARSIWA Commentary, n. 18, Introduction to Chapter II of Part Three, para. 1.
[75] Ibid., para. 2.
[76] See M. Akehurst, 'Reprisals by Third States' (1970) 44 BYIL 1–18, at 15–16; M. Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?' (2001) 72 BYIL 337–56, at 344.

reticence of states to allow for such measures and a mixed picture emerging from state practice.[77] The most comprehensive study on this question so far has come to a slightly different result, and has argued that it would have been very well possible to affirm the existence of a basis in customary international law for taking countermeasures in the collective interest.[78] In any case, Articles 48 and 54 of the ARSIWA constitute the outer limit for precluding the wrongfulness of measures of 'self-help' in the collective interest. As the available practice on countermeasures in the collective interest shows, such countermeasures are taken both by individual states[79] as well as by collectives of states, or states acting in conjunction with an international organisation. The latter practice is of special relevance for the topic of shared responsibility. Examples from this practice include the reaction of Western states against the imposition of martial law in Poland in 1981 when landing rights for the Polish airline LOT were suspended; temporary import prohibitions concerning goods from Argentina in 1982 in the context of the Falklands conflict; measures adopted against Iraq in 1990 before the UN Security Council adopted sanctions; and the reaction of Western states against the former Yugoslavia in 1998 when European Commission member states froze assets and imposed a flight ban for Yugoslav airlines in reaction to the escalating Kosovo crisis.[80] More recent practice arguably includes the extended sanctions programme of the European Union against Iran which goes beyond what the relevant UN Security Council resolutions require, as it stipulates a comprehensive oil embargo against Iran.[81] It emerges from this practice that groups of states and international organisations acting collectively also rely on the justificatory function of the concept of countermeasures.

Once one is willing to accept the lawfulness of the concept of countermeasures in the collective interest as such, this entails that Article 22 of the ARSIWA is also reasonably well-equipped to deal with situations of shared responsibility, as there are no apparent reasons why states could

[77] See the comments of governments in UN Doc. A/CN.4/515 (2001), at pp. 87 et seq.; see further A. Pellet, 'Les articles de la CDI sur la responsabilité internationale des Etats pour fait internationalement illicite suite – et fin?' (2002) 43 AFDI 1–23, at 20.

[78] C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: CUP, 2005), p. 246; for an overview of the practice see ibid., pp. 207 et seq. and M. Dawidowicz, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and their Relationship to the UN Security Council' (2006) 77 BYIL 333–418. See also E. Katselli, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of the International Community* (London: Routledge, 2010).

[79] The ILC Commentary refers, for example, to the measures taken by the United States against Uganda in 1978, and against South Africa in 1986, as well as by the Netherlands against Suriname in 1982. See ILC ARSIWA Commentary, n. 18, Article 54, paras. 3–4.

[80] Ibid, para. 3.

[81] See EU Council Decision 2012/35/CFSP of 23 January 2012 and EU Council Regulation 267/2012 of 23 March 2012; on these measures see further P.-E. Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions against Iran' (2012) 17 J Conflict & Sec L 301–336.

not do collectively what they are entitled to do individually. The problematic issues, however, lie elsewhere: what obligations under international law qualify as obligations *erga omnes*?[82] And what procedural and substantive requirements have to be observed when a group of states and/or international organisations resort to taking such countermeasures in the collective interest? Of these problems, the measures adopted by the European Union against Iran are a good example. It is far from certain whether Iran is effectively in breach of its obligations under the Non-Proliferation Treaty (NPT).[83] While it is reasonable to assume that there have been violations of the safeguards agreement Iran entered into with the International Atomic Energy Agency, it can be doubted whether the obligations contained in this agreement are *erga omnes* obligations, since they are frequently described as being rather technical in character.[84] Also, if one considers the alleged quality of the NPT as a 'world order treaty',[85] this does not necessarily justify an extension of the range of obligations emanating from this regime for the violation of which non-injured states and/or international organisations may take countermeasures.

Yet another question is how to deal with the situation in which state A takes countermeasures against state B for the violation of an obligation the latter owed to state A. If state A can rely on Article 22 of the ARSIWA, it would also be possible for state C to furnish 'aid or assistance' to state A for the commission of the act, which would be wrongful had it not been undertaken in response to the previous conduct of state B. This situation is comparable to the scenarios we have surveyed above with respect to consent. Here also, the crucial question would be when the conduct of state C would lose its character as mere 'aid or assistance' and cross the threshold of triggering the independent responsibility of state C. Where this would be the case because, for instance, the contribution of state C would be too substantial to consider it as mere support, the question of the wrongfulness of the conduct of state C would then depend on whether state C could rely on the right to take countermeasures in the collective interest, as just discussed. Where this would not be the case – as, arguably, in the great majority of cases – state C would then commit a wrongful act and could not avail itself of the defence of countermeasures under Article 22 of the ARSIWA. This shows, again, that states have to carefully measure whether or not to participate in conduct with a cooperating state that is only

