

2007

Coercion, Causation, and the Fictional Elements of Indirect State Responsibility

James D. Fry

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Recommended Citation

James D. Fry, Coercion, Causation, and the Fictional Elements of Indirect State Responsibility, 40 *Vanderbilt Law Review* 611 (2021)

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Coercion, Causation, and the Fictional Elements of Indirect State Responsibility

*James D. Fry**

ABSTRACT

This Article provides an in-depth analysis of Article 18 of the 2001 ILC Draft Articles on State Responsibility, which holds a coercing state indirectly responsible for an injurious act committed by a coerced state. Not only does this provision lack support from state practice, but the structural and logical flaws within the current formulation ensure that this provision does not significantly influence the evolution of state practice. Indeed, it would have been better for the ILC to have left Article 18 out of the Draft Articles, given that other, less problematic provisions could have covered such situations involving coercion. In reaching this conclusion, this Article explores the fascinating roles that coercion and causation play within the law of state responsibility.

* Fellow, University of Geneva Faculty of Law; Teaching Assistant, International Law Section, Graduate Institute of International Studies, Geneva. LL.M. (Leiden University Faculty of Law); J.D. (Georgetown University Law Center); M.I.A. (Columbia University); B.A. (Brigham Young University). The Author thanks Andrea Bianchi, Camille Cosendai, Jean d'Aspremont, John Dugard, David Fry, August Reinisch, Thomas Schultz, and Ramses Wessel for their comments on earlier drafts of this Article.

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I. INTRODUCTION

The law of state responsibility is one of the most complex areas of international law, in terms of both articulating and implementing its principles. The International Law Commission (ILC or Commission) spending over five decades to write its Draft Articles on

State Responsibility (Draft Articles) testifies to this truth.¹ Aspects of state responsibility within this body of law that have little, if any, support from state practice are that much more difficult to understand in practical terms. One such aspect is the law relating to indirect state responsibility that arises from coercion of another state. Draft Article 18 is the most recent rubric for holding a coercing state indirectly responsible for an injurious act committed by a coerced state:

A State which coerces another State to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and (b) the coercing State does so with knowledge of the circumstances of the act.²

This formulation of state responsibility remains largely theoretical. The relatively weak cases cited in the Commentaries, which are based on tenuous counterfactual reasoning, and the absence of stronger cases indicate that this Article does not reflect customary international law. Moreover, three structural flaws of Article 18 essentially ensure that this provision will never become customary international law: (1) a veritable catch-22 involving the definition of coercion, (2) the disappearance of the internationally wrongful act, and (3) an overly strict and confused standard of attributive causation in the language “but for the coercion.” Each flaw further enables coercing states to plausibly deny this brand of responsibility. With these perceived defects, Article 18 never will sufficiently deter states from engaging in coercion and may even encourage it. Therefore, it would be best if this provision were removed altogether.³

This Article is divided into five parts, with this introduction and a brief conclusion constituting Parts I and V, respectively. Part II explains the notion of indirect responsibility and provides a brief history of the development of this notion that leads to coercion of another state as a basis for state responsibility. Part III critically analyzes the state practice supposedly supporting this provision and explains why it is important. This Part also looks at the general prohibition of coercion under customary international law and why this might be the normative purpose behind Article 18’s stand-alone existence. Part IV, the pivotal portion of this Article, sets out in detail the three structural flaws that are so detrimental to the application of Article 18. The lack of firm state practice hints at the

1. See INTERNATIONAL LAW COMMISSION, STATE RESPONSIBILITY (2006), available at http://untreaty.un.org/ilc/summaries/9_6.htm. See generally Draft Articles on State Responsibility, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/RES/56/10 (Dec. 12, 2001) [hereinafter Draft Articles on State Responsibility].

2. Draft Articles on State Responsibility, *supra* note 1, art. 18.

3. The Author acknowledges the unlikelihood that the ILC will reopen the debate on this point, though this reality does not reduce the value of critically assessing the ILC’s work.

ultra-progressive nature of Article 18, though these three blemishes are what ensure that Article 18 will remain in the virtual realm until amendment.

Critics might assert that many of the arguments here are overly formalistic; however, one must not forget that legal formalism is likely the best tool for a lawyer to use in criticizing the work of an organization that is itself extremely formalistic in its approach to codifying international law. Besides legal formalism, this Article adopts a textualist approach to analyzing Article 18, relying mostly on the plain meaning of the text, though also looking at the internal context and structure of the text, to address whether Article 18 is coherent and reflective of customary international law.⁴ Indeed, as the ILC emphasized strong textualism over contract law in the Vienna Convention on the Law of Treaties (VCLT),⁵ it presumably will not mind having textualism applied to its own pronouncements. While the intent of the Special Rapporteurs and the ILC was considered in depth, it was not the predominant source of meaning. In this context, this Article rejects the positivist corrective justice theory, which states that a decision-maker will not bother with ambiguous cause-in-fact, but instead will be driven to award damages based on the coercing state's perceived immorality.⁶ Although this might be what happens ultimately if an actual case ever arises (especially if Article 18 remains in its murky condition), the Draft Articles are about establishing a coherent system for evaluating state responsibility. By doing so, positivist and normative efficiency theorists will be pleased by the increased predictability that likely will come from decision-makers.⁷ Finally, the purpose of this Article is not to suggest how Article 18 ought to be amended, but merely to point out its perceived shortcomings. Despite this critical tenor, the Author wishes to emphasize that no disrespect is intended to the ILC and its members, whom the Author holds in the highest regard.⁸ Nonetheless, the issues raised here warrant further consideration

4. See generally Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 825 (2002) (discussing the characteristics of new textualism).

5. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 30 (4th ed., 2003).

6. See generally Erik S. Knutsen, *Ambiguous Cause-in-Fact and Structured Causation: A Multi-Jurisdictional Approach*, 38 TEX. INT'L L.J. 249, 285 (2003) (explaining the positivist corrective justice theory in ambiguous cause-in-fact cases).

7. See *id.* at 286 (explaining that structured causation will provide for more predictable and more efficient judicial decisions).

8. In particular, the Author acknowledges the tremendous work of Special Rapporteur James Crawford in preparing the Draft Articles on State Responsibility as presently constituted. While Article 18 might have benefited from a greater allocation of time, it admittedly was a small piece in a complex area of international law, and his attention likely was better used on more pressing matters. See Draft Articles on State Responsibility, *supra* note 1, art. 18.

and hopefully will aid in the gradual transformation of the Draft Articles into customary international law.

II. INDIRECT RESPONSIBILITY AND COERCION

This Part provides the background necessary to fully understand Article 18 and how it fits into the broader debate over indirect responsibility. However, before delving into the evolution of the principle and its *sui generis* definitions, it is useful to define indirect responsibility, which is the general topic of Chapter IV of the Draft Articles containing Article 18. To begin, the full title of Chapter IV is “Responsibility of a State in Connection with the Act of Another State,”⁹ and comprises Articles 16 to 19. Otherwise known by its shorthand “indirect responsibility,” Chapter IV involves the triangular relationship between the injured state, the state committing the internationally wrongful act, and a third state that has some relationship or influence over the state committing the act.¹⁰ In essence, the state committing the internationally wrongful act has breached an international obligation to the injured state, and the principle allows the injured state the opportunity to make a claim against the third state for whatever reason—possibly because the state committing the internationally wrongful act either is unavailable or protected by *force majeure*, or because the injured state does not otherwise want to bring a claim against that state. Under Chapter IV, the third state generally is not to be held responsible for the assistance, direction, or coercion itself, but rather for the act that flowed from the assistance, direction, or coercion. For comparison purposes, it might be useful to note how, under Article 16 that deals with aid or assistance in committing an internationally wrongful act, the third state is not responsible for the internationally wrongful act per se when assisting in its commission, but for that state’s wrongful participation in the commission of that act. In comparison, Article 18 does not appear to have any of the states committing an internationally wrongful act, a point that Part IV(B) develops further.

After laying out a brief history of the two theories that shaped this area of indirect responsibility, this Part provides an analysis of the definitions for coercion that were adopted by the ILC. As discussed below, the definition’s focus on the existence of a temporary relationship of control during the wrongful act is the fundamental source of the fictional elements of Article 18.

