Part One

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Part One defines the general conditions necessary for State responsibility to arise. Chapter I lays down three basic principles for responsibility from which the articles as a whole proceed. Chapter II defines the conditions under which conduct is attributable to the State. Chapter III spells out in general terms the conditions under which such conduct amounts to a breach of an international obligation of the State concerned. Chapter IV deals with certain exceptional cases where one State may be responsible for the conduct of another State not in conformity with an international obligation of the latter. Chapter V defines the circumstances precluding the wrongfulness for conduct not in conformity with the international obligations of a State.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Iran-United States Claims Tribunal

Rankin v. *Islamic Republic of Iran*

In its 1987 award in the *Rankin* v. *Islamic Republic of Iran* case, the Tribunal, in determining whether it had jurisdiction over the case, considered that Part One of the articles provisionally adopted by the International Law Commission in 1980 constituted "the most recent and authoritative statement of current international law" on the origin of State responsibility for internationally wrongful acts:[23] [4]

… the Tribunal observes that only injuries resulting from popular movements which are not an act of the Government of Iran are excluded from the Tribunal's jurisdiction by this provision [*i.e.*, paragraph 11 of the Declaration of the Government of Algeria of 19 January 1981[24] [5]], which exclusion is no more than a restatement of the customary international law requirement that a State's responsibility is engaged only by wrongful conduct attributable to the State. Such conduct has in recent years come under the scrutiny of the United Nations International Law Commission, culminating in the development of a set of draft articles on the origins of State responsibility for internationally wrongful acts. The Tribunal has adopted the criteria set down by the International Law Commission as the most recent and authoritative statement of current international law in this area. *See* draft articles on State responsibility (Part 2 of the draft) as provisionally adopted by the International Law Commission, cited *1980 Yearbook of the International Law Commission*, vol. II, Part Two at

[23] [4] Part One of the articles provisionally adopted by the International Law Commission (entitled "Origin of international responsibility") became, with amendments, Part One of the articles finally adopted in 2001.

[24] [5] Under paragraph 11 of the Declaration of the Government of Algeria of 19 January 1981, the United States of America agreed to "bar and preclude prosecution against Iran of any pending or future claim … arising out of events occurring before the date of this Declaration related to … (*d*) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran".

pp. 30–34, United Nations doc. A/CN.4/SER.A/1980/Add.1 (Part 2); accord Alfred L.W. Short v. The Islamic Republic of Iran, Award No. 312–11135–3 (14 July 1987).[25] 6

In furtherance of this finding, the Tribunal later referred to draft articles 5 to 10 provisionally adopted by the International Law Commission as the legal basis

to examine the circumstances of each departure [of United States citizens from the Islamic Republic of Iran] and to identify the general and specific acts relied on and evidenced to determine how they affected or motivated at that time the individual who now is alleging expulsion and whether such acts are attributable to Iran.[26] 7

[A/62/62, para. 7]

International arbitral tribunal (under the ICSID Convention)

Burlington Resources Inc. v. *Republic of Ecuador*

The arbitral tribunal in *Burlington Resources Inc.* v. *Republic of Ecuador* referred generally to the State responsibility articles in support of the assertion that "someone's breach of an obligation corresponds to the breach of another's right".[27] 15

[A/68/72, para. 17]

[25] 6 IUSCT, Award No. 326–10913–2, 3 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), p. 141, para. 18. The relevant extract of the previous case referred to in this passage (*Short* v. *Islamic Republic of Iran*) is reported [on pp. 168–169] below.

[26] 7 *Ibid*., pp. 147–148, para. 30.

[27] 15 ICSID, Case No. ARB/08/5, Decision on Liability, 14 December 2012, para. 214, footnote 355.

Chapter I

GENERAL PRINCIPLES

Article 1. Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Commentary

(1) Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part One. The term "international responsibility" covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.

(2) PCIJ applied the principle set out in article 1 in a number of cases. For example, in the *Phosphates in Morocco* case, PCIJ affirmed that when a State commits an internationally wrongful act against another State international responsibility is established "immediately as between the two States".[28] [34] ICJ has applied the principle on several occasions, for example in the *Corfu Channel* case,[29] [35] in the *Military and Paramilitary Activities in and against Nicaragua* case,[30] [36] and in the *Gabčíkovo-Nagymaros Project* case.[31] [37] The Court also referred to the principle in its advisory opinions on *Reparation for Injuries*,[32] [38] and on the *Interpretation of Peace Treaties (Second Phase)*,[33] [39] in which it stated that "refusal to fulfil a treaty obligation involves international responsibility".[34] [40] Arbitral tribunals have repeatedly affirmed the principle, for example in the *Claims of Italian Nationals Resident in Peru* cases,[35] [41] in

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[28] [34] *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74,* p. 10, at p. 28. See also *S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1,* p. 15, at p. 30; *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21; and *ibid., Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17,* p. 29.

