Chapter I

GENERAL PRINCIPLES

Commentary

(1) Chapter I of Part Two comprises six articles, which define in general terms the legal consequences of an internationally wrongful act of a State. Individual breaches of international law can vary across a wide spectrum from the comparatively trivial or minor up to cases which imperil the survival of communities and peoples, the territorial integrity and political independence of States and the environment of whole regions. This may be true whether the obligations in question are owed to one other State or to some or all States or to the international community as a whole. But over and above the gravity or effects of individual cases, the rules and institutions of State responsibility are significant for the maintenance of respect for international law and for the achievement of the goals which States advance through law-making at the international level.

(2) Within chapter I, article 28 is an introductory article, affirming the principle that legal consequences are entailed whenever there is an internationally wrongful act of a State. Article 29 indicates that these consequences are without prejudice to, and do not supplant, the continued obligation of the responsible State to perform the obligation breached. This point is carried further by article 30, which deals with the obligation of cessation and assurances or guarantees of non-repetition. Article 31 sets out the general obligation of reparation for injury suffered in consequence of a breach of international law by a State. Article 32 makes clear that the responsible State may not rely on its internal law to avoid the obligations of cessation and reparation arising under Part Two. Finally, article 33 specifies the scope of the Part, both in terms of the States to which obligations are owed and also in terms of certain legal consequences which, because they accrue directly to persons or entities other than States, are not covered by Parts Two or Three of the articles.

Article 28. Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Commentary

(1) Article 28 serves an introductory function for Part Two and is expository in character. It links the provisions of Part One which define when the international responsibility of a State arises with the provisions of Part Two which set out the legal consequences which responsibility for an internationally wrongful act involves.

(2) The core legal consequences of an internationally wrongful act set out in Part Two are the obligations of the responsible State to cease the wrongful conduct (art. 30) and to make full reparation for the injury caused by the internationally wrongful act (art. 31). Where the internationally wrongful act constitutes a serious breach by the State of an obligation arising under a peremptory norm of general international law, the breach may entail further consequences both for the responsible State and for other States. In particular, all States in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach and not to render aid or assistance to the responsible State in maintaining the situation so created (arts. 40–41).

(3) Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations *of* the State and not only those owed *to* other States. Thus, State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.

Article 29. Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Commentary

(1) Where a State commits a breach of an international obligation, questions as to the restoration and future of the legal relationship thereby affected are central. Apart from the question of reparation, two immediate issues arise, namely, the effect of the responsible State's conduct on the obligation which has been breached, and cessation of the breach if it is continuing. The former question is dealt with by article 29, the latter by article 30.

(2) Article 29 states the general principle that the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached. The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act (see article 14) and the obligation of cessation (see subparagraph (*a*) of article 30).

(3) It is true that in some situations the ultimate effect of a breach of an obligation may be to put an end to the obligation itself. For example, a State injured by a material breach of a bilateral treaty may elect to terminate the treaty.[607] 424 But as the relevant provisions of the 1969 Vienna Convention make clear, the mere fact of a breach and even of a repudiation of a treaty does not terminate the treaty.[608] 425 It is a matter for the injured State to react to the breach to the extent permitted by the Convention. The injured State may have no interest in terminating the treaty as distinct from calling for its continued performance. Where a treaty is duly terminated for breach, the termination does not affect legal relationships which have accrued under the treaty prior to its termination, including the obligation to make reparation for any breach.[609] 426 A breach of an obligation under general international law is even less likely to affect the underlying obligation, and indeed will never do so *as such*. By contrast, the secondary legal relation of State responsibility arises on the occurrence of a breach and without any requirement of invocation by the injured State.

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[607] 424 See footnote [605] 422 above.

[608] 425 Indeed, in the *Gabčíkovo-Nagymaros Project* case, ICJ held that continuing material breaches by both parties did not have the effect of terminating the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System (see footnote [13] above), p. 68, para. 114.

[609] 426 See, e.g., *"Rainbow Warrior"* (footnote [22] 46 above), p. 266, citing Lord McNair (dissenting) in *Ambatielos, Preliminary Objection, I.C.J. Reports 1952*, p. 28, at p. 63. On that particular point the Court itself agreed, *ibid*., p. 45. In the *Gabčíkovo-Nagymaros Project* case, Hungary accepted that the legal consequences of its termination of the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System on account of the breach by Czechoslovakia were prospective only, and did not affect the accrued rights of either party (see footnote [13] above), pp. 73–74, paras. 125–127. The Court held that the Treaty was still in force, and therefore did not address the question.

(4) Article 29 does not need to deal with such contingencies. All it provides is that the legal consequences of an internationally wrongful act within the field of State responsibility do not affect any continuing duty to comply with the obligation which has been breached. Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation.

Article 30. Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(*a*) to cease that act, if it is continuing;

(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Commentary

(1) Article 30 deals with two separate but linked issues raised by the breach of an international obligation: the cessation of the wrongful conduct and the offer of assurances and guarantees of non-repetition by the responsible State if circumstances so require. Both are aspects of the restoration and repair of the legal relationship affected by the breach. Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performance. The continuation in force of the underlying obligation is a necessary assumption of both, since if the obligation has ceased following its breach, the question of cessation does not arise and no assurances and guarantees can be relevant.[610] [427]

(2) Subparagraph (*a*) of article 30 deals with the obligation of the State responsible for the internationally wrongful act to cease the wrongful conduct. In accordance with article 2, the word "act" covers both acts and omissions. Cessation is thus relevant to all wrongful acts extending in time "regardless of whether the conduct of a State is an action or an omission . . . since there may be cessation consisting in abstaining from certain actions".[611] [428]

(3) The tribunal in the *"Rainbow Warrior"* arbitration stressed "two essential conditions intimately linked" for the requirement of cessation of wrongful conduct to arise, "namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".[612] [429] While the obligation to cease wrongful conduct will arise most commonly in the case of a continuing wrongful act,[613] [430] article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions. The phrase "if it is continuing" at the end of subparagraph (*a*) of the article is intended to cover both situations.