9. Draft Articles on State Responsibility, *supra* note 1, Ch. IV.

10. *Id.*

A. *The Conflict Between Representation and Control Theories*

Since the early 1900s, the theoretical framework underlying indirect responsibility has switched between the representation and control theories. Understanding this debate, especially the arguments of the control theory, is helpful in understanding the current formulation of Article 18. Early commentaries and draft articles mentioned the possibility of indirect responsibility of a state without ever naming coercion of another state as a distinct issue or even possibility.¹¹ Dionisio Anzilotti was the first to talk about indirect responsibility in 1902, though he limited his focus to the representation theory.¹² He reasoned that an injured state would not be able to address a represented state in asserting its responsibility, as the represented state did not carry out its own international relations; thus, the representing state should be held indirectly responsible.¹³ The main examples of such representative relationships are Switzerland and Liechtenstein, New Zealand and Western Samoa, and Italy and San Marino, where there is representation without any degree of control. The lack of control meant that an injured state could just as easily make a claim through the representing state against the represented state as it could make a claim directly against the represented state, so the reasoning behind the representation theory is not particularly persuasive.¹⁴ Still, commentators and codifications alike relied on Anzilotti's representation theory. Indeed, it was adopted within Article IX(2) of the 1927 Lausanne session on International Responsibility of States for Injuries on Their Territory to the Person or Property of Foreigners,¹⁵ Article 3 of the 1929 Harvard Law School Draft Convention,¹⁶ and even the Mavrommatis Palestine Concession Case of the Permanent Court of International Justice, to name a few.¹⁷

In the 1930s, there was a movement away from this theory in favor of the control theory, which appears to have most influenced the Draft Articles.¹⁸ The control theory essentially is based on the link between responsibility and freedom. Indirect responsibility will apply

11. See, e.g., Eighth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur, U.N. Doc. A/CN.4/318, 2(1) Y.B. Int'l L. Comm'n 3 (1979) [hereinafter Eighth Report].

12. See *id.* ¶ 5.

13. See *id.*

14. It is even less persuasive once one realizes that Anzilotti mentioned no cases to support his views. See *id.*

15. See *id.* ¶ 6 n.11 (citing U.N. Doc. A/CN.4/96 annex 8, 2 Y.B. Int'l L. Comm'n 228 (1956)).

16. See *id.* ¶ 6 n.11 (citing U.N. Doc. A/CN.4/96 annex 9, 2 Y.B. Int'l L. Comm'n 228 (1956)).

17. See *id.* ¶ 6 n.13.

18. See *id.* ¶¶ 7, 17 (discussing critiques of the earlier theory and describing the control theory).

only if the state that committed the internationally wrongful act was operating in a sphere of action for which it had complete freedom of decision.¹⁹ From the perspective of the controlled state, it “should be responsible for [its] actions towards foreign Governments only in proportion to [its] freedom of action.”²⁰ Eagleton said in 1928:

[I]f one State controls another in any circumstances which might prevent the latter from discharging its international obligations, the basis of a responsibility of the protecting State for the subordinated State is laid. Responsibility must be located in each separate case by ascertaining the actual amount of freedom from external control, or conversely, the actual amount of control left, to the respondent State.²¹

Therefore, if there is no restriction on the dependent state’s freedom of decision, the dependent state is solely responsible.²²

From this control theory, one can see the motivation behind all of Chapter IV dealing with indirect responsibility, though to varying degrees. Article 17 and its predecessor, Article 28(1), talk specifically about control of a state leading to indirect responsibility for the controlling state.²³ As explained in Part III(C) below, if it were not for Article 18 and the principle *lex specialis derogat legi generali*,²⁴ coercion of another state conceivably could fit under this general rubric of control, as presumably control includes the temporary variety that results from coercion. Such an approach would have been favorable, as Article 17 lacks the problematic language “but for” and the other shortcomings described in Part IV.²⁵ Nonetheless, in Ago’s efforts to be exhaustive in listing all the ways in which states can be held indirectly responsible, he introduced, and the ILC adopted, coercion of another state as a separate basis for indirect responsibility.²⁶ This notion has been perpetuated in the Second Reading, though now as a stand-alone Article.²⁷ To understand why this was not the ideal approach, to say the least, it is important to understand the unique definition of coercion in this context, which is the topic of the next Subpart.

19. See *id.* ¶ 17.

20. *Id.* ¶ 17 n.33 (quoting F. DE MARTENS, 1 TRAITÉ DE DROIT INTERNATIONAL 379 (A. Leo trans., 1883)).

21. *Id.* ¶ 17 (quoting CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 43 (1928)).

22. See *id.*

23. See Draft Articles on State Responsibility, *supra* note 1, art. 17.

24. The principle of *lex specialis derogat legi generali* is that when two laws contradict, the more specific of the two should govern. See generally Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5 J. INT’L ECON. L. 17, 70-71 (2002) (discussing the significance of *lex specialis* in international law).

25. Draft Articles on State Responsibility, *supra* note 1, art. 17.

26. See generally Eighth Report, *supra* note 11 (analyzing the law surrounding state responsibility and proposing bases for responsibility).

27. See Draft Articles on State Responsibility, *supra* note 1, art. 17.

B. Coercion in the Context of State Responsibility

For a clear idea of what coercion is in the context of state responsibility and what type of activities Article 18 covers, it is useful to explore what it is not. Coercion of another state does not include direct responsibility, such as acts of organs of a state where there is no control of another. Nor does coercion include topics falling under other articles of Chapter IV, in particular the international relationships of dependence that fall under Article 17 and include vassalages or protectorates, relations between federal states and the member states of the federation, and relations between an occupying state and the occupied state in cases of territorial occupation (where the occupied supposedly retains sovereignty and international personality while the occupier controls many sectors).²⁸ Other situations that Article 18 does not cover are those covered by Article 16, where one state “aids or assists” the state that committed the internationally wrongful act, which includes situations where a state provides essential facilitation or financing for the activity.²⁹ Coercion under Article 18 is not about aggression or countermeasures—areas of the law where coercion commonly is discussed. Finally, Article 18 does not deal with the coercion itself being an internationally wrongful act, which may or may not be the case and is a separate issue altogether. Instead, Article 18 is concerned with imputing responsibility for an internationally wrongful act against the injured state to a state other than the one that committed the internationally wrongful act.

The definition of coercion is important in seeing how coercion is distinct from the other types of conduct leading to indirect responsibility. The First Reading relied on a definition established by Roberto Ago, which saw coercion as a state forcing another state to commit an internationally wrongful act where there is no standing relationship of control or dominance between the two states, but where control is manifest only at the time of the wrongful act in question.³⁰ The ILC’s report for the First Reading distinguished the type of control in coercion from other types as being “purely occasional and not permanent,”³¹ or a temporary relationship during the time of the coercion. Therefore, even though occupation is a form of coercion in the broader sense, it is not covered under this definition of coercion because of the existence of a continuing relationship,

28. See JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY* 152-56 (2002).

29. See *id.* at 148.

30. See Eighth Report, *supra* note 11, ¶ 5.

31. Report of the International Law Commission on the work of its Thirty-first Session, U.N. Doc. A/34/10, Supp. No. 10, ¶ 26, 2(2) Y.B. Int’l L. Comm’n 93, 102 (1979) [hereinafter *Thirty-first Session Report*].

rather than a temporary one. The Commentary to the Second Reading does not expressly reject Ago's focus on a temporary relationship, but it emphasizes a different point—that coercion is conduct that forces the will of the coerced state, giving it no effective choice but to comply with the wishes of the coercing state.³² Still, it must implicitly rely on this element of temporary relationship of control for its reasoning, for coercion loses its uniqueness from occupation and the other situations that give rise to indirect responsibility in Chapter IV when the element of temporary relationship is removed.³³ The strength of the logic behind Article 18 and its wording significantly decreases when the uniqueness of coercion becomes blurred. Yet, as explained in Part IV(C)(4) below, any definition that relies explicitly or implicitly on a temporary relationship is artificial, as temporary relationships do not appear to exist between states. Before getting to these types of criticisms, however, this Article looks at the state practice cited in support of Article 18 to determine whether it reflects customary international law.

III. ARTICLE 18 AND CUSTOMARY INTERNATIONAL LAW

A significant step in understanding the fictional elements of Article 18 is to understand the customary international law in this area. By "fiction," this Article uses the primary, plain-language meaning: "[A]n imaginative creation or a pretense that does not represent actuality but has been invented."³⁴ While the Author acknowledges that there are many useful legal fictions, such as Kelsen's view of the state as a normative order,³⁵ this Article asserts that Article 18 is a relatively useless one. As this Part shows, no state practice or legal effect appears to derive from this provision, which might reflect its uselessness as a legal fiction.³⁶ As Part IV explains, the source of this uselessness likely is its structure. In addition to being a useless fiction, Article 18 might even be harmful

32. See CRAWFORD, *supra* note 28, at 156.

33. See Report of International Law Commission on the work of its Fifty-first Session, U.N. Doc. A/54/10, Supp. No. 10, ¶ 275, 2(2) Int'l Law Comm'n 48, 69-73 (1999) (noting this criticism implicitly) [hereinafter Fifty-first Session Report].

34. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed., 2000), available at <http://dictionary.reference.com/search?q=fiction> (last visited Aug. 25, 2006).