[82] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, ICJ Reports 1970, 3, para. 33.
[83] Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions against Iran', n. 81, at 326.
[84] Ibid., at 329.
[85] On this concept see C. Tomuschat, 'Obligations Arising for States without or against their Will' (1993) 241 RCADI 248, 269.

deemed lawful because of the intervention of one of the circumstances precluding wrongfulness. Because in most situations no forms of judicial dispute settlement will be available, states take this decision at their own risk and in light of the fact that all actors will judge the legality of their conduct for themselves.[86]

3.4 Force majeure

Force majeure is defined by the ILC as 'the occurrence of an irresistible force or an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.'[87] It is similar to the 'supervening impossibility of treaty performance' as laid down in Article 61 of the Vienna Convention on the Law of Treaties (VCLT).[88] However, the scope of the two has to be distinguished. Whereas Article 61 of the VCLT is a ground for the suspension or termination of treaty obligations, *force majeure* is only concerned with the preclusion of the wrongfulness of a given act and leaves intact the underlying obligation which has to be complied with as soon as the situation of *force majeure* is no longer occurring.[89] Article 23(2) of the ARSIWA further sets forth that *force majeure* cannot be relied upon if the state in question has contributed to the situation or has – by way of contract or agreement, for instance – assumed the risk of that situation occurring.

The quite substantial available practice on *force majeure* is limited to bilateral situations.[90] It can be imagined, however, that *force majeure* may also have a role to play in situations of 'shared responsibility'. If two or more actors involved in a wrongful act can both rely on *force majeure*, the situation does not pose particular problems. As is the case with the other defences, difficult questions arise as soon as only one among a plurality of actors involved relies on *force majeure*.

If, in a group of states acting together (A, B, and C), only state A is absolved from responsibility due to the intervention of an irresistible and unforeseeable event, states B and C could find themselves in the situation that the injured state D would try to obtain compensation

[86] Cf. *Air Service Agreement of 27 March 1946* (*United States of America v. France)*, (1978) 18 RIAA 417, at para. 81.
[87] Article 23 ARSIWA/ARIO, n. 5.
[88] See further S. Szurek, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: *Force Majeure*', in J. Crawford, A. Pellet and S. Olleson (eds.), *The International Law of Responsibility* (Oxford: OUP, 2010), pp. 475–480, at p. 475.
[89] Cf. Article 27(a) ARSIWA, n. 5.
[90] For an overview see Paddeu, 'A Genealogy of *Force Majeure* in International Law', n. 13, at 482–487.

for the entire injury from them. At least, this would be a conceivable scenario if state D could hold states B and C jointly and severally responsible, i.e. if it could claim reparation for its entire injury from only one of the involved states (or two of the three, for that matter). This scenario shows that the adaptability of the circumstances precluding wrongfulness to situations of shared responsibility also depends on the manner in which other rules and principles of the law of international responsibility are applied and interpreted. It is a matter of debate whether the law of international responsibility includes a principle of joint and several liability.[91] In the absence of such a principle, states B and C would not be overly burdened by the reliance upon *force majeure* by state A. Depending on the facts of the case, it might then be problematic, however, to calculate the exact amount of reparation that state D can ask of states B and C. In many situations of shared responsibility, it will be difficult, if not impossible, to identify the exact contributions of the various actors involved. Judge Simma dealt with a comparable question in his Separate Opinion in the *Oil Platforms* case, where he discussed the problem of 'factually indivisible acts'.[92]

The underlying rationale of *force majeure* in international law militates for a restrictive application of this circumstance. Its core requirement is the 'material impossibility' for a state or international organisation to conform itself to an obligation. If two or more actors act together in a group, it appears that this material impossibility should be assessed for each and every actor independently. This holds especially true for integral as opposed to reciprocal or interdependent obligations, if we follow the terminology of Sir Gerald Fitzmaurice, ILC Special Rapporteur on the law of treaties.[93] This may be illustrated by an example pertaining to shared responsibility arising out of situations where there is no concerted action. If we take, for instance, obligations in the context of climate change governance, such as goals for the reduction of greenhouse gases, why should states B and C profit from state A's material impossibility to comply with its obligation? An extension of *force majeure* to other states would considerably weaken the normative pull of the obligation in question. In fact, this example may show that *force majeure* will always only be available for the specific state or

[91] S. Besson, 'La pluralité d'Etats responsable – Vers une solidarité internationale ?' (2007) 17 SZIER 13–38, at 15 et seq.; J.E. Noyes and B.D. Smith, 'State Responsibility and the Principle of Joint and Several Responsibility' (1988) 13 YJIL 225–67; decidedly in favour of the existence of such a principle: A. Orakhelashvili, 'Division of Reparation Between Responsible Entities', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford: OUP, 2010), pp. 647–665, at p. 657; specifically on joint and several responsibility in situations of complicity see Aust, *Complicity and the Law of State Responsibility*, n. 47, pp. 288–95.