(4) Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act. Cessation is often the main focus of the controversy produced by conduct in breach of an international obligation.[614] [431] It is

[610] [427] 1969 Vienna Convention, art. 70, para. 1.

[611] [428] *"Rainbow Warrior"* (see footnote [22] 46 above), p. 270, para. 113.

[612] [429] *Ibid*., para. 114.

[613] [430] For the concept of a continuing wrongful act, see paragraphs (3) to (11) of the commentary to article 14.

[614] [431] The focus of the WTO dispute settlement mechanism is on cessation rather than reparation: Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), especially article 3, paragraph 7, which provides for compensation "only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement".

frequently demanded not only by States but also by the organs of international organizations such as the General Assembly and Security Council in the face of serious breaches of international law. By contrast, reparation, important though it is in many cases, may not be the central issue in a dispute between States as to questions of responsibility.[615] [432]

(5) The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.

(6) There are several reasons for treating cessation as more than simply a function of the duty to comply with the primary obligation. First, the question of cessation only arises in the event of a breach. What must then occur depends not only on the interpretation of the primary obligation but also on the secondary rules relating to remedies, and it is appropriate that they are dealt with, at least in general terms, in articles concerning the consequences of an internationally wrongful act. Secondly, continuing wrongful acts are a common feature of cases involving State responsibility and are specifically dealt with in article 14. There is a need to spell out the consequences of such acts in Part Two.

(7) The question of cessation often arises in close connection with that of reparation, and particularly restitution. The result of cessation may be indistinguishable from restitution, for example in cases involving the freeing of hostages or the return of objects or premises seized. Nonetheless, the two must be distinguished. Unlike restitution, cessation is not subject to limitations relating to proportionality.[616] [433] It may give rise to a continuing obligation, even when literal return to the *status quo ante* is excluded or can only be achieved in an approximate way.

(8) The difficulty of distinguishing between cessation and restitution is illustrated by the *"Rainbow Warrior"* arbitration. New Zealand sought the return of the two agents to detention on the island of Hao. According to New Zealand, France was obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was no question of cessation.[617] [434] Evidently, the return of the two agents to the island was of no use to New Zealand if there was no continuing obligation on the part of France to keep them there. Thus, a return to the *status quo ante* may be of little or no value if the obligation breached no longer exists. Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not competent to release it from such perform-

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On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, Australia-Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126/RW), 21 January 2000, para. 6.49.

[615] [432] For cases where ICJ has recognized that this may be so, see, e.g., *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at pp. 201–205, paras. 65–76; and *Gabčíkovo-Nagymaros Project* (footnote [13] above), p. 81, para. 153. See also C. D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 77–92.

[616] [433] See article 35 (*b*) and commentary.

[617] [434] UNRIAA, vol. XX, p. 217, at p. 266, para. 105 (1990).

ance. The distinction between cessation and restitution may have important consequences in terms of the obligations of the States concerned.

(9) Subparagraph (*b*) of article 30 deals with the obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Assurances and guarantees are concerned with the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases. They are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily. For example, following repeated demonstrations against the United States Embassy in Moscow from 1964 to 1965, President Johnson stated that:

> The U. S. Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between states. Expressions of regret and compensation are no substitute for adequate protection.[618] [435]

Such demands are not always expressed in terms of assurances or guarantees, but they share the characteristics of being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation and they are included in article 30.

(10) The question whether the obligation to offer assurances or guarantees of non-repetition may be a legal consequence of an internationally wrongful act was debated in the *LaGrand* case. This concerned an admitted failure of consular notification contrary to article 36 of the Vienna Convention on Consular Relations. In its fourth submission Germany sought both general and specific assurances and guarantees as to the means of future compliance with the Convention. The United States argued that to give such assurances or guarantees went beyond the scope of the obligations in the Convention and that ICJ lacked jurisdiction to require them. In any event, formal assurances and guarantees were unprecedented and should not be required. Germany's entitlement to a remedy did not extend beyond an apology, which the United States had given. Alternatively, no assurances or guarantees were appropriate in the light of the extensive action it had taken to ensure that federal and State officials would in future comply with the Convention. On the question of jurisdiction, the Court held

> that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation . . . Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.[619] [436]

On the question of appropriateness, the Court noted that an apology would not be sufficient in any case in which a foreign national had been "subjected to prolonged detention or sentenced to severe penalties" following a failure of consular notification.[620] [437] But in

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[618] [435] Reprinted in ILM, vol. 4, No. 2 (July 1965), p. 698.

[619] [436] *LaGrand, Judgment* (see footnote [117] 119 above), p. 485, para. 48, citing *Factory at Chorzów, Jurisdiction* (footnote [10] 34 above).