35. See HANS Kelsen, GENERAL THEORY OF LAW AND STATE 181 (A. Wedberg trans., 1945).

36. See Roberto Lavalle, *The Law of the United Nations and the Use of Force, Under the Relevant Security Council Resolutions of 1990 and 1991, to Resolve the Persian Gulf Crisis*, 23 NETHERLANDS Y.B. INT'L L. 3, 64 (1992) (discussing legal fictions).

to establishing a robust system for determining state responsibility. In the end, it might have been best to have left Article 18 out of the Second Reading entirely.

A. *The ILC as a Codification Body*

The ILC has several different roles. United Nations Charter Article 13(1) states that the U.N. General Assembly “shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.”³⁷ The ILC was formed in 1947 to enable the General Assembly to implement this provision,³⁸ and the ILC takes up issues of international law at the recommendation of the General Assembly.³⁹ The ILC determined that state responsibility was a suitable topic for codification in 1949 and began its work in 1953 with a U.N. General Assembly request to “undertake the codification of the principles of international law governing State responsibility.”⁴⁰ This mandate expressly does not allow the ILC to contribute to the progressive development of state responsibility, so one would be justified in concluding that the ILC was intended to be limited to the codification of customary international law.⁴¹ After all, the ILC is the main codification body of the United Nations and is beholden to the General Assembly’s authorization.⁴²

Some critics might argue that codification without progressive development is impossible and that these two purposes are inextricably linked.⁴³ Admittedly, virtually no distinction is made between these two approaches in practice. In addition, the ILC often drafts particular rules that are supported by little, if any, state practice in order to articulate a complete set of rules. One need only

37. U.N. Charter art. 13, para. 1.

38. Statute of the International Law Commission, art. 1(1), G.A. Res. 174 (II), at 105, U.N. GAOR, 2d Sess., U.N. Doc. A/519 (Nov. 21, 1947) (providing that the ILC purpose is “the promotion of the progressive development of international law and its codification”) [hereinafter ILC Statute].

39. See Carl-August Fleischhauer, *Article 13, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 265, 270 (Bruno Simma ed., 1995).

40. Request for the Codification of the Principles of International Law Governing State Responsibility, G.A. Res. 799 (VIII), U.N. GAOR, 8th Sess., at 52, U.N. Doc. A/2630 (Dec. 7, 1953), available at http://libwww.essex.ac.uk/Human_Rights/developmentbibdocs/ARES2630.pdf (last visited Aug. 25, 2006) [hereinafter Request for Codification].

41. See International Law Commission, Origin and Background of the Development and Codification of International Law, <http://www.un.org/law/ilc/> (last visited Apr. 22, 2007).

42. See United Nations Documentation Research Guide, <http://www.un.org/Depts/dhl/resguide/specil.htm> (last visited Apr. 22, 2007).

43. See, e.g., Don M. McRae, *The International Law Commission: Codification and Progressive Development after Forty Years*, 25 CAN. Y.B. INT’L L. 355, 362 (1987).

look as far as VCLT Part V, § 2 on the Invalidity of Treaties,⁴⁴ which represents yet another solid example of the ILC trying to be exhaustive in its approach to codification, but losing some clarity in the process. This want of clarity is due to the lack of state practice that could have been drawn upon to help clarify certain key distinctions, such as the distinction between error and fraud.⁴⁵ Still, this does not mean that a distinction ought not to be made. After all, Article 15 of the ILC statute lays these out as separate, even mutually exclusive, principles: Progressive development is “the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States,” whereas codification of international law is “the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.”⁴⁶ The Author sees progressive development and codification as two distinct tasks that can be separated, because one theoretically can take a snap shot of the international system at a certain time and try to codify that customary international law without trying to mold its future form. Other commentators would seem to agree,⁴⁷ as does the International Court of Justice in the North Sea Continental Shelf Cases.⁴⁸ These tasks must be kept separate; otherwise, the ILC would be allowed to operate *ultra vires*. Keeping in mind the importance of the ILC limiting its acts to codification in this context, the Article now turns to the state practice that supposedly forms the basis for Article 18.

B. Scant State Practice

One simply cannot assume that Article 18 and its predecessor reflect customary international law, as some commentators do.⁴⁹ To

44. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

45. See, e.g., PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 173, 177-78 (José Mico & Peter Haggemacher trans., 1995) (asserting, *inter alia*, that there is “an almost total lack of practice in this field”); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE (2000).

46. ILC Statute, *supra* note 38, art. 15.

47. See Luis Barrionuevo Arévalo, *The Work of the International Law Commission in the Field of International Environmental Law*, 32 B.C. ENVTL. AFF. L. REV. 493, 499 (2005); see also Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 445 n.61 (2004) (arguing the ILC is required to “employ differentiated procedures for the codification and progressive development of customary international law”).

48. See North Sea Continental Shelf Cases, 1969 I.C.J. 3, 41 (Feb. 20).

49. See Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal Courts in the United States: Breard v. Greene*, 23 HASTINGS INT'L & COMP. L.

determine customary international law, one must look to state practice and *opinio juris*, which is to say that one must look for “general and consistent practice of states followed by them from a sense of legal obligation.”⁵⁰ As is clear from the Commentaries, the situations of coercion of another state are expected to be rare. Ago recognized this when he pointed out that indirect responsibility was seen as a special situation, with the subtopic of coercion of another state being a “somewhat marginal case of indirect responsibility.”⁵¹ Bin Cheng identified this roughly twenty-five years before Ago when he stated that states would be held responsible for the acts of other states only in exceptional circumstances.⁵² Therefore, state practice is expected to be rare. Indeed, the debate prior to Ago was theoretical, with virtually no mention of state practice or cases whatsoever. Ago included examples, however, which created another problem in that the examples seem to have tricked people into thinking that this was something other than a theoretical debate. Indeed, the cases that Ago cited, which the Commentaries for the First and Second Readings continue to cite, are too weak to support this type of indirect responsibility as an autonomous basis for responsibility.

1. The Shuster Case

The first cited case of state practice is the 1911 Shuster case. In early 1911, the Persian government was having major financial problems and asked the U.S. government how it could solve its problems.⁵³ The U.S. government recommended a financial advisor, and the Persian government entered into a contract with this individual, Mr. W. Morgan Shuster.⁵⁴ However, it quickly became

REV. 27, 82 n.215 (1999); Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT'L L. 532, 558 (1986).

50. See generally North Sea Continental Shelf Cases, *supra* note 48, at 42-46; Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 29-30 (June 3); Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Can.), 1984 I.C.J. 264, 298-99 (Oct. 12); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 130 (1999); ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 76-78 (1971).

51. Eighth Report, *supra* note 11, ¶ 4. However, this Article acknowledges that the situations of coercion of another state are not necessarily rare, as the superpowers during the Cold War could have applied more coercion on other states to commit internationally wrongful acts, for example, though they ultimately did not do so.

52. See generally BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 208-14 (Cambridge Univ. Press 2006) (1953) (discussing the principle of individual responsibility).

53. See Clement L. Bouvé, *Russia's Liability in Tort for Persia's Breach of Contract*, 6 AM. J. INT'L L. 389, 391-92 (1912); see also Eighth Report, *supra* note 11, ¶ 40 (also providing the basic background of the Shuster case).

54. See Bouvé, *supra* note 53, at 391-92.

clear to Shuster that he would not be able to function properly in Persia because Russia saw his presence as a challenge to its ambitions in the region.⁵⁵ Shuster's suspicions proved correct when Russia invaded Persia with 8,000 troops in an effort to have him and his four assistants removed from Persia.⁵⁶ Consequently, the Persian government broke its contract with Shuster and compensated him for the breach.⁵⁷ Some commentators believe that this compensation prevented the U.S. government from invoking indirect responsibility of the St. Petersburg government, which would have claimed that the Persian authorities acted under coercion by the St. Petersburg government.⁵⁸

2. The Romano-Americana Company Case

The second cited case of state practice is the Romano-Americana Company case of 1928. This is a case in which a U.S. company suffered harm from the Romanian government's 1916 destruction of the company's oil storage facilities located in Romanian territory.⁵⁹ At that time, Romania was at war with Germany, which was preparing to invade Romania.⁶⁰ The U.S. government believed that the British government forced Romania to destroy the facilities in anticipation of the German invasion, so it first brought a claim on behalf of Romano-Americana against the British government.⁶¹ The British government refused to accept responsibility, because it believed that it had urged, not forced, Romania to act in the common interest.⁶² The U.S. government changed its mind and instead brought a claim against Romania, which assumed responsibility of the acts committed by its organs.⁶³ Romania then compensated the U.S. company, as it had done with British, French, Dutch, and Belgian companies that similarly had been damaged.⁶⁴ The only disagreement that commentators see between the United States and the United Kingdom is whether Romania was coerced; it appeared as though both governments had agreed that if there was any coercion, the government exerting it would have been responsible for the damages.⁶⁵