[92] *Oil Platforms* (*Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, 161, Separate Opinion by Judge Simma, para. 78.

[93] Sir G. Fitzmaurice, 'Second Report on the Law of Treaties', ILC *Yearbook* 1957/II, 30–31 and 35.

international organisation which found itself in a situation of material impossibility to live up to its international obligations.

Finally, the defence of *force majeure* has a problematic relationship with a particular form of shared responsibility, i.e. the coercion of another state under Article 18 of the ARSIWA.[94] This provision provides for attribution of responsibility and is 'concerned with the specific problem of coercion deliberately exercised in order to procure the breach of one state's obligation to a third state.'[95] From the perspective of the coerced state, it can be said that the situation is not very different from one of *force majeure*. Indeed, the Commentary of the ILC acknowledges that 'coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State.'[96] It has been noted in the literature that this construction leads to an intricate conceptual problem. If the effect of *force majeure* as a circumstance precluding wrongfulness is to protect the coerced state against all claims of wrongfulness, there remains no wrongful act for which responsibility can be attributed to the coercing state.[97] The ILC took that problem into account and argued in its Commentary for a differentiation between the preclusion of wrongfulness for the coerced state, but not for the coercing state, pointing to the social necessity that the injured state must be able to hold one state responsible.[98] Conceptually, this is not very convincing, because the ultimate basis for the attribution of responsibility becomes blurred if one follows this approach. Instead, this scenario seems to provide an argument for a differentiation between circumstances precluding wrongfulness and other forms of defences which would merely excuse the coerced state or, more generally, the state that is faced with a situation of *force majeure*. Such a construction would ensure that the coerced state faces no claims of reparation for conduct which it was not effectively in a position to control. At the same time, its conduct would remain to be characterised as wrongful and responsibility could thus be attributed to the coercing state.[99]

[94] See Chapter 4 of this volume, Fry, 'Attribution of Responsibility', n. 11, pp. ___.
[95] ARSIWA Commentary, n. 18, Article 18, para. 1.
[96] Ibid., para. 2.
[97] Paddeu, 'A Genealogy of *Force Majeure* in International Law', n. 13, at 398 with footnote 104.
[98] ARSIWA Commentary, n. 18, Article 18, para. 4.
[99] Paddeu, 'A Genealogy of *Force Majeure* in International Law', n. 13, at 398.

3.5 Distress

The defence of distress addresses the specific situation in which an individual acting as a state organ, or in any other way that is attributable to a state or an international organisation, finds him or herself in a situation of peril and thus has no other reasonable way of 'saving the author's life or the lives of other persons entrusted to the author's care'.[100] Accordingly, distress is a highly personalised notion, implying almost by definition that it will only work with respect to the conduct attributable to an individual state or international organisation. If a group of states or international organisations cooperate in a certain way and one of the individuals involved finds him or herself in a situation of distress, only the state or international organisation to which the conduct in question is attributed can rely on the defence of distress. Difficult questions may once again arise due to uncertainties with respect to other questions of the law of international responsibility. If we consider a multiple attribution of conduct to, for instance, one state and an international organisation[101] to be possible, the underlying rationale of distress would seem to speak for the assumption that both this state and the international organisation could exculpate themselves.

In cases of complicity, things might be more complicated again. Considerations of fairness would encourage us to look more closely at the intent of the aiding/assisting state: did it merely wish to support the relevant individual to save his or her life? Or did it have further motives, possibly exploiting the situation of peril in which the person in question found him or herself? Such a situation could then border on a case of direction or control. These considerations may appear to be rather academic at first sight, but they might help to show how difficult it will be for the law of international responsibility to arrive at solutions that are considered fair and equitable in situations of shared responsibility.

3.6 Necessity

Among the circumstances precluding wrongfulness that are acknowledged by the ILC's work, necessity[102] has a particularly poor reputation as an antithesis to the rule of law as such.[103] It is

[100] Article 24 ARSIWA/ARIO, n. 5.
[101] See the contribution of F. Messineo in Chapter 3 of this volume, 'Attribution of Conduct', n. 10, pp. ___.
[102] Article 25 ARSIWA/ARIO, n. 5.
[103] Cf. *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*, Decision of 30 April 1990, (1990) XX RIAA 217, at 254; P.

associated with one state placing its interests above the obligation to comply with international law, and acting ruthlessly to the detriment of other states.[104] The ILC tried to restrict the scope of its application as much as possible, which becomes evident from a number of limiting conditions, as well as from the negative formulation of Article 25 ('necessity may not be invoked … unless').[105] In the ARIO, its scope of application was further reduced because there was a lack of practice indicating that international organisations could rely on necessity to the same extent as can states. According to Article 25 of the ARIO, an international organisation may only invoke necessity for the protection of an interest of one its member states, or of the international community as a whole, when the organisation has the function to protect that interest.[106]

A central requirement for the applicability of Article 25 is that the act in question 'is the only means for the State to safeguard an essential interest against a grave and imminent peril'. This formulation could be read to imply that among a group of states or international organisations acting together, necessity will only be available as a defence for one state or international organisation that can point to such an essential interest. However, such a reading of Article 25 would neglect that the ILC has also considered it possible that an essential interest of 'the international community as a whole' is covered by this provision.[107] Therefore, Article 25 itself allows for cooperative efforts of states to rely on a state of necessity, if they deem it necessary to protect an essential interest of the international community. Therefore, a plurality of states acting together may potentially rely on Article 25 of the ARSIWA.