[620] [437] *LaGrand, Judgment* (see footnote [117] 119 above), p. 512, para. 123.

the light of information provided by the United States as to the steps taken to comply in future, the Court held:

> that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (*b*), must be regarded as meeting Germany's request for a general assurance of non-repetition.[621] [438]

As to the specific assurances sought by Germany, the Court limited itself to stating that:

> if the United States, notwithstanding its commitment referred to . . . should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.[622] [439]

The Court thus upheld its jurisdiction on Germany's fourth submission and responded to it in the operative part. It did not, however, discuss the legal basis for assurances of non-repetition.

(11) Assurances or guarantees of non-repetition may be sought by way of satisfaction (e.g. the repeal of the legislation which allowed the breach to occur) and there is thus some overlap between the two in practice.[623] [440] However, they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past. In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48.

(12) Assurances are normally given verbally, while guarantees of non-repetition involve something more—for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested, international practice is not uniform. The injured State usually demands either safeguards against the repetition of the wrongful act without any specification of the form they are to take[624] [441] or, when the wrongful act affects its nationals, assurances of better protection of persons and property.[625] [442] In the *LaGrand* case, ICJ spelled out with some specificity the obligation that would arise for the United States from a future breach, but added that "[t]his obligation can be carried out in various ways. The choice of

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[621] [438] *Ibid*., p. 513, para. 124; see also the operative part, p. 516, para. 128 (6).

[622] [439] *Ibid*., pp. 513–514, para. 125. See also paragraph 127 and the operative part (para. 128 (7)).

[623] [440] See paragraph (5) of the commentary to article 36.

[624] [441] In the "Dogger Bank" incident in 1904, the United Kingdom sought "security against the recurrence of such intolerable incidents", G. F. de Martens, *Nouveau recueil général de traités*, 2nd series, vol. XXXIII, p. 642. See also the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General in Jakarta, in which the Chinese Deputy Minister for Foreign Affairs sought a guarantee that such incidents would not be repeated in the future, RGDIP, vol. 70 (1966), pp. 1013 et seq.

[625] [442] Such assurances were given in the *Doane* incident (1886), Moore, *Digest*, vol. VI, pp. 345–346.

means must be left to the United States".[626] 443 It noted further that a State may not be in a position to offer a firm guarantee of non—repetition.[627] 444 Whether it could properly do so would depend on the nature of the obligation in question.

(13) In some cases, the injured State may ask the responsible State to adopt specific measures or to act in a specified way in order to avoid repetition. Sometimes the injured State merely seeks assurances from the responsible State that, in future, it will respect the rights of the injured State.[628] 445 In other cases, the injured State requires specific instructions to be given,[629] 446 or other specific conduct to be taken.[630] 447 But assurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words "if the circumstances so require" at the end of subparagraph (*b*). The obligation of the responsible State with respect to assurances and guarantees of non-repetition is formulated in flexible terms in order to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by States in the past.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal

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

In its 1990 award in the *Rainbow Warrior* case, the arbitral tribunal, having noted that France had alleged that New Zealand was demanding, rather than *restitutio in integrum*, the cessation of the denounced behaviour, made reference to the concept of cessation, and its distinction with restitution, with reference to the reports submitted to the International

[626] 443 *LaGrand, Judgment* (see footnote [117] 119 above), p. 513, para. 125.

[627] 444 *Ibid*., para. 124.

[628] 445 See, e.g., the 1901 case in which the Ottoman Empire gave a formal assurance that the British, Austrian and French postal services would henceforth operate freely in its territory, RGDIP, vol. 8 (1901), p. 777, at pp. 788 and 792.

[629] 446 See, e.g., the incidents involving the *"Herzog"* and the *"Bundesrath"*, two German ships seized by the British Navy in December 1899 and January 1900, during the Boer war, in which Germany drew the attention of Great Britain to "the necessity for issuing instructions to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war", Martens, *op. cit.* (footnote [624] 441 above), vol. XXIX, p. 456 at p. 486.

[630] 447 In the *Trail Smelter* case (see footnote [357] 253 above), the arbitral tribunal specified measures to be adopted by the Trail Smelter, including measures designed to "prevent future significant fumigations in the United States" (p. 1934). Requests to modify or repeal legislation are frequently made by international bodies. See, e.g., the decisions of the Human Rights Committee: *Torres Ramirez* v. *Uruguay*, decision of 23 July 1980, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40* (A/35/40), p. 126, para. 19; *Lanza* v. *Uruguay*, decision of 3 April 1980, *ibid*., p. 119, para. 17; and *Dermit Barbato* v. *Uruguay*, decision of 21 October 1982, *ibid*., *Thirty-eighth Session, Supplement No. 40* (A/38/40), p. 133, para. 11.

Law Commission by Special Rapporteurs Riphagen and Arangio-Ruiz.[631] [178] The arbitral tribunal observed in particular that, by inserting a separate article concerning cessation, the International Law Commission had endorsed the view of Special Rapporteur Arangio-Ruiz that "cessation has inherent properties of its own which distinguish it from reparation":

Recent studies on State responsibility undertaken by the Special Rapporteurs of the International Law Commission have led to an analysis in depth of the distinction between an order for the cessation of the unlawful act and *restitutio in integrum*. Professor Riphagen observed that in numerous cases 'stopping the breach was involved, rather than reparation or *restitutio in integrum stricto sensu*' (*Yearbook . . . 1981*, vol. II, Part One, document A/CN.4/342 and Add.1–4, para. 76).