55. See *id.* at 392.

56. See *id.*

57. See Eighth Report, *supra* note 11, ¶ 40.

58. See *id.* (citing Bouvé, *supra* note 53, at 389).

59. See *id.* ¶ 41.

60. See *id.*

61. See *id.*

62. See *id.*

63. See *id.*

64. See *id.*

65. See *id.*

3. Counterfactuals and Their Weak Conclusions

These cases are particularly weak support for the assertion that Article 18 reflects customary international law. For starters, both cases are old, and neither involved a judicial or arbitral determination. *Romano-Americana* involved urging, not coercion, which Romania apparently acknowledged. The U.S. claim against Britain apparently lacked merit, as Romania already had compensated numerous other foreign and domestic claimants for similar claims that arose from the same general event. Why the United States insisted on seeking compensation from Great Britain is unclear. What is clear from this case, however, is that urging is insufficient for indirect responsibility to arise, as the Second Reading Commentary notes.⁶⁶ Most notably, this case does not directly support the notion that coercion gives rise to indirect responsibility for the coercing state, but rather that the United States perhaps can be more creative than others in choosing from whom to seek reparations. Furthermore, *Shuster* involved occupation of Persia by the Tsarist troops, so it does not fall within the definition of coercion in the context of state responsibility, which excludes occupation. Though pure speculation, perhaps this is why the Commentary to the Second Reading relegates *Shuster* to a footnote,⁶⁷ whereas the case had been featured prominently in the past.⁶⁸ That said, *Shuster* appears to come closer to coercion than *Romano-Americana* if the Tsarist troops' occupation was, in fact, limited to a particular region of Persia, and Persia retained some ability to exercise its sovereignty. Still, the structural weaknesses of Article 18 that are discussed in Part IV below make it so that no case conceivably could support Article 18's current configuration.

In addition, the conclusions derived from these cases involve serious counterfactual reasoning. Counterfactual reasoning is where one imagines the world in a way other than the way it actually is, and then divines what would have happened in a given situation.⁶⁹ For example, if Manchester United had scored two more goals in the last five minutes of the game, it would have won. The earlier event is the antecedent, and the outcome is the desired consequence that is assumed would have happened.⁷⁰ The fundamental problem with this type of reasoning is that it involves a "fanciful and unknowable

66. See Draft Articles on State Responsibility, Second Reading, U.N. GAOR, 52nd Sess., U.N. Doc. A/CN.4/L.600, art. 18 (Aug. 21, 2000).

67. See CRAWFORD, *supra* note 28, at 158 n.323.

68. See *id.*; see *supra* text accompanying notes 53-65.

69. See Barbara A. Spellman & Alexandra KinCannon, *The Relation Between Counterfactual ("But For") and Causal Reasoning: Experimental Findings and Implications for Juror's Decisions*, 64 LAW & CONTEMP. PROBS. 241, 241 (2001).

70. See *id.*

state of affairs," on account of it never having existed.⁷¹ Therefore, the reliability of such reasoning is highly suspect. In *Shuster*, the Commentaries assert that *if Persia had not* paid Shuster, then the United States *would have had* a claim against Russia based on indirect responsibility.⁷² In *Romano-Americana Company*, the Commentaries see the argument not as whether there was such a thing as indirect responsibility—because the states seemed to be saying that if there was coercion, then there would be indirect responsibility—but whether there was coercion.⁷³ The case is essentially saying that *if* the British government *had* coerced Romano, then there would have been indirect responsibility. Both examples are based on tenuous counterfactual reasoning, which certainly is not a strong enough basis for an entirely distinct theory of indirect responsibility. Indeed, one cannot make any real conclusions from what does not happen. Such unconvincing state practice might be the clearest indication that Article 18 does not reflect customary international law.

4. Potentially Applicable Scenarios: Bilateral Immunity Agreements

Admittedly, it is possible to tinker with the fact patterns of the above two cases and dream up other hypothetical situations that come closer to being an example of when Article 18 might come into play. Such hypothetical situations would have to involve some type of compulsion, whether armed or unarmed, where the target state's organs still have sufficient independence to breach an international obligation owed to another state, but the coerced state has no effective choice. Putting aside the paradox discussed in Part IV(A) below, one could conceivably envision a number of scenarios of indirect responsibility coming from U.S. economic pressure on other states to assist in the war on terror, for example. Perhaps the best example is of U.S. pressure exerted on other states to enter into bilateral immunity agreements to block those states from handing over U.S. nationals to the International Criminal Court. In 2002, the U.S. Congress passed the American Servicemembers' Protection Act (ASPA), which prohibits the United States from providing military assistance to a party to the Rome Statute unless it has signed a Rome Statute Article 98 waiver, otherwise known as a bilateral immunity agreement.⁷⁴ That said, U.S. pressure has not been limited to parties

71. See Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 67 (1956).

72. See Eighth Report, *supra* note 11, ¶ 40.

73. See *id.* ¶¶ 41-42.

74. See Eric M. Meyer, *International Law: The Compatibility of the Rome Statute of the International Criminal Court with the U.S. Bilateral Immunity*

of the Rome Statute. As of December 2005, ninety-two states had entered into these agreements.⁷⁵ Apparently more states secretly have entered into such agreements but have asked to remain anonymous.⁷⁶ Twenty-three states that have refused to enter into an agreement have been subjected to U.S. sanctions.⁷⁷ By signing these agreements, these states-parties to the Rome Statute allegedly violate the obligation under the fifth paragraph of the Preamble to “put an end to impunity for the perpetrators of [grave] crimes,” thus possibly breaching their international obligation to the rest of the parties to the Rome Statute.⁷⁸

While some will be eager to point to this as coercion of another state that potentially awakens the applicability of Draft Article 18, it is a stretch to say that the targets of U.S. pressure are denied any effective choice in the matter. Indeed, the U.S. threat under ASPA appears to be limited to military aid, not other forms of aid. As a result, the twenty-three states that have refused to enter these agreements continue to survive, if not thrive, economically. Indeed, when states such as Jordan took a tough stand against the United States in utterly refusing to sign the agreement, the United States eventually backed down,⁷⁹ thus undermining the argument that these so-called coerced states have had no choice in the matter. While such sanctions might make it uncomfortable for states in search of U.S. military parts and maintenance, these states likely will be able to get these supplies from other sources, just as Iran apparently may have done following its falling out with the United States in 1979.⁸⁰ Moreover, as explained in Part IV(C)(4) below, the pressurized relationship between the United States and these other states continues beyond the breach of the international obligation under the Rome Statute, as the threat of sanctions under the ASPA continues.

Agreements Included in the American Servicemembers' Protection Act, 58 OKLA. L. REV. 97, 99 (2005) (citing 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, § 2007, 116 Stat. 820, 899-909 (codified at 22 U.S.C. §§ 7421-32 (2004))).

75. See Coalition for the International Criminal Court, Status of U.S. Bilateral Immunity Agreements, <http://iccnow.org/?mod=bia> (last visited Apr. 7, 2007).

76. See David A. Tallman, Note, *Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict*, 92 GEO. L.J. 1033, 1044 n.90 (2004) (citing U.S. Department of State Daily Press Briefing (June 12, 2003), <http://www.state.gov/r/pa/prs/dpb/2003/21540.htm>).

77. See Johan D. van der Vyver, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, 18 EMORY INT'L L. REV. 133, 143 (2004).

78. Rome Statute of the International Criminal Court, pmbl., U.N. Doc A/CONF.183/9 (July 17, 1998).

79. See Kenneth Roth, *Human Rights as a Response to Terrorism*, 6 OR. REV. INT'L L. 37, 57 (2004).

80. See, e.g., Tim Starks, *House Measure Aims to Squelch Sale of F-14 Fighter Parts to Iran*, CQ WEEKLY, March 30, 2007 (noting reports that contraband components of F-14 fighter aircraft ended up in Iran).

Consequently, this is not a situation of coercion, which requires by definition a temporary relationship of coercion only for the duration of the wrongful act. Again, as explained in more detail in Part IV(C)(4), all of these hypothetical situations likely will fail due to the artificial requirements of a temporary relationship and no choice on the part of the coerced state. Thus, Article 18 neither reflects customary international law, nor is it likely to reflect such under its current formulation.

C. Failure of Article 18 to Further the General Prohibition on Coercion

Even if Article 18 does not reflect customary international law, the possibility remains that the normative purpose of Article 18 is to support the general prohibition of coercion, which might be considered as customary international law.⁸¹ However, this prohibition seems to be limited to armed force, similar to that found in U.N. Charter Article 2(4).⁸² Indeed, customary international law allows a state that has had its rights violated by another state to use proportional, legal (presumably unarmed) coercion to encourage termination of the violation or prevent future violations.⁸³ Therefore, Article 18 might go beyond this customary international law by including within the definition of coercion types of coercion other than armed coercion, such as economic coercion.⁸⁴ In Ago's proposal that led to the Draft Articles after their First Reading, coercion was considered so serious so as to separate responsibility from the act that gave rise to that responsibility, and only coercion in the "sense in which that term is accepted in the United Nations system" was acceptable, not every form of pressure.⁸⁵ The ILC disagreed, concluding that coercion should not be limited to the threat or use of armed force, but instead should cover all actions that seriously limit

81. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. V. U.S.), 1986 I.C.J. 14, 98-102 (June 17).