A case in point is the 1999 Kosovo intervention by several NATO member states, which argued that an 'overwhelming humanitarian necessity' required them to use armed force against the Former Federal Republic of Yugoslavia. In the course of the ICJ proceedings brought against eleven NATO members, Belgium defended its conduct, among other grounds, by relying on then Draft Article 33 as adopted on first reading.[108] Various arguments militate

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Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 Harv Int L J 1 17; Gaja, 'Fourth Report on the Responsibility of International Organizations', n. 51, para. 35; Okowa, 'Defences in the Jurisprudence of International Tribunals', n. 7, p. 398.

[104] Cf. C. Tomuschat, 'Conclusions général', in Société française pour le droit international (ed.), *La Nécessité en droit international* (Paris: Pedone, 2007), pp. 377–382, at p. 380.

[105] See on these limiting conditions T. Christakis, '«Nécessité n'a pas de loi?» Rapport général sur la nécessité en droit international', in *La nécessité en droit international*, colloque de la Société française pour le droit international (ed.) (Paris: Pedone, 2007), pp. 11–63, at pp. 23–30.

[106] ARIO Commentary, n. 71, Article 25, para. 4.

[107] ARSIWA Commentary, n. 18, Article 25, para. 15.

[108] *Legality of Use of Force* (*Serbia and Montenegro v. Belgium)*, Oral Pleadings of Belgium, CR 1999/15, ICJ Reports 1999, pp. 17 et seq.

against such an approach. Article 25(1)(b) of the ARSIWA sets out that the act to be justified by necessity would not 'seriously impair an essential interest of the State or States towards which the obligation exists'. In light of the importance of the prohibition of the use of force under Article 2(4) of the UN Charter, such an essential interest is probably given. Since Article 2(4) of the UN Charter only knows two generally accepted exceptions – self-defence and authorisations of the UN Security Council under Chapter VII of the Charter – it would also seem to be the case that Article 25(2)(a) of the ARSIWA would speak against the possibility of relying on necessity here because 'the international obligation in question excludes the possibility of invoking necessity'. Finally, attention needs to be paid to Article 26 of the ARSIWA, which sets out the boundary of peremptory norms under general international law for the applicability of the circumstances precluding wrongfulness.[109] The Kosovo case may show also that a group of states could feel compelled to act in situations of necessity.

Furthermore, however, what practical relevance will the necessity construction have in situations such as the Kosovo intervention? The notion of 'essential interests' is ill-defined even with respect to the interests of individual states. The ILC has not offered any guidance with respect to what might be essential interests of the international community in this context. The Commentary only states that '(t)he extent to which a given interest is "essential" depends on all the circumstances and cannot be prejudged.'[110] A systematic take on the ILC's work could assimilate this notion to the regime of 'serious breaches of peremptory norms under general international law', as set forth in Articles 40 and 41 of the ARSIWA. The debates on the scope of the obligation of cooperation in Article 41(1) of the ARSIWA,[111] the lack of clarity with respect to the taking of collective countermeasures,[112] the disputed range of the obligation to prevent genocide under Article 1 of the Genocide Convention,[113] and finally, the

[109] On these issues see also O. Corten, 'La nécessité et le *jus ad bellum*', in Société française pour le droit international (ed.), *La Nécessité en droit international* (Paris: Pedone, 2007), pp. 127–150, at pp. 145–49; in general, Special Rapporteur James Crawford also appeared to be sceptical of such an argument: see Summary Record of the 2587th meeting of the ILC, UN Doc. A/CN.4/SR.2587 (1999), para. 27.
[110] ARSIWA Commentary, n. 18, Article 25, para. 15.
[111] S. Villalpando, *L'émergence de la communaté internationale dans la responsabilité des Etats* (Paris: Presses Universitaires de France, 2005), pp. 379 et seq.
[112] Tams, *Enforcing Obligations Erga Omnes in International Law*, n. 78, passim.
[113] O. Ben-Naftali, 'The Obligations to Prevent and Punish Genocide', in P. Gaeta (ed.), *The UN Genocide Convention – A Commentary* (Oxford: OUP, 2009), pp. 27–57. Convention on the Prevention and Punishment of Genocide, Paris, 9 December 1948, in force 12 January 1951, 78 UNTS 277 (Genocide Convention).

possibly emerging 'responsibility to protect'[114] – all these issues show that the enforcement of community interests is a protracted and complicated matter.[115]

In various contexts, international law provides for different substantive and procedural hurdles before states and other actors can take up the role of 'guardians of the community interest'.[116] It would be very questionable if the balancing exercise between competing interests necessitated by Article 25 of the ARSIWA and the ARIO could bypass the more special rules concerning the enforcement of community interests in international law.[117] Hence, the addition of necessity into the toolbox for the enforcement of the community interest may not necessarily be a promising suggestion for the advancement of the international rule of law.