The present Special Rapporteur, Professor Arangio-Ruiz, has proposed a distinction between the two remedies (International Law Commission report to the General Assembly for 1988, para. 538).

. . .

The International Law Commission has accepted the insertion of an article separate from the provisions on reparation and dealing with the subject of cessation, thus endorsing the view of the Special Rapporteur Arangio-Ruiz that cessation has inherent properties of its own which distinguish it from reparation (International Law Commission report to the General Assembly for 1989, para. 259).

Special Rapporteur Arangio-Ruiz has also pointed out that the provision on cessation comprises all unlawful acts extending in time, regardless of whether the conduct of a State is an action or an omission (International Law Commission report to the General Assembly for 1988, para. 537).

This is right, since there may be cessation consisting in abstaining from certain actions—such as supporting the 'contras'—or consisting in positive conduct, such as releasing the United States hostages in Teheran.

. . .

Undoubtedly the order requested by the New Zealand Government for the return of the two agents would really be an order for the cessation of the wrongful omission rather than a *restitutio in integrum*. This characterization of the New Zealand request is relevant to the Tribunal's decision, since in those cases where material restitution of an object is possible, the expiry of a treaty obligation may not be, by itself, an obstacle for ordering restitution.[632] [179]

[A/62/62, para. 101]

International arbitral tribunal

Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi

In its 1991 award, the arbitral tribunal established to hear the *LAFICO-Burundi* case, in order to determine the consequences for the parties of Burundi's responsibility in the case,

[631] [178] At the time of the said award, the draft articles on the legal consequences of the commission of an internationally wrongful act were still under consideration, on the basis of the reports by Special Rapporteurs Riphagen and Arangio-Ruiz. The provisions finally adopted by the International Law Commission in 2001 on cessation and restitution are, respectively, articles 30 and 35.

[632] [179] *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*, arbitral award, 30 April 1990, para. 113, reproduced in UNRIAA, vol. XX, p. 270.

quoted draft article 6 of Part Two of the draft articles ("Content, forms and degrees of international responsibility"),[633] [180] as provisionally adopted by the International Law Commission. It considered that the nature as a rule of customary international law of this provision concerning the obligation to put an end to a wrongful act "is not in doubt".[634] [181]

[A/62/62, para. 102]

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[633] [180] This provision was amended and incorporated in article 30(a) finally adopted by the International Law Commission in 2001. Draft article 6 of Part Two read as follows:

Article 6

Cessation of wrongful conduct

> A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

[634] [181] *Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi*, arbitral award to 4 March 1991, para. 61 (English version in: *International Law Reports*, vol. 96, pp. 320-321).

Article 31. Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Commentary

(1) The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.[635] 448

In this passage, which has been cited and applied on many occasions,[636] 449 the Court was using the term "reparation" in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.

(2) In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[637] 450

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.[638] 451 In the second sentence, it dealt with that aspect of reparation encompassed by "compensation" for

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[635] 448 *Factory at Chorzów, Jurisdiction* (see footnote [10] 34 above).

[636] 449 Cf. the ICJ reference to this decision in *LaGrand, Judgment* (footnote [117] 119 above), p. 485, para. 48.

[637] 450 *Factory at Chorzów, Merits* (see footnote [10] 34 above), p. 47.

[638] 451 Cf. P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des États", *Collected Courses . . . 1984–V* (Dordrecht, Martinus Nijhoff, 1986), vol. 188, p. 9, at p. 94, who uses the term *restauration*.

an unlawful act—that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

(3) The obligation placed on the responsible State by article 31 is to make "full reparation" in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed"[639] [452] through the provision of one or more of the forms of reparation set out in chapter II of this part.

(4) The general obligation of reparation is formulated in article 31 as the immediate corollary of a State's responsibility, i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility,[640] [453] the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

(5) The responsible State's obligation to make full reparation relates to the "injury caused by the internationally wrongful act". The notion of "injury", defined in paragraph 2, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, "injury" includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individually unaffected by the breach.[641] [454] "Material" damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. "Moral" damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.[642] [455]

(6) The question whether damage to a protected interest is a necessary element of an internationally wrongful act has already been discussed.[643] [456] There is in general no such requirement; rather this is a matter which is determined by the relevant primary rule. In

[639] [452] *Factory at Chorzów, Merits* (see footnote [10] 34 above), p. 47.

[640] [453] For the States entitled to invoke responsibility, see articles 42 and 48 and commentaries. For the situation where there is a plurality of injured States, see article 46 and commentary.

[641] [454] Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. Generally on notions of injury and damage, see B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973); B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", *Collected Courses . . . 1984–II* (The Hague, Nijhoff, 1985), vol. 185, p. 95; A. Tanzi, "Is damage a distinct condition for the existence of an internationally wrongful act?", Simma and Spinedi, eds., *op. cit.* (footnote [264] 175 above), p. 1; and Brownlie, *System of the Law of Nations . . .* (footnote [88] 92 above), pp. 53–88.

[642] [455] See especially article 36 and commentary.

[643] [456] See paragraph (9) of the commentary to article 2.

some cases, the gist of a wrong is the causing of actual harm to another State. In some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs. In some cases there is an outright commitment to perform a specified act, e.g. to incorporate uniform rules into internal law. In each case the primary obligation will determine what is required. Hence, article 12 defines a breach of an international obligation as a failure to conform with an obligation.