82. U.N. Charter art. 2, para. 4. *But see* Vienna Convention on the Law of Treaties arts. 51, 52, May 23, 2969, UN Doc. A/CONF.39/27, 1155 U.N.T.S. 331, reprinted in 63 AM. J. INT'L L. 875 (1969) (stating that coercion invalidates treaties, which provisions generally are considered to be reflective of custom).

83. See 1 OPPENHEIM'S INTERNATIONAL LAW § 131 (9th ed., 1992); Sarah H. Cleveland, *Norm Internationalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 55 (2001).

84. Critics point to U.N. Charter Article 2(7) and the subsequent practice surrounding it as a prohibition of states from intervening in the domestic affairs of other states through such means as economic coercion. See, e.g., Thomas W. Wälde, *Managing the Risk of Sanctions in the Global Oil & Gas Industry: Corporate Response Under Political, Legal and Commercial Pressures*, 36 TEX. INT'L L.J. 183, 192 n.29 (2001). However, one must not overlook the fact that Article 2(7)'s prohibition only applies to the United Nations itself, as expressly stated in the first line of that provision. U.N. Charter art. 2, para. 7.

85. Eighth Report, *supra* note 11, ¶ 42 n.99.

the freedom of decision of the coerced state by making it extremely difficult to act in a way different from that required by the coercing state.⁸⁶ The reason for this disagreement is not entirely clear, though it likely reflects the ILC's desire to acknowledge the multiple ways that states attempt to exercise control over one another.

Assuming, *arguendo*, that the customary international law on coercion in general and Article 18 were parallel, Article 18 would not further this prohibition and deter potential coercers, as explained in the following Part. Indeed, while Article 18 mentions coercion, the standard for coercion there is so high that potential coercers likely will dismiss it as inapplicable or easily evadable, or will otherwise not be deterred. Ultimately, Article 18 likely will be inapplicable to most, if not all, forms of coercion due to Article 18's language. If Article 18 did not exist, much clearer provisions, such as Article 17, might apply to cases of coercion—provisions that lack such strict and confusing language as that of Article 18. Article 17, titled "Direction and Control Exercised over the Commission of an Internationally Wrongful Act," reads as follows:

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.⁸⁷

The Commission itself recognized that a situation involving the coercion of another state is similar to a situation in which a state is under the direction and control of another state.⁸⁸ However, the principle of *lex specialis derogat legi generali* dictates that Article 18 will govern in cases involving coercion of another state. This canon of construction, which is a general principle of law,⁸⁹ provides that specific legal provisions prevail over general ones when their respective rules conflict.⁹⁰ Therefore, any benefits from the potential applicability of Article 17 and any redundancy between Articles 17 and 18 are lost in such situations.⁹¹

86. See Thirty-first Session Report, *supra* note 31, ¶ 29.

87. Draft Articles on State Responsibility, *supra* note 1, art. 17.

88. See Thirty-first Session Report, *supra* note 31, ¶ 25, at 102.

89. See Marti Koskeniemi, International Law Commission Study Group on Fragmentation, *Fragmentation of International Law: Topic (a): The Function and Scope of the Lex Specialis Rule and the Question of "Self-Contained Regimes": An Outline*, ¶ 2.2, available at http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf (last visited Apr. 15, 2007).

90. See Raj Bhala & David A. Gantz, *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99, 156 (2005).

91. Some critics might see Article 17 as more restrictive because of its language of "directs and controls another State." Draft Articles on State Responsibility, *supra*

This Part has shown that Article 18 does not reflect customary international law. The next Part continues with the theme established toward the end of this Part—that Article 18 does not, and will not, deter potential coercers from engaging in coercion—and attempts to explain why this is the case.

IV. THE STRUCTURAL FLAWS OF ARTICLE 18

Article 18 contains three structural flaws that doom it to ineffectuality, which is the crux of this Article's thesis that Article 18 has significant fictional elements. Again, fiction does not mean that it is a lie, but that it is an invention that does not reflect reality.⁹² Each structural weakness is discussed below, in ascending order of technical complexity.

A. *The Circularity of Sovereignty*

Article 18 contains a catch-22 type of circularity that ensures state practice never evolves around it.⁹³ For Article 18 to apply, the coerced state must retain sovereignty sufficient for its organs to independently perform the internationally wrongful act. Otherwise, the coercing state would be responsible under direct responsibility, thus removing the need to sue under the provisions involving indirect responsibility. However, when a state is coerced into acting, the requisite sovereignty is lost, as sovereignty entails the ability of a state to choose its own actions.⁹⁴ Coercion, as defined in the Article's

note 1, art. 17. However, one must not forget that "absolute" control is not required for Article 17 to apply, nor must a controlling state also separately direct that controlled state, as critics might be tempted to suggest. *Id.* On the contrary, as explained in Part IV(C)(2), *infra*, Article 18 has absolute-type language with the "but for" test provided, so Article 18 is far more restrictive than Article 17. Thus, in the end Article 18 will be less of a deterrent for smart coercers, because they will realize that Article 18 is such a high standard and that it will apply over Article 17, which lacks such a high standard.

92. See *supra* text accompanying note 34.

93. This might appear to the civil-law lawyer as a uniquely common-law way of looking at the evolution of law. However, it is more a reflection of the difference between *lex ferenda* and *lex lata*, and how the former becomes the latter.

94. See, e.g., Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 851 (1979) (defining sovereignty as "a power to make choices—about how to use public monies and direct public attention, and about how to vary the choices as the needs of the community change"); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 123, U.N. Doc. A/8082 (Oct. 24, 1970) (providing that an element of sovereignty is the state's "right freely to choose and develop its political, social, economic and cultural systems"); Roth, *supra* note 79, at 1026. However, this Article acknowledges that *force majeure* situations can be seen as an example of a state losing all effective choice and yet still retaining sovereignty. That said, a distinction can be made in that *force*

Commentary, is “[n]othing less than conduct which forces the will of the coerced State . . . giving it *no effective choice* but to comply with the wishes of the coercing State.”⁹⁵ An earlier Commentary on the First Reading recognized that “the coerced State behaves as a State deprived of its sovereign capacity of decision.”⁹⁶ It is a contradiction to say that a semi-sovereign state has no choice without also losing the very sovereignty characteristic needed for this type of indirect responsibility to apply. Thus emerges the first paradox that renders Article 18 a fiction.⁹⁷

This conclusion makes sense from a policy perspective. In domestic civil cases, persons (both legal and natural) are often held responsible vicariously for acts that they did not themselves commit but were instead committed by such entities as their representatives, animals, or objects.⁹⁸ Such vicarious liability makes sense in those cases because the principal or owner accepted a risk that the representative, animal, or object might cause harm.⁹⁹ On the international level, however, states are sovereign, which means that states are responsible for their own decisions. The exception is where that state has lost its sovereignty, either through complete occupation or some other form of control. Article 18 positions itself awkwardly, even artificially, in the nonsensical realm of independence without choice—sovereignty without sovereignty, if you will. Such circularity ensures that Article 18 never will be significantly relied upon. While one might correctly think of coercion, in general terms, as involving something less than the absolute elimination of the coerced’s will, the binary nature of Article 18’s allocation of responsibility (discussed in Part IV(C)(4) below) pushes such sound notions off to the side.

B. *Disappearance of the Internationally Wrongful Act*

The second structural flaw of Article 18 is the disappearance of the requisite internationally wrongful act. The basic elements for

majeure situations involve external conditions that cannot be attributed to another entity (at least not one here on earth), though this distinction ultimately might not be valid.

95. See CRAWFORD, *supra* note 28, at 156.

96. Thirty-first Session Report, *supra* note 31, ¶ 25, at 102.

97. For a discussion of the overly narrow definition of coercion within the context of international organization responsibility, see Jean d’Aspremont, *Abuse of the Legal Personality of International Organizations and the Responsibility of Member States*, 4 INT’L ORG. L. REV. (forthcoming 2007), and Albane Geslin, *Réflexions sur la Répartition de la Responsabilité entre l’Organisation Internationale et ses Etats Membres*, 109 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 548, 575 (2005).

98. See Antony Honoré, *Causation in the Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed., Winter 2005), available at <http://plato.stanford.edu/archives/win2005/entries/causation-law> (last visited Apr. 15, 2007).