More specifically with respect to situations of shared responsibility, this assessment should caution us, as a matter of policy, to construe Article 25 of the ARSIWA and the ARIO in a manner that would make it easier for groups of states and/or international organisations to rely on this provision. If the contribution that necessity can make for the enforcement of the international community interest is limited, it can be argued that the 'personalised' character of necessity as an exception for a specific state and/or international organisation should be stressed.

In this context, we should not lose sight of the power dynamics. Shared responsibility is a natural consequence of cooperation among states, which by this very cooperation enhance their clout. States cooperate in order to achieve goals that they could not achieve when acting alone. If we take into account that the intervention of necessity does not presuppose any form of previous wrongful conduct on the part of the state against which the measure in question has been taken, it is questionable whether a potentially large number of 'third states' and/or international organisations should benefit from the intervention of this defence. Construing Article 25 of the ARSIWA and the ARIO in a way that would invite such wider participation in measures of necessity would work to the detriment of the affected state, which in itself has not set any legally relevant cause for an infringement of its interests.

[114] M. Vashakmadze, 'Responsibility to Protect', in B. Simma, D.-E. Khan, G. Nolte and A. Paulus (eds.), *The Charter of the United Nations – A Commentary*, 3rd edn. (Oxford: OUP, 2012), pp. 1201–1236.
[115] On the inter-relatedness of these questions see C. Tams, 'Individual States as Guardians of Community Interests', in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Oxford: OUP, 2011), pp. 379–405.
[116] Ibid.
[117] See also Christakis, '«Nécessité n'a pas de loi?»', n. 105, p. 26.

4. Challenges for the circumstances precluding wrongfulness in situations of shared responsibility

After having gone through the individual circumstances precluding wrongfulness, it is notable that, in general, the circumstances precluding wrongfulness are oriented towards bilateral situations. With the possible exception of self-defence, all the circumstances precluding wrongfulness included in the ILC's work were conceived with a bilateral type of situation in mind. It can thus be presumed that as such they work only to the benefit of individual states or international organisations that can point to the fulfilment of the criteria laid down in Articles 20 to 27 of the ARSIWA and the ARIO. There is no automatic extension of the circumstances to other states or international organisations cooperating with states or international organisations that can rely on the defences.

Difficult situations can arise in virtually all modes of shared responsibility. In cases of multiple attribution, it is conceivable that the two or more states or international organisations to which the conduct or omission is attributed are not in the same legal position so as to avail themselves of the very same circumstance precluding wrongfulness. Multiple attribution of a given course of conduct may thus lead to diverging legal consequences depending on, for instance, the question of whether or not all states implicated in the taking of countermeasures are injured states under Article 42 of the ARSIWA. Joint responsibility between states which act together on the same footing may bring about situations in which only one of them can rely on a circumstance precluding wrongfulness. Complicity situations may lead to difficult exercises of determining whether conduct is lawful support for the acts taken by another state or international organisation, and thus benefiting from a circumstance precluding wrongfulness, or whether it entails an independent violation of the law which would need a justification in its own right – thus making it difficult for involved states and international organisations to determine whether or not they can support an actor who is relying on a circumstance precluding wrongfulness.

It appears that the circumstances are more severely tested by situations of shared responsibility arising out of concerted action than by shared responsibility arising out of situations where there is no concerted action. The absence of a link between the conduct in the latter case makes it reasonable to apply the circumstances with respect to all implicated actors individually. It is in the nature of such shared responsibility that the conduct of each contributing state or international organisation is assessed on its own merits. Shared responsibility arising out of

concerted action poses more difficult questions, because the link between the conduct of the various actors involved makes it look more problematic if, more by chance than by design, suddenly only one actor benefits from a defence. Situations exhibit features of such shared responsibility because of the very fact that states and/or international organisations act together. Some kind of commonality between them may thus be said to be a defining feature of these situations. The intervention of a defence that only works to the favour of one among a group of states or international organisations potentially disintegrates this commonality.

In contrast, the circumstances can all cope reasonably well with the situation in which a group of states is acting together and all the states involved can rely on the circumstance precluding wrongfulness. Whether this is the case, however, may give rise to intricate questions (as was illustrated for the defences of consent and the taking of countermeasures). The application of the circumstances precluding wrongfulness becomes problematic when, among a group of involved states and/or international organisations, not all of the involved actors can rely on a circumstance precluding wrongfulness. While there may be good reasons to limit the reach of the circumstances to only some of the actors involved in cooperative conduct, it is equally conceivable that the circumstances may instead randomly apply in favour of one state and/or international organisation and not the other.