(7) As a corollary there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation. In the *"Rainbow Warrior"* arbitration it was initially argued that "in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation", but the parties subsequently agreed that:

> Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.[644] [457]

The tribunal held that the breach by France had "provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage . . . of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well".[645] [458]

(8) Where two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed. For the secondary rules of State responsibility to intervene at this stage and to prescribe that there is no responsibility because no identifiable harm or damage has occurred would be unwarranted. If the parties had wished to commit themselves to that formulation of the obligation they could have done so. In many cases, the damage that may follow from a breach (e.g. harm to a fishery from fishing in the closed season, harm to the environment by emissions exceeding the prescribed limit, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless, States may enter into immediate and unconditional commitments in their mutual long-term interest in such fields. Accordingly, article 31 defines "injury" in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case.

(9) Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only "[i]njury . . . caused by the internationally wrongful act of a State" for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.

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[644] [457] *"Rainbow Warrior"* (see footnote [22] 46 above), pp. 266–267, paras. 107 and 109.

[645] [458] *Ibid.*, p. 267, para. 110.

(10) The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses "attributable to [the wrongful] act as a proximate cause",[646] 459 or to damage which is "too indirect, remote, and uncertain to be appraised",[647]460 or to "any direct loss, damage—including environmental damage and the depletion of natural resources—or injury to foreign Governments, nationals and corporations as a result of" the wrongful act.[648] 461 Thus, causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used,[649] 462 in others "foreseeability"[650] 463 or "proximity".[651] 464 But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.[652] 465 In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage "is not a part

[646] 459 See United States-German Mixed Claims Commission, *Administrative Decision No. II*, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 23, at p. 30 (1923). See also *Dix* (footnote [267] 178 above), p. 121, and the Canadian statement of claim following the disintegration of the *Cosmos 954* Soviet nuclear-powered satellite over its territory in 1978, ILM, vol. 18 (1979), p. 907, para. 23.

[647] 460 See the *Trail Smelter* arbitration (footnote [357] 253 above), p. 1931. See also A. Hauriou, "Les dommages indirects dans les arbitrages internationaux", RGDIP, vol. 31 (1924), p. 209, citing the *"Alabama"* arbitration as the most striking application of the rule excluding "indirect" damage (footnote [75] 87 above).

[648] 461 Security Council resolution 687 (1991) of 3 April 1991, para. 16. This was a resolution adopted with reference to Chapter VII of the Charter of the United Nations, but it is expressed to reflect Iraq's liability "under international law . . . as a result of its unlawful invasion and occupation of Kuwait". UNCC and its Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under paragraph 16. See, e.g., Recommendations made by the panel of Commissioners concerning individual claims for serious personal injury or death (category "B" claims), report of 14 April 1994 (S/AC.26/1994/1), approved by the Governing Council in its decision 20 of 26 May 1994 (S/AC.26/Dec.20 (1994)); Report and recommendations made by the panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC claim"), of 15 November 1996 (S/AC.26/1996/5/Annex), paras. 66–86, approved by the Governing Council in its decision 40 of 17 December 1996 (S/AC.26/Dec.40 (1996)).

[649] 462 As in Security Council resolution 687 (1991), para. 16.

[650] 463 See, e.g., the *"Naulilaa"* case (footnote [464] 337 above), p. 1031.

[651] 464 For comparative reviews of issues of causation and remoteness, see, e.g., H. L. A. Hart and A. M. Honoré, *Causation in the Law*, 2nd ed. (Oxford, Clarendon Press, 1985); A. M. Honoré, "Causation and remoteness of damage", *International Encyclopedia of Comparative Law*, A. Tunc, ed. (Tübingen, Mohr/The Hague, Martinus Nijhoff, 1983), vol. XI, part I, chap. 7; Zweigert and Kötz, *op. cit.* (footnote [355] 251 above), pp. 601–627, in particular pp. 609 et seq.; and B. S. Markesinis, *The German Law of Obligations: Volume II—The Law of Torts: A Comparative Introduction*, 3rd ed. (Oxford, Clarendon Press, 1997), pp. 95–108, with many references to the literature.

[652] 465 See, e.g., the decision of the Iran-United States Claims Tribunal in *The Islamic Republic of Iran* v. *The United States of America*, cases A15 (IV) and A24, Award No. 590–A15 (IV)/A24–FT, 28 December 1998, *World Trade and Arbitration Materials*, vol. 11, No. 2 (1999), p. 45.

of the law which can be satisfactorily solved by search for a single verbal formula”.[653][466] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a “duty to mitigate”, this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.[654] [467] The point was clearly made in this sense by ICJ in the *Gabčíkovo-Nagymaros Project* case:

> Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that “It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained”.
>
> It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.[655] [468]

(12) Often two separate factors combine to cause damage. In the *United States Diplomatic and Consular Staff in Tehran* case,[656] [469] the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students’ own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,[657] [470] the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent

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[653] [466] P. S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford, Clarendon Press, 1995), p. 466.

[654] [467] In the WBC claim, a UNCC panel noted that “under the general principles of international law relating to mitigation of damages . . . the Claimant was not only permitted but indeed obligated to take reasonable steps to . . . mitigate the loss, damage or injury being caused” report of 15 November 1996 (S/AC.26/1996/5/Annex) (see footnote [648] 461 above), para. 54.

[655] [468] *Gabčíkovo-Nagymaros Project* (see footnote [13] above), p. 55, para. 80.

[656] [469] *United States Diplomatic and Consular Staff in Tehran* (see footnote [39] 59 above), pp. 29–32.