99. See *id.*

state responsibility, as currently formulated under Draft Article 2 of the Second Reading, are an internationally wrongful act that arises from a "breach of an international obligation of the State" and "attribution of that act to a state under international law."¹⁰⁰ In articulating the reasons behind holding a coercing state indirectly responsible, Roberto Ago divided the attribution of the internationally wrongful act to the coerced state from the attribution of the responsibility for that internationally wrongful act.¹⁰¹ The ILC's report on the First Reading reflects this same reasoning.¹⁰² This was done because the coercing state did not commit the act that led to the breach of the international obligation. Article 18 breaks this divide down, allegedly because "there is no reason why the wrongfulness of that act should be precluded vis-à-vis the coercing State."¹⁰³ However, this ignores the reasons provided by Ago and the ILC. Indeed, the coercing state simply did not commit the act that gave rise to the breach of the international obligation. If the coerced state did not commit the internationally wrongful act, as Article 18(a) provides when it states that "the act would, but for the coercion, be an internationally wrongful act of the coerced State,"¹⁰⁴ where is the key internationally wrongful act that is required by Draft Article 1? Certainly the victim did not commit the internationally wrongful act. The coercing state may or may not have committed an internationally wrongful act vis-à-vis the coerced state in the form of the coercion itself, but this is an entirely separate issue when it comes to a discussion of indirect responsibility vis-à-vis the injured state.

What Article 18 likely was intended to establish was the displacement of attribution, and ultimately international responsibility, to the coercing state. However, under Draft Article 1, one must still find an internationally wrongful act in order to ascribe responsibility, which is something that Article 18 neglects.

In the end, Ago's division of the attribution of responsibility and the attribution of the internationally wrongful act makes overwhelming sense, which is lost in Article 18 as presently constituted. Without an internationally wrongful act, any kind of responsibility becomes tenuous under this provision, thus impeding significantly the Article's chances of ever reflecting actuality.

C. Confusion Between Cause-in-Fact and Legal Causation

The third structural flaw of Article 18 is the most complex as it involves causation, a general topic that seems to plague scholars and

100. Draft Articles on State Responsibility, *supra* note 1, art. 2.

101. See Eighth Report, *supra* note 11, ¶ 39.

102. See Thirty-first Session Report, *supra* note 31, ¶ 28.

103. See CRAWFORD, *supra* note 28, at 157.

104. Draft Articles on State Responsibility, *supra* note 1, art. 18(a).

courts alike.¹⁰⁵ The Second Reading for Article 18 added a new standard of causation to indirect responsibility with the “but for” language: “if (a) the act would, *but for the coercion*, be an internationally wrongful act of the coerced State”¹⁰⁶ This language was added to ensure its application in only the narrowest of circumstances.¹⁰⁷ However, what Article 18’s specific formulation does is confuse the different types of causation, hence discouraging potential claimants from using it as a basis for their recovery for fear of being held to a high standard of causation. Before analyzing these types of causation, it is important to note that the ILC likely did not have this detailed an understanding of but-for causation in their minds when they adopted the language of Article 18. That said, this does not change the grammatical strictness of “but for” or the likelihood that Special Rapporteur James Crawford—a renowned common-law lawyer—knew of this phrase’s eccentricities. With this in mind, this Part explores the more theoretical flaws of Article 18 as it relates to causation.

1. The Different Types of Causation

Causation is an important part of all areas of law, especially the law of state responsibility, in that it is causation alone (whether a state or its organs caused an injury), not fault (knowledge or negligence), that determines responsibility.¹⁰⁸ In common law, there are two components to causation: the first is cause-in-fact, which focuses on whether the defendant’s actions were the necessary cause of the injury at issue, and the second is legal causation, or proximate cause, which focuses on what legal consequences should apply to the defendant’s injurious conduct.¹⁰⁹ This latter type of causation is used to identify only those causes-in-fact that are sufficiently connected to the outcome to have been the *foreseeable* cause of that outcome, thus

105. See Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT’L L. 265, 300 (2002); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1737 (1985).

106. Draft Articles on State Responsibility, Second Reading, U.N. GAOR, 52nd Sess., U.N. Doc. A/CN.4/L.600, art. 18 (Aug. 21, 2000) (emphasis added).

107. See International Law Commission, Provisional Summary Record of the 2605 Meeting for the Fifty-first Session, July 19, 1999, UN Doc. A/CN.4/SR.2605, at 10-11 [hereinafter ILC Provisional Summary].

108. See RAY AUGUST, PUBLIC INTERNATIONAL LAW 346 (Prentice Hall 1995) (citing Lighthouse Arbitration (Fr. v. Greece), 23 INT’L L. REP. 352-53 (1956) (rejecting a claim for damages following an evacuation because there was no causal connection between the damage caused by the fire and the damage following the evacuation, as the latter damage was “neither a foreseeable nor a normal consequence of the evacuation”)).

109. See Foster, *supra* note 105, at 300-01; Ernest J. Weinrib, *A Step Forward in Factual Causation*, 38 MOD. L. REV. 518, 518 (1975).

making them the causes-in-law.¹¹⁰ But-for causation relates to the former type, which originates from common-law tort jurisprudence and is still used in many common-law states.¹¹¹ Therefore, it is no surprise if the but-for language of Article 18 immediately jumps out for common-law lawyers and not for civil-law lawyers. But-for causation is also a long-established principle in international law, where it must be shown that the wrongdoer's act was the cause-in-fact of the injury (which "cannot be attributed to any other cause") and the proximate cause (such that the "reasonable man in the position of the wrongdoer at the time would have foreseen [such damage] as likely to ensue from his action") in order to demand compensation from the alleged wrongdoer.¹¹²

The plain-language meaning of the idiomatic preposition "but for" connotes a strict causal relationship between the antecedent condition and the outcome: "But for the children, they would have gotten a divorce long ago."¹¹³ In the legal context, "but for" has the same strict sense of causation: "of or relating to *the* necessary cause (as a negligent act) without which a particular result (as damage) would not have occurred."¹¹⁴ In other words, the but-for test in this setting determines not just a necessary condition but also a sufficient, or at least a substantial, condition.¹¹⁵ The quintessential example of but-for causation is one in which a passenger on a boat with no life preservers fell overboard and drowned, but the owner of the boat was not held liable because it could not be shown that the lack of life preservers was the necessary condition for the drowning to have occurred.¹¹⁶ There is no other, softer definition of "but for": but-for language is the strictest standard for causation. Indeed, legislatures often introduce a but-for test of causation when they want to narrow

110. See Knutsen, *supra* note 6, at 252.

111. See generally *id.* at 250, 253 n.7 (citing U.S., U.K., and Canadian tort cases); Foster, *supra* note 105, at 305 n.163 (citing Australian, Canadian, and U.S. cases for the principle).

112. See CHENG, *supra* note 52, at 249-50 (quoting Samoan Claims Award (Germany v. U.S. and U.K.) U.S. Dep't of State National Archives, 210 Dispatches (1902)); see also Gregory D. DiMeglio, *Claims Against Iraq: The UN Compensation Commission and Other Remedies*, 86 AM. SOC'Y INT'L L. PROC. 477, 499 (1992) (reporting that Richard B. Lillich stated that the but-for rule is "the usual causation rule in international law that goes back beyond Borchard and Eagleton").

113. CHRISTINE AMME, *THE AMERICAN HERITAGE DICTIONARY OF IDIOMS* (1997), available at <http://dictionary.reference.com/search?q=but%20for> (last visited Apr. 15, 2007).

114. Merriam-Webster's Dictionary of Law (10th ed., 1996.), available at <http://dictionary.lp.findlaw.com/scripts/results.pl?co=dictionary.lp.findlaw.com&topic=e0/e018498e4b750252d3c154f724556c09> (last visited Apr. 15, 2007) (emphasis added).

115. Please note that this would appear to be a divergence from formal logic, in that no one cause can be sufficient in a complex chain of events. Still, this does not seem to deter common-law courts from looking for *the* necessary cause.

116. See generally *New York Cent. R.R. v. Grimstad*, 264 F. 334, 335 (2d Cir. 1920).

or tighten the application of a legal principle.¹¹⁷ The same is true for international law, with but-for language being viewed as “deny[ing] the possibility of developing” the principle that contains such language.¹¹⁸

The but-for test of causation is best applied when all the facts are available and easily discernible.¹¹⁹ The test is appropriate where it is possible to establish that one condition, among competing conditions, was the necessary condition for the outcome at issue.¹²⁰ Indeed, the test is often abandoned in favor of a more flexible test for causation in the domestic context when the case involves mixed sources of causation of the injury.¹²¹ If the test is used where there are multiple causes-in-fact, and it is found that the injury would not have occurred without the respondent’s act, then that respondent can be held liable for the injury, even though others that may necessarily have caused the injury can also be held liable in a joint-and-several liability arrangement.¹²² Based on this description of the general meaning of “but for,” the Article turns to answering what “but for” means exactly in Article 18. It turns out that its usage here is counterintuitive.