Furthermore, uncertainties with respect to other questions of the law of international responsibility impact upon the assessment of how well-equipped the regime of the circumstances precluding wrongfulness is. There are borderline cases where it is fairly unclear whether conduct qualifies as aid or assistance, or because independent violations of international obligations might make it difficult to foresee whether or not an aiding or assisting state will benefit from the circumstance precluding wrongfulness which works in favour of a cooperating actor. Also, the ongoing debate about the admissibility of countermeasures in the collective interest impacts upon the application of Article 22 of the ARSIWA and the ARIO to situations of shared responsibility.

Likewise, uncertainties pertaining to the division of reparation between several actors will be decisive with respect to the question of whether the application of the circumstances precluding wrongfulness will produce reasonable results. If, for instance, a group of states bears responsibility for given conduct and only one of the states is exculpated due to a situation of distress, the other states could find themselves in a situation in which they face a reparation claim which exceeds their own contribution to the wrongful conduct. Technically, this situation

could be remedied by the disclaimer included by the ILC in Article 27 of the ARSIWA and the ARIO, according to which 'the invocation of a circumstance precluding wrongfulness (…) is without prejudice to (b) the question of compensation for any material loss caused by the act in question.'

At first sight, this disclaimer could be understood as, once again, challenging the ILC's decision to focus only on the codification of the secondary rules of international responsibility. If, after all, the effect of the circumstances precluding wrongfulness is taken seriously, there would be no basis to hold them responsible and order them to pay compensation for conduct which is, due to the intervention of the respective defence, perfectly lawful.[118]

The ILC was obviously mindful of this conceptual problem and observed in the Commentary that

> (a)lthough article 27(b) uses the term "compensation", it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected.[119]

The ILC further observed that Article 27(b) would not attempt to specify the conditions under which an affected state could obtain compensation. Instead it would be for the states involved to agree on the 'possibility and extent of compensation payable in a given case'.[120] Just how convincing this conceptual construction is remains an open question.[121] In a rather laconic manner, the Commentary to the parallel provision in the ARIO observes that the question is simply left open by the 'no prejudice' clause. This would be the correct solution, as 'it would be difficult to set a general rule concerning compensation for losses caused by an act that would be wrongful, but for the presence of a certain circumstance.'[122] Somewhat indirectly, this formulation engages with the criticism the ILC has encountered after the inclusion of Article 27(b) of the ARSIWA. In the literature, it has been questioned whether the ILC was not

[118] See Christakis, '«Nécessité n'a pas de loi?»', n. 105, pp. 51–54.
[119] ARSIWA Commentary, n. 18, Article 27, para. 4.
[120] Ibid., para. 6.
[121] In this context, it can also be noted that it is unclear why other forms of the content of international responsibility are not also covered by this 'without prejudice' clause. For instance, it can be asked why reparation or satisfaction are not featured. In particular, satisfaction might be a particularly appropriate consequence of an act of necessity which is characterised by the fact that it is targeting an 'innocent' party. On these questions see also Christakis, 'Les "Circonstances excluant l'illicéité: une illusion optique?"', n. 27, p. 241.
[122] ARIO Commentary, n. 71, Article 27, para. 2.

effectively providing for a 'liability without wrongfulness' regime by the inclusion of this provision.[123]

In this context, once again a differentiation between circumstances precluding wrongfulness and defences that might merely excuse the state or international organisation in question might have helped to clarify this matter. In fact, the Draft Articles as adopted by the ILC on first reading in 1996 contained such a recognition *in nuce*, with a Draft Article 35 stating that the intervention of the circumstances of consent, *force majeure* and fortuitous event, distress, and necessity would 'not prejudge any question that may arise in regard to compensation for damage caused by that act.'[124] For the cases of countermeasures and self-defence, however, this 'without prejudice' clause did not apply. This solution was, however, somewhat at odds with the consistent affirmation of the ILC that it would *not* differentiate between circumstances precluding wrongfulness and responsibility.

The problems associated with Article 27(b) of the ARSIWA and the ARIO become even more complex for the type of situations which interest us here. The absence of a clearly defined system of joint and several responsibility, and the lack of procedural mechanisms for questions of internal redress among a group of states and/or international organisations finding themselves in a situation of shared responsibility arising out of concerted action, are likely to complicate situations of shared responsibility even further. This also holds true for the suggestion of the ILC that the states involved should negotiate the amount of compensation owed. Such negotiations will most likely become more protracted if they go beyond a purely bilateral framework.

5. Rethinking the conceptual basis of defences in the law of international responsibility

In the light of these difficulties, it may be asked how the state of the law could be improved. This question is legitimate despite the strong normative pull that the work of the ILC has exerted so far in the field of international responsibility. Despite the unsettled issue of the final legal status of the two sets of Articles, both – but so far, especially the ARSIWA – have been relied on to a large extent in international practice, and this holds true also for the

[123] Christakis, 'Les "Circonstances excluant l'illicéité: une illusion optique?"', n. 27, p. 237.
[124] Article 35 of the Draft Articles on State Responsibility adopted on first reading, ILC *Yearbook* 1996/II(2) 58, at 62.

circumstances precluding wrongfulness.[125] While not all of the circumstances have been applied in judicial practice since their adoption in 2001, at least the defences of countermeasures, *force majeure*, and necessity have been relied upon by international courts and tribunals.[126] A realistic proposal to improve the state of the law will thus have to take the defences as codified in Articles 20 to 27 of the ARSIWA and the ARIO as a starting point.