[657] [470] *Corfu Channel, Merits* (see footnote [11] 35 above), pp. 17–18 and 22–23.

causes,[658] 471 except in cases of contributory fault.[659] 472 In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines even though Albania had not itself laid the mines.[660] 473 Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *United States Diplomatic and Consular Staff in Tehran* case, the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.[661] 474

(13) It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct. Indeed, in the *Zafiro* claim the tribunal went further and in effect placed the onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

> We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.
>
> In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.[662] 475

(14) Concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach. However, the notion of "proportionality" applies differently to the different

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[658] 471 This approach is consistent with the way in which these issues are generally dealt with in national law. "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause . . . In other words, the liability of a tortfeasor is not affected *vis-à-vis* the victim by the consideration that another is concurrently liable": T. Weir, "Complex liabilities", A. Tunc, ed., *op. cit.* (footnote [651] 464 above), part 2, chap. 12, p. 43. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident of 27 July 1955* case when it said, referring to Article 38, paragraph 1 (*c*) and (*d*), of the ICJ Statute, that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage" (Memorial of 2 December 1958 (see footnote [502] 363 above), p. 229).

[659] 472 See article 39 and commentary.

[660] 473 See *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 244, at p. 250.

[661] 474 *United States Diplomatic and Consular Staff in Tehran* (see footnote [39] 59 above), pp. 31–33.

[662] 475 The *Zafiro* case (see footnote [229] 154 above), pp. 164–165.

forms of reparation.[663] [476] It is addressed, as appropriate, in the individual articles in chapter II dealing with the forms of reparation.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Panel of Commissioners of the United Nations Compensation Commission

S/AC.26/2003/15

In its 2003 report and recommendations concerning part three of the third instalment of "F3" claims,[664] [182] the Panel of Commissioners of the United Nations Compensation Commission found that the loss resulting from the use or diversion of Kuwait's resources to fund the costs of putting right the loss and damage arising directly from Iraq's invasion and occupation of Kuwait (which it termed "direct financing losses") fell "squarely within the types of loss contemplated by articles 31 and 35 of the International Law Commission articles, and the principles established in the [*Factory at*] *Chorzów* case, and so are compensable".[665] [183]

[A/62/62, para. 103]

S/AC.26/2005/10

In the 2005 report and recommendations concerning the fifth instalment of "F4" claims,[666] [184] the Panel of Commissioners of the United Nations Compensation Commission noted that the claimants had asked for compensation for loss of use of natural resources damaged as a result of Iraq's invasion and occupation of Kuwait during the period between the occurrence of the damage and the full restoration of the resources. While Iraq had argued that there was no legal justification for compensating claimants for "interim loss" of natural resources that had no commercial value, the claimants invoked, inter alia, the principle whereby reparation must "wipe out all consequences of the illegal act", first articulated by the Permanent Court of International Justice in the *Factory at Chorzów* case and then "accepted by the International Law Commission".[667] [185] The Panel concluded that a loss due to depletion of or damage to natural resources, including resources that may have a commercial value, was compensable if such loss was a direct result of Iraq's invasion and occupation of Kuwait. Although this finding was based on an interpretation of Security Council resolution 687 (1991) and United Nations Compensation Commission Governing Council decision 7, the panel noted that it was not "inconsistent with any principle or rule of general international law".[668] [186]

[A/62/62, para. 104]

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[663] [476] See articles 35 (*b*), 37, paragraph 3, and 39 and commentaries.

[664] [182] "F3" claims before the United Nations Compensation Commission are claims filed by the Government of Kuwait, excluding environmental claims.

[665] [183] S/AC.26/2003/15, para. 220 (footnote omitted).

[666] [184] "F4" claims before the United Nations Compensation Commission are claims for damage to the environment.

[667] [185] S/AC.26/2005/10, para. 49.

[668] [186] *Ibid.*, paras. 57 and 58.

International arbitral tribunal (under the ICSID Convention)

ADC Affiliate Limited and ADC & ADMC Management Limited v. *Republic of Hungary*

In its 2006 award, the arbitral tribunal constituted to hear the *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Hungary* case, in determining the "customary international law standard" for damages assessment applicable in the case, referred, together with case law and legal literature, to article 31, paragraph 1, finally adopted by the International Law Commission in 2001. The tribunal noted that the said provision, which it quoted, "expressly rel[ies] on and closely follow[s] *Chorzów Factory*". In addition, the tribunal recalled that the Commission's commentary on this article states that "The general principle of the consequences of the commission of an internationally wrongful act was stated by the Permanent Court in the Factory of Chorzów case".[669] [187]

[A/62/62, para. 105]

International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. *Serbia and Montenegro)*

In its 2007 judgment in the *Genocide* case, the Court, having found that the Respondent had failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide, referred to article 31 finally adopted by the International Law Commission in 2001 in the context of its examination of the question of reparation:

> The principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the *Factory at Chorzów* case: that 'reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed' (*P.C.I.J. Series A, No. 17*, p. 47: see also Article 31 of the ILC's Articles on State Responsibility).[670] [10]

[A/62/62/Add.1, para. 6]

International arbitral tribunal (under the ICSID Convention)

LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. *Argentine Republic*

The arbitral tribunal constituted to hear the *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *Argentina* case, having previously found Argentina to be in breach of its obligations under the 1991 bilateral investment treaty between the United States and Argentina,[671] [38] proceeded to consider the applicable standard for reparation in its 2007 award. The tribunal stated that it agreed with the claimants that "the appropri-

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[669] [187] ICSID, *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Republic of Hungary*, Case No. ARB/03/16, award, 2 October 2006, paras. 494 and 495.