2. The Problems with “But For” in Article 18

Article 18 is problematic with regard to “but for” and but-for causation for two reasons. First, the “but for” language here is particularly confusing. Such language generally indicates that a factual determination on causation is involved, not legal causation.¹²³ At first glance, it is obvious that the but-for test of Article 18 is not the typical one because the claimant is not required to show that the injury would not have happened but for the coercion, even though the claimant presumably must show coercion by the coercing state. Moreover, Article 18 is not talking about whether the coercion rises to a sufficient level for indirect responsibility to be applied to the coercing state. Once past the surface, it becomes clear that Article 18 deals with legal causation—or what legal consequences should apply to the respondent’s injurious conduct once coercion has been shown—despite this cause-in-fact language. Indeed, whether the coercing state or the coerced state is responsible for the internationally

117. See Foster, *supra* note 105, at 282 (referring to the Australian Legislature’s Migration Legislation Amendment Bill (No. 6) 2001, Bills Digest No. 55 2001-02, at 11).

118. See North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 232 (dissenting opinion of Judge Lachs).

119. See generally Knutsen, *supra* note 6, at 253-54.

120. See *id.* at 253. Please see disclaimer in *supra* note 115.

121. See Foster, *supra* note 105, at 281-82.

122. See Fowler Harper & Fleming James, Jr., *Legal Cause, in FREEDOM AND RESPONSIBILITY* 314 (Herbert Morris ed., 1961).

123. See Foster, *supra* note 105, at 314-15.

wrongful act is a question of law. This point is supported by the Commentary, which indicates that “but for the coercion” reflects the notion that the responsibility of the coerced state will be precluded vis-à-vis the injured third state.¹²⁴ However, this is not the normal meaning and usage for “but for,” which can be confusing.

As a result of this confusion, potential claimants are unlikely to know what they will have to prove and to what level they will have to prove it, which likely will deter them from bringing claims under this provision. Indeed, these issues are entirely unclear under Article 18. If taken as a factual causation test, one is forced to make sense of “but for.” The essential grammatical structure for “but for” is: “but for X, Y would not have occurred.” This translates into the conditional formulation “if X, then Y.” Examples of but-for causation statements are readily found throughout the international law literature.¹²⁵ For example, but for the speedboat attack on the USS Vincennes (X), Flight 655 would not have been destroyed (Y).¹²⁶ This translates into the assertion that the speedboat attack caused the destruction of Flight 655. Here, the language is (after reordering the phrase for the sake of clarity) “but for the coercion,” “the act would . . . be an internationally wrongful act of the coerced State.”¹²⁷ Non-coercion is the X variable, and attribution of the internationally wrongful act to the coerced State is the Y variable. The translation of this subparagraph is: if X, then Y, or that the absence of coercion necessarily causes the coerced state to incur attribution of the internationally wrongful act, or that coercion necessarily caused the coerced state to avoid attribution of the internationally wrongful act. Likewise, the contrapositive, and only the contrapositive, is necessarily true.¹²⁸ The contrapositive of “if X, then Y” is “if not Y, then not X.” This translates into: if the coerced state avoids attribution of an internationally wrongful act, then there was coercion. In other words, coercion places all of the responsibility on the coercing state. How the claimant would be expected to prove that it had absolutely no options other than committing the internationally wrongful act is ambiguous, even perhaps nonsensical,

124. Draft Articles on State Responsibility, *supra* note 1, art. 18 (Commentary).

125. These examples are provided merely to illustrate the usage of “but for” and do not indicate the Author’s support for the assertions made in these examples in any way.

126. See David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 YALE J. INT’L L. 245, 382 (1991); see also John Quigley, *International Law Violations by the United States in the Middle East as a Factor Behind Anti-American Terrorism*, 63 U. PITT. L. REV. 815, 827 (2002) (providing other but-for language in regard to U.S. funding of Israeli settlements and terrorist attacks).

127. See Linnan, *supra* note 126.

128. See Jim Loy, *Converse, Inverse, Contrapositive* (1999), <http://www.jimloy.com/logic/converse.htm> (last visited Apr. 15, 2007).

thus indicating that Article 18 must be talking about legal causation. On the contrary, Article 18 is a declaration of responsibility being limited to the coercing state, which would appear to be legal causation. However, the strict but-for reasoning, within this legal causation context, fails here because it does not lead to a just result.¹²⁹

While attributive causation is still a type of causation, it is legal in nature, not factual, in that it deals with the legal consequences of an act.¹³⁰ However, the causative link in Article 18 is unrealistic. In essence, Article 18 makes an attributive, or rather negative attributive, causal link: coercion by the coercing state leads to no responsibility for the coerced state. The corollary to this is that the coercion places all of the responsibility on the coercing state. Therefore, for Article 18 to be a grounds for a claim, the coercing state's coercion must be absolute (as appears to be required by the text of Article 18). Otherwise, the coercing state would be held responsible for a disproportionate share of the responsibility, which would be unjust. The coercion is a reason for shifting some of the responsibility from the coerced state to the coercing state, but not a reason for shifting all of the responsibility, as the internationally wrongful act was completed, at least in part, because of the coerced state's own voluntary actions. It is possible that the coerced state acted beyond what was demanded by the coercing state or failed to resist small levels of coercion by the coercing state and instead used the coercion as a pretext to do what it always wanted to do to the injured state, both of which would be unforeseeable by the coercing state.¹³¹ Indeed, typically there are many factors that influence a state's decisions—here, the coerced state's decision to breach an international obligation it owed the injured state.¹³² No one can know what actually drove the coercing state, through its leaders, to commit the internationally wrongful act.¹³³ Justice would seem to require the sharing of responsibility between the coerced and the coercing states to some degree, or at least a holding of joint and several responsibility for the two states, and not to assess coercion in a binary manner. While it is difficult, if not impossible, to show that either cause was the necessary one, it is clear that all of the possible causes (the coerced and the coercing states' acts) put together were

129. See Spellman & KinCannon, *supra* note 69, at 254.

130. See Honoré, *supra* note 98; Foster, *supra* note 105, at 297-98, 300.

131. See CHENG, *supra* note 52, at 242 (quoting Angola Arbitration (Portugal v. Germany), Award I, 2 UN REP. INT'L ARB. AWARDS 1011, 1031 (1928), saying it is an "inadmissible extension of responsibility" to include losses unconnected with the initial act, as there are "causes which are independent of the author of the act and which he could in no way have foreseen").

132. See Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 966 (2005).

133. See *id.* at 967.

jointly sufficient to lead to that act.¹³⁴ Therefore, a type of causation other than but-for causation is needed.¹³⁵ To make the injured state prove that the coercing state's coercion was the necessary cause of the injury—to the point that there is no responsibility due the coerced state—is an overly high burden that few, if any, can meet on account of international relations being so much more complex than a garden-variety common-law tort case.¹³⁶

3. But-For Language in Legal Causation: Unsuitable Bedfellows

Regardless of this confusion over legal and factual causation, and “but for” being inappropriate wording for legal causality, “but for” still retains its grammatical strictness. The result is that “but for” becomes a declaration of a strict legal relationship that is not necessarily accurate—that coercion by the coercing state absolves the coerced state of any responsibility. This is so despite what the Commentary would have one believe when it alludes to flexibility with “in most cases” and “no effective choice.”¹³⁷ Such flexible language contradicts the very nature of “but for,” which indicates a clear causal relationship with no exceptions. One must not forget that this is not the exact tortious but-for causation of tort law in the common-law system, which begins with a strict but-for analysis and then introduces policy reasoning to limit or augment liability.¹³⁸ Here, Article 18's attributive causation starts and ends with a strict but-for test.

With regard to legal causation, Article 18 appears to assume that any amount of coercion is sufficient for all of the responsibility to be placed upon the coercing state and to absolve the coerced state of any responsibility. In other words, Article 18 simply assumes that the coercion will be the proximate cause of the injury and the reason why the coerced state is not held responsible. However, proximate causation is a separate and distinct test for causation, where the injured claimant must show that there is an “unbroken connection” between the coercing state's act and the injury suffered that can be “clearly, unmistakably, and definitely traced” to the coercing state's act.¹³⁹ Such an unbroken connection simply cannot be assumed, as it is in Article 18, especially when the coerced state's own act always will fulfill the role of an intervening cause. One might think that

134. See Honoré, *supra* note 98.

135. See generally Michael S. Moore, *The Metaphysics of Causal Intervention*, 88 CAL. L. REV. 827, 827-78 (2000) (discussing the metaphysics of causal intervention).