The main reason for conceptual difficulties with the defences appears to lie in them being lumped together into a single group, all of them bringing about a preclusion of wrongfulness. As already mentioned several times, this construction was never undisputed and a critical proposal for a conceptual reconfiguration of the defences could thus over time become accepted, also in international practice.[127] Accordingly, it is suggested here to follow the differentiation between circumstances that preclude wrongfulness (consent, self-defence, countermeasures) and those that merely excuse the state and/or international organisation that invokes them (*force majeure*, distress, necessity).[128]

What would this change? For situations of shared responsibility, this differentiation could indicate that the presence of a circumstance truly precluding wrongfulness also impacts upon other implicated states, such as states that aid or assist the main actor. When the lawfulness of the conduct in question is clearly established, other states implicated in this conduct should benefit from this assessment. An argument in this regard is also the consistency with the level of primary rules; this construction would follow the UN Charter law on self-defence, for instance. Also with respect to consent, it can be said that the structural similarity of this defence, with the conclusion of an agreement between the involved actors, indicates that it is really lawfulness that is established. In contrast, the latter group of circumstances have a more 'personal' and extrinsic character,[129] and have in and of themselves no connection to the existence of the breached obligation. Rather, they concern the particular situation in which the

[125] See already J. Crawford and S. Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 ICLQ 959–972, at 966–68.
[126] See the case law referred to in the UN Materials, above n. 3.
[127] In fact, the critics of the ILC approach argue that a differentiation between differing degrees of wrongfulness would more closely mirror international practice than the all or nothing approach of the ILC: see Christakis, 'Les "Circonstances excluant l'illicéité: une illusion optique?"', n. 27, p. 226.
[128] This distinction follows the suggestion made by Special Rapporteur J. Crawford but not adopted by the ILC: see 'Second Report on State responsibility', n. 29, paras. 228–229; a similar, but not identical distinction was suggested by Christakis, 'Les "Circonstances excluant l'illicéité: une illusion optique?"', n. 27, p. 244. Christakis argues to exclude consent altogether from the list of defences and distinguishes between *force majeure* and countermeasures, which would preclude wrongfulness on the one hand, and necessity and distress, on the other hand, which would exclude or attenuate responsibility. On self-defence as an attenuating circumstance, see Christakis and Bannelier, 'La légitime défense en tant que "circonstance excluant l'illicéité"', n. 53, p. 256.
[129] Okowa, 'Defences in the Jurisprudence of International Tribunals', n. 7, at p. 409: 'external circumstances beyond its control'.

state and/or international organisation organ that acted found itself when the relevant conduct was committed. Accordingly, it is more apt to speak of 'excuses' here. The 'personalised' character of these circumstances militates against their transmission to other states that find themselves implicated in the conduct in question.

In addition, a difference between self-defence and countermeasures, on the one hand, and the circumstances of *force majeure*, distress, and necessity, on the other, may also be seen in the fact that the former group of circumstances comes to be applied as a response to a wrongful act of the state against which measures of self-defence or self-help are taken. By contrast, *force majeure*, distress, and necessity all do not presuppose any form of wrongful conduct on the part of the state whose rights are ultimately infringed.

The law of international responsibility has various functions. Its main function still lies in providing a framework for the provision of reparation.[130] While injury is a precondition for a claim of reparation, responsibility arises regardless of the question of whether there is material damage of a state or another actor protected by international law. This signals that the law of international responsibility has developed into a more general tool for the upholding of international legality.[131] This rule of law-related function of the law of international responsibility[132] is an important conceptual factor for our subject. Among the three defences that we suggest to group into the former category (preclusion of wrongfulness), self-defence and countermeasures are especially concerned with means to ensure a return to legality. Some would critically say that they do so in a rather archaic and primitive manner, both being forms of 'self-help' and thus remnants of an 'old' international law which was characterised by the absence of judicial and other institutionalised forms of dispute settlement.[133] Yet, in the still imperfectly centralised international legal system of today, their importance remains unchallenged by states whose views cannot be disregarded in this respect. These considerations do not apply for the second group of defences ('excuses'). *Force majeure*, distress, and