[670] [10] [International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43], para. 460.

[671] [38] See ICSID, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *Argentine Republic*, Case No. ARB/02/1, decision on liability, 3 October 2006 (discussed in document (A/62/62), para. 96).

ate standard for reparation under international law is 'full' reparation as set out by the Permanent Court of International Justice in the *Factory at Chorzów* case and codified in Article 31 of the International Law Commission Draft articles on Responsibility of States for Internationally Wrongful Acts".[672] [39]

[A/65/76, para. 28]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. *the United Mexican States*

In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc.* v. *Mexico* considered article 31 to reflect a rule applicable under customary international law.[673] [40]

[A/65/76, para. 29]

International arbitral tribunal (under the ICSID Convention)

Biwater Gauff (Tanzania) Ltd. v. *United Republic of Tanzania*

In its 2008 award, the tribunal in the *Biwater Gauff (Tanzania) Ltd.* v. *Tanzania* case cited the definition of the term "injury" in article 31, paragraph 2 (" . . . any damage, whether material or moral, caused by the internationally wrongful act of a State") in support of its assertion that "[c]ompensation for any violation of the [investment treaty between the United Kingdom and the United Republic of Tanzania], whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach . . . and the loss sustained".[674] [41] The tribunal then proceeded to quote *in extenso* extracts from the commentary to article 31 describing the necessary link between the wrongful act and the injury in order for the obligation of reparation (here in the form of compensation) to arise,[675] [42] and held that "in order to succeed in its claims for compensation, [the claimant] has to prove that the value of its investment was diminished or eliminated, and the actions [it] complains of were the *actual and proximate cause* of such dimunition in, or elimination of, value".[676] [43] The tribunal also found occasion to refer to the definition of "injury" in paragraph 2 in support of its view that "[i]t is . . . insufficient to assert that simply because there has been a 'taking', or unfair or inequitable conduct, there must necessarily have been an '*injury*' caused such as to ground a claim for compensation. Whether or not each wrongful act by the [respondent] 'caused injury' such as to ground a claim for compensation must be analysed in terms of each specific 'injury' for which [the claimant] has in fact claimed damages".[677] [44]

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[672] [39] *Ibid*., award, 25 July 2007, para. 31.

[673] [40] *Archer Daniels Midland Company*, cited in [footnote] [3] 4 above, award, 21 November 2007, para. 275.

[674] [41] *Biwater Gauff*, cited in [footnote] [5] 6 above, paras. 779 and 783.

[675] [42] *Ibid*., para. 785, quoting extracts from paragraph (10) of the commentary to article 31.

[676] [43] *Ibid*., para. 787, emphasis added.

[677] [44] *Ibid*., para. 804 and footnote 369, (footnotes omitted) emphasis in the original.

[A/65/76, para. 30]

Duke Energy Electroquil Partners & Electroquil S.A. v. *Republic of Ecuador*

In its 2008 award, the tribunal in the *Duke Energy Electroquil Partners & Electroquil S.A.* v. *Ecuador* case, referred to article 31 as having, in its view, "codified" the principle of "full" compensation, as earlier established by the Permanent Court of International Justice in the *Factory at Chorzów* case.[678] [45] The tribunal saw "no reason not to apply this provision by analogy to investor-state arbitration".[679] [46]

[A/65/76, para. 31]

Eritrea-Ethiopia Claims Commission

Ethiopia's Damages Claims, Final Award, 17 August 2009, and Eritrea's Damages Claims, Final Award, 17 August 2009

In its 2009 final awards on *Ethiopia's Damages Claims* and *Eritrea's Damages Claims*, the Eritrea-Ethiopia Claims Commission recalled that an earlier version of the State responsibility articles had included a qualification that "[i]n no case may a people be deprived of its own means of subsistence", which was also reflected in article 1, paragraph 2, of both Human Rights Covenants.[680] [47] The Claims Commission further observed that the principle set out by the Permanent Court of International Justice in the *Chorzów Factory* case, that the purpose of compensation payable by a responsible State is "to seek to wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" was reflected in article 31 of the State responsibility articles.[681] [48]

[A/65/76, para. 32]

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[678] [45] *Case concerning the Factory at Chorzów (Germany* v. *Poland)*, 1928, PCIJ, Series A No. 17, p. 21.

[679] [46] ICSID, *Duke Energy Electroquil Partners & Electroquil S.A.* v. *Republic of Ecuador*, Case No. ARB/04/19, award, 18 August 2008, para. 468.

[680] [47] Eritrea-Ethiopia Claims Commission, *Ethiopia's Damages Claims*, Final Award, 17 August 2009, para. 19, and Eritrea-Ethiopia Claims Commission, *Eritrea's Damages Claims*, Final Award, 17 August 2009, para. 19, reference to the predecessor to article 31, namely draft article 42 [6 bis], at paragraph 3, as adopted by the Commission on first reading, at its forty-eighth session in 1996. The provision was deleted during the second reading, at the fifty-second session of the Commission in 2000. See *Yearbook of the International Law Commission, 2000*, vol. II, Part Two, paras. 79, 100 and 101. A reference to the qualification, as contained in article 1, paragraph 2, of the two Human Rights Covenants was, however, retained in the commentary to article 50, at paragraph (7). See further the discussion under article 56 below.