136. See Glennon, *supra* note 132, at 968.

137. See CRAWFORD, *supra* note 28, at 156-57 (emphasis added).

138. See Foster, *supra* note 105, at 274-75.

139. See CHENG, *supra* note 52, at 243 (quoting Administrative Decision No. II, German-U.S. Mixed Claims Commission, Dec. & Op. 5, 12-13 (1923)).

potential claimants would be encouraged to bring claims under Article 18 on account of its assumption that the proximate cause was the coercion. However, the “but for” language and the ambiguity of Article 18 combine to make such a murky picture of the causation requirement that potential claimants are likely to be scared off entirely. In addition, because the but-for test of causation does not work well where there are multiple causes for an injury,¹⁴⁰ it should not be applied here where the coerced state and the coercing state both may be the cause of the injury. Even if it were applied to such a case with multiple causes, attribution of all the responsibility to the coercing state under Article 18 strays from the standard of holding the coercing and coerced states potentially jointly and severally liable.¹⁴¹ This type of joint and several liability between the coercing and coerced states appears to be what Draft Article 19 has in mind, which goes beyond being a mere consistency clause to expressly keeping the coerced state and all others on the hook for responsibility.¹⁴² In particular, Article 19 reads: “This Chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.”¹⁴³ In that regard, Articles 18 and 19 appear to conflict.

4. Degrees of Coercion

As already mentioned in the preceding Section, Article 18 assumes that coercion is a binary function—either coercion leads to full responsibility for the coercing state or it does not. As some commentators have noted, state responsibility generally is seen as being indivisible. Under this view, it is not possible to allocate varying degrees of responsibility to the respective states.¹⁴⁴ This approach to state responsibility is incorrect for two reasons. First, in reality, there are varying degrees of coercion, which should lead to varying degrees of responsibility in a joint-responsibility type of arrangement. The spectrum of coercion conceivably runs from a gun to a leader’s head to a stern diplomatic request with actual coercion only looming in the distant background. While all of these might fit under the definition of coercion (assuming the coercion is temporary, if such is even possible, as discussed in the following paragraph), the intensity of the coercion is obviously different, and so ought to be the level of responsibility. Under the control theory explained in Part II(A) above, which acted as the basis for this portion of the Draft

140. See Foster, *supra* note 105, at 274, 308-09, 322-23.

141. See text accompanying *supra* note 98.

142. See Draft Articles on State Responsibility, *supra* note 1, art. 19.

143. *Id.*

144. See, e.g., GUIDO DEN DEKKER, THE LAW OF ARMS CONTROL 344 (2001).

Articles, responsibility of the coerced state ought to be in proportion to its freedom of action, and responsibility for the coercing state ought to be in proportion to the freedom it denied the coerced state. Any approach to indirect responsibility that lacks such logic, such as Article 18's approach, nags at one's notions of justice and state equality. Indeed, there can be no such thing as absolute coercion or absolute causation in such complex relations as those between states.¹⁴⁵ As Japanese ILC member Mr. Tsuruoka commented, "No coercion was so strong that it left no freedom of action at all to the State subjected to it."¹⁴⁶ There are many situations in international relations, as well as in interpersonal relationships, where an entity has an influence on another entity's decision without it being shown, or being possible to be shown, that the act (here, an internationally wrongful act) would not have happened but for (read: without) that influence.¹⁴⁷ To say that the coercing state is absolutely responsible for the injury and the coerced state is absolved of all responsibility on account of the coercion ignores reality.

Second, contrary to the definition of coercion as first expressed by Ago and implicitly adopted by Crawford in the Second Reading, which relies on a temporary relationship of control for the duration of the wrongful act, a temporary relationship of control does not appear to exist in interstate relations. Indeed, coercion is throughout the international system, and the self-interest of a state that flows from the coercion of another state is a major reason why states follow international legal rules, or do anything else for that matter.¹⁴⁸ The international system seems to be based, at least partially, on coercion

145. Critics might wonder how this view of coercion would impact an analysis of Article 52 of the Vienna Convention on the Law of Treaties (VCLT), which voids a treaty "if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations," which is similar to the coercion of Draft Article 18, though narrower. Vienna Convention on the Law of Treaties, May 23, 2969, UN Doc. A/CONF.39/27, 1155 U.N.T.S. 331, reprinted in 63 AM. J. INT'L L. 875 (1969). In response, one need only glance at the myriad valid peace treaties between victor and conquered states that were all procured through blatant coercion to bring into serious doubt VCLT Article 52's reflection of customary international law. See LORD MCNAIR, *THE LAW OF TREATIES* 207-09 (Oxford Univ. Press 1961); THOMAS M. FRANCK & MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW* 243 (West Publishing 1987); David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?*, 32 COLUM. J. TRANSNAT'L L. 533, 568 (1995). But see Fisheries Jurisdiction Cases, Jurisdiction, Judgment, 1973 I.C.J. 3, 14 and 1973 I.C.J. 49, 59 (declaring art. 52 to have codified existing general international law, though not mentioning the paradoxical case of peace treaties).

146. See Draft Articles Proposed by the Drafting Committee, Doc. A/CN.4/318, ¶¶ 12, 18, in 1 Yearbook International Law Commission 169, 172 (1979).

147. See Honoré, *supra* note 98.

148. See Glennon, *supra* note 132, at 965-66 (2005) (though rejecting this view because it does not "recognize the reality of multicausality").

between states, though the form of coercion often differs.¹⁴⁹ As a would-be coercer's credibility increases with every threat it carries out, the need to keep carrying them out diminishes with each game, as merely the hint of punishment triggers the desired result.¹⁵⁰ In other words, once a dominant position is perceived or established, express threats need not be made in exercising control over a state, since states are involved in a repeat-game scenario.¹⁵¹ Indeed, interstate relations tend to go on endlessly.¹⁵² Admittedly, coercion loses its uniqueness from occupation and the other situations that give rise to indirect responsibility in Chapter IV if the element of temporary relationship is removed.¹⁵³ However, this element makes little sense in interstate relations.

Finally, it is interesting to note one practical problem to coercion being a basis for indirect responsibility. Coercion is often seen as legitimate when the coerced state remains a net beneficiary, thus making the outcome relatively easy to achieve for the coercing state.¹⁵⁴ This raises the possibility that the coerced states will refuse to cooperate with the injured state in making a case against the coercing state, when such cooperation is usually necessary to prove coercion.¹⁵⁵ Even if the coerced state is not the net beneficiary of the coercion, it still may remain in the coerced state's interest not to cooperate with the injured state's claim of coercion, for if coercion worked once on the coerced state, it is likely to work again. Though pure speculation, this might have been what happened in *Shuster and Romano-Americana*, with Persia and Romania being compelled by Russia and Great Britain, respectively, to claim responsibility for the breach and pay compensation so that Russia and Great Britain would not have to do so through a theory of indirect responsibility. Indeed, the coercing state has every incentive to apply coercion again on the coerced state to deny the earlier coercion, as the prospects of being held indirectly responsible increase.

149. See *id.* at 940-41, 984-85 (describing how coercion is throughout the consent-based system).

150. See BRUCE RUSSETT ET AL., *WORLD POLITICS* 93 (2000) (citing JONATHAN MERCER, *REPUTATION AND INTERNATIONAL POLITICS* (1996)).

151. See, e.g., Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication*, 33 *GEO. WASH. INT'L L. REV.* 873, 905 (2001).

152. See WALTER C. CLEMENS, JR., *DYNAMICS OF INTERNATIONAL RELATIONS: CONFLICT AND MUTUAL GAIN IN AN ERA OF GLOBAL INTERDEPENDENCE* 225 (Rowman & Littlefield 2003).

153. See Eighth Report, *supra* note 11, ¶ 275.

154. See Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39 *INT'L ORG.* 579, 593 (1985).

155. See *id.*

V. CONCLUSION

Roberto Ago ought to be commended for his thoroughness, while he was preparing for the First Reading of the Draft Articles on State Responsibility, in identifying and addressing so many ways in which a state might be held indirectly responsible. However, his largely academic exercise led to the creation of a basis of indirect responsibility that was not particularly supported by state practice—namely, coercion of another state. Perhaps out of respect for Ago's work, this principle developed into an autonomous principle with its very own article number in the Second Reading of the Draft Articles. Despite this perceived progress, Article 18 no more reflects customary international law than it did before under its old number Article 28(2). On the contrary, three fundamental flaws in Article 18 ensure that no state will be able or willing to bring a claim under it, as Article 18 raises the bar exceedingly high with its language "but for the coercion," among other things. The normative purpose of Article 18 could have been to support the international community's general disdain for coercion by creating a deterrent for such action. However, the definition of coercion is so artificial that no real deterrence seems probable. Although Article 17 has the potential to deter coercing states by creating an applicable basis of indirect responsibility for acts of coercion without the three structural weaknesses listed for Article 18, the principle of *lex specialis derogat legi generali* removes general Article 17 from possible application when Article 18 is applicable. As Article 18 seems to contain a high standard for causation through its "but for" language, potential coercers might be encouraged to coerce other states after finding these weaknesses in the only state responsibility provision that would directly apply to that situation. The Draft Articles would be better off without Article 18, as its absence would stop the perpetuation of a relatively useless legal fiction, thereby increasing the perceived validity of the remaining provisions.