[130] *Factory at Chorźow* (*Germany v. Poland)*, Jurisdiction, 1927 PCIJ Series A - No. 9, 21; *Barcelona Traction, Light and Power Company, Limited*, n. 82, para. 36; on the traditional focus of this field of law on reparation see also G. Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations' (2002) 13 EJIL 1083–1098.
[131] Cf. P.-M. Dupuy, 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and the Codification of the Law of Responsibility' (2002) 13 EJIL 1053–1081, at 1057.
[132] On the relationship between state responsibility and the rule of law see A. Watts, 'The International Rule of Law' (1993) 36 GYIL 15–45, at 39; I. Brownlie, *The Rule of Law in International Affairs* (The Hague, Nijhoff: 1998), p. 79; A. Gattini, 'Post 1945 German International Law and State Responsibility' (2007) 50 GYIL 407 et seq.; Aust, *Complicity and the Law of State Responsibility*, n. 47, pp. 83–89.
[133] Cf. B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (Leiden: Nijhoff, 2009), p. 128.

necessity deal with external factors impacting on states and/or international organisations and their officials in concrete situations. It does not seem to be warranted to expand the group of actors who can rely on these *ad hoc* mechanisms.

In this context, it can be wondered how this differentiation should be further developed. In terms of process, there are various conceivable avenues. Given the still insecure final status of the ARSIWA, it is a possible scenario that states could return to this issue when setting up a multilateral convention on state responsibility. As this prospect is rather unrealistic and – in light of possible interests of states to lower standards of responsibility – also undesirable, it can be left to the practice of states and international, as well as domestic, courts and tribunals to develop this field of the law further. As the ARSIWA are meant to be evidence of customary international law on the matter, states are also free to engage in new forms of practice that might change existing customary law. This practice could materialise in diplomatic contexts as well as in the form of agreements in specific sub-fields and regimes of international law. As the state of the law is also not completely settled, there is considerable leeway for courts and tribunals to apply the circumstances along the lines suggested here.

In terms of substance, it then needs to be asked which states should be allowed to join forces for the 'return to legality'. Here, the distinction suggested by Nollkaemper and Jacobs between public and private functions of the law of international responsibility[134] might potentially be useful. To a certain extent, this distinction is an abstraction of the already existing differentiation between different kinds of obligations in international law, i.e. obligations owed only in bilateral pairings and obligations owed to a broader group of states and/or international organisations, in some cases even *erga omnes*. The categories of obligations *erga omnes partes* and obligations *erga omnes* will be especially decisive for establishing which states may take part in measures aimed at inducing a state and/or international organisation to return to legality.

Beyond this field of obligations, the rule on complicity will have to establish what forms of support third states might render to a state invoking a circumstance precluding wrongfulness. If the conduct in question would 'only' result in responsibility for complicity *in the absence* of the intervention of the defences of consent, self-defence, and the taking of countermeasures, such forms of support may lawfully be rendered by third states and/or international organisations. If, however, the conduct would result in an independent breach of the obligation

[134] Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 4, 400 et seq.

concerned, third states and/or international organisations are not entitled to this conduct, if not for the violation of an obligation *erga omnes* or *erga omnes partes*.

With respect to excuses, this approach would make it clear that third states and/or international organisations could only rely on those excuses if the conditions are met for them individually. In some cases, cooperation with conduct that is merely excused may nonetheless still be carried out in a lawful manner. In this respect, Article 6 of the ARSIWA and Article 7 of the ARIO would allow states and/or international organisations to place an organ at the disposal of another state and/or international organisation. If the rather limiting conditions for this operation are met, conduct of the organ which has thus been placed at the disposal of the receiving state and/or international organisation would only be attributed to the latter.

It is not submitted here that this suggested differentiation between two types of circumstances would solve all the problems we have encountered in this Chapter. Almost by definition, situations of shared responsibility will, by virtue of their complex character, stress-test existing rules pertaining to the responsibility of states and international organisations. The complexities of international cooperation are an ever-creative force for the challenging of abstract rules conceived before a concrete dispute arises. This points towards the need for an integrated approach to questions of shared responsibility. Finding a seemingly convincing solution with respect to one question may entail problematic consequences in other respects. The problems pertaining to questions of reparation have shown this interdependence of the various parts of the law of international responsibility.[135]

6. Conclusion

In sum, a mixed balance can be drawn for the suitability of the circumstances precluding wrongfulness for situations of shared responsibility. Generally speaking, the suitability of the rules decreases to the extent that the complexity of the factual situation, i.e. the number of actors involved, increases. This is due to the design of the defences, which are modelled on bilateral situations. The circumstances precluding wrongfulness can cope reasonably well with situations in which all actors within a group can rely on the same circumstance precluding wrongfulness. If, however, only some of the states and/or international organisations acting

[135] See Chapter 7 of this volume, P. d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', in P.A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: CUP, 2014), pp. ___.

together can rely on circumstance precluding wrongfulness, difficult questions arise pertaining to the issue of whether cooperating states and/or international organisations also benefit from the defence, and the problem of how to partition possible claims of reparation among the cooperating states and/or international organisations. This contribution has argued that these problems are partly caused by the approach underlying the ILC's work in this field, which consisted of lumping together all defences in a group of circumstances precluding wrongfulness. A more differentiated approach that distinguishes between circumstances precluding wrongfulness and mere excuses could help to remedy at least some of these problems.