[29] [35] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949,* p. 4, at p. 23.

[30] [36] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 14, at p. 142, para. 283, and p. 149, para. 292.

[31] [37] *Gabčíkovo-Nagymaros Project* [*(Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7], at p. 38, para. 47.

[32] [38] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949,* p. 174, at p. 184.

[33] [39] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 221.

[34] [40] *Ibid.*, p. 228.

[35] [41] Seven of these awards rendered in 1901 reiterated that "a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by

the *Dickson Car Wheel Company* case,[36] [42] in the *International Fisheries Company* case,[37] [43] in the *British Claims in the Spanish Zone of Morocco* case[38] [44] and in the *Armstrong Cork Company* case.[39] [45] In the *"Rainbow Warrior"* case,[40] [46] the arbitral tribunal stressed that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility".[41] [47]

(3) That every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized, both before[42] [48] and since[43] [49] article 1 was first formulated by the Commission. It is true that there were early differences of opinion over the definition of the legal relationships arising from an internationally wrongful act. One approach, associated with Anzilotti, described the legal consequences deriving from an internationally wrongful act exclusively in terms of a binding bilateral relationship thereby established between the wrongdoing State and the injured State, in which the obligation of the former State to make reparation is set against the "subjective" right of the latter State to require reparation. Another view, associated with Kelsen, started from the idea that the legal order is a coercive order and saw the authorization accorded to the injured State to apply a coercive sanction against the responsible State as the primary legal consequence flowing directly from the wrongful act.[44] [50] According to this view, general international law empowered the injured State to react to a wrong; the obligation to make reparation was treated as subsidiary, a way by which the responsible

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its agents" (UNRIAA, vol. XV (Sales No. 66.V.3), pp. 399 (Chiessa claim), 401 (Sessarego claim), 404 (Sanguinetti claim), 407 (Vercelli claim), 408 (Queirolo claim), 409 (Roggero claim), and 411 (Miglia claim)).

[36] [42] *Dickson Car Wheel Company (U.S.A.)* v. *United Mexican States*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 669, at p. 678 (1931).

[37] [43] *International Fisheries Company (U.S.A.)* v. *United Mexican States*, *ibid.*, p. 691, at p. 701 (1931).

[38] [44] According to the arbitrator, Max Huber, it is an indisputable principle that "responsibility is the necessary corollary of rights. All international rights entail international responsibility", UNRIAA, vol. II (Sales No. 1949.V.1), p. 615, at p. 641 (1925).

[39] [45] According to the Italian-United States Conciliation Commission, no State may "escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law", UNRIAA, vol. XIV (Sales No. 65.V.4), p. 159, at p. 163 (1953).

[40] [46] 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, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990).

[41] [47] *Ibid.*, p. 251, para. 75.

[42] [48] See, *e.g.*, D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955) vol. I, p. 385; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 499; G. I. Tunkin, *Teoria mezhdunarodnogo prava* (Moscow, Mezhdunarodnye otnoshenia, 1970), p. 470, trans. W. E. Butler, *Theory of International Law* (London, George Allen and Unwin, 1974), p. 415; and E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sørensen, ed. (London, Macmillan, 1968), p. 533.

[43] [49] See, *e.g.*, I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press, 1998), p. 435; B. Conforti, *Diritto internazionale*, 4th ed. (Milan, Editoriale Scientifica, 1995), p. 332; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 6th ed. (Paris, Librairie générale de droit et de jurisprudence, 1999), p. 742; P.-M. Dupuy, *Droit international public*, 4th ed. (Paris, Dalloz, 1998), p. 414; and R. Wolfrum, "Internationally wrongful acts", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, North-Holland, 1995), vol. II, p. 1398.

[44] [50] See H. Kelsen, *Principles of International Law*, 2nd ed., R. W. Tucker, ed. (New York, Holt, Rinehart and Winston, 1966), p. 22.

State could avoid the application of coercion. A third view, which came to prevail, held that the consequences of an internationally wrongful act cannot be limited either to reparation or to a "sanction".[45] [51] In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances.

(4) Opinions have also differed on the question whether the legal relations arising from the occurrence of an internationally wrongful act were essentially bilateral, *i.e.* concerned only the relations of the responsible State and the injured State *inter se*. Increasingly it has been recognized that some wrongful acts engage the responsibility of the State concerned towards several or many States or even towards the international community as a whole. A significant step in this direction was taken by ICJ in the *Barcelona Traction* case when it noted that:

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[46] [52]

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations. Among these the Court instanced "the outlawing of acts of aggression, and of genocide, as also … the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[47] [53] In later cases the Court has reaffirmed this idea.[48] [54] The consequences of a broader conception of international responsibility must necessarily