[681] [48] *Ibid.*, *Ethiopia's Damages Claims*, para. 24, and *Eritrea's Damages Claims*, para. 24, quoting *Factory at Chorzów*, p. 47.

Article 32. Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Commentary

(1) Article 3 concerns the role of internal law in the characterization of an act as wrongful. Article 32 makes clear the irrelevance of a State's internal law to compliance with the obligations of cessation and reparation. It provides that a State which has committed an internationally wrongful act may not invoke its internal law as a justification for failure to comply with its obligations under this part. Between them, articles 3 and 32 give effect for the purposes of State responsibility to the general principle that a State may not rely on its internal law as a justification for its failure to comply with its international obligations.[682]477 Although practical difficulties may arise for a State organ confronted with an obstacle to compliance posed by the rules of the internal legal system under which it is bound to operate, the State is not entitled to oppose its internal law or practice as a legal barrier to the fulfilment of an international obligation arising under Part Two.

(2) Article 32 is modelled on article 27 of the 1969 Vienna Convention, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This general principle is equally applicable to the international obligations deriving from the rules of State responsibility set out in Part Two. The principle may be qualified by the relevant primary rule, or by a *lex specialis*, such as article 50 of the European Convention on Human Rights, which provides for just satisfaction in lieu of full reparation "if the internal law of the High Contracting Party concerned allows only partial reparation to be made".[683] 478

(3) The principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions. For example, the dispute between Japan and the United States in 1906 over California's discriminatory education policies was resolved by the revision of the Californian legislation.[684] 479 In the incident concerning article 61, paragraph 2, of the Weimar Constitution (Constitution of the Reich of 11 August 1919), a constitutional amendment was provided for in order to ensure the discharge of the obligation deriving from article 80 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).[685] 480 In the *Peter Pázmány University* case, PCIJ specified that the property to be returned should be "freed from any measure of transfer, compulsory administration,

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[682] 477 See paragraphs (2) to (4) of the commentary to article 3.

[683] 478 Article 41 of the Convention, as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Other examples include article 32 of the Revised General Act for the Pacific Settlement of International Disputes and article 30 of the European Convention for the Peaceful Settlement of Disputes.

[684] 479 See R. L. Buell, "The development of the anti-Japanese agitation in the United States", *Political Science Quarterly*, vol. 37 (1922), pp. 620 et seq.

[685] 480 See *British and Foreign State Papers, 1919* (London, H. M. Stationery Office, 1922), vol. 112, p. 1094.

or sequestration".[686] [481] In short, international law does not recognize that the obligations of a responsible State under Part Two are subject to the State's internal legal system nor does it allow internal law to count as an excuse for non-performance of the obligations of cessation and reparation.

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[686] [481] *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), Judgment, 1933, P.C.I.J., Series A/B, No. 61*, p. 208, at p. 249.

Article 33. Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Commentary

(1) Article 33 concludes the provisions of chapter I of Part Two by clarifying the scope and effect of the international obligations covered by the Part. In particular, paragraph 1 makes it clear that identifying the State or States towards which the responsible State's obligations in Part Two exist depends both on the primary rule establishing the obligation that was breached and on the circumstances of the breach. For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a single neighbouring State. Evidently, the gravity of the breach may also affect the scope of the obligations of cessation and reparation.

(2) In accordance with paragraph 1, the responsible State's obligations in a given case may exist towards another State, several States or the international community as a whole. The reference to several States includes the case in which a breach affects all the other parties to a treaty or to a legal regime established under customary international law. For instance, when an obligation can be defined as an "integral" obligation, the breach by a State necessarily affects all the other parties to the treaty.[687] [482]

(3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights.[688] [483] The range of possibilities is demonstrated from the ICJ judgment in the *LaGrand* case, where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".[689] [484]

(4) Such possibilities underlie the need for paragraph 2 of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be

[687] [482] See further article 42 (*b*) (ii) and commentary.

[688] [483] Cf. *Jurisdiction of the Courts of Danzig* (footnote [70] 82 above), pp. 17–21.

[689] [484] *LaGrand, Judgment* (see footnote [117] 119 above), para. 77. In the circumstances the Court did not find it necessary to decide whether the individual rights had "assumed the character of a human right" (para. 78).

that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (art. 55). The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State".

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Additional Facility Rules)

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. *the United Mexican States*

In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc.* v. *Mexico*, after holding that Chapter Eleven of NAFTA enjoys the status of *lex specialis* in relation to the State responsibility articles,[690] [49] noted that Chapter Eleven includes the possibility of private claimants (who are nationals of a NAFTA member State) invoking in an international arbitration the responsibility of another NAFTA member State. Accordingly, "it is a matter of the particular provisions of Chapter Eleven to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account". In support of this latter assertion the tribunal cited article 33, paragraph 2, of the State responsibility articles, which provides that the customary rules on state responsibility codified therein operate " . . . without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State". Accordingly, in the view of the tribunal:

> Customary international law—pursuant to which only sovereign States may invoke the responsibility of another State—does not therefore affect the rights of non-State actors under particular treaties to invoke state responsibility. This rule is not only true in the context of investment protection, but also in the human rights and environmental protection arena.[691] [50]

[A/65/76, para. 33]

[690] [49] See article 55 below.

[691] [50] *Archer Daniels Midland Company*, cited in [footnote] [3] 4 above, para.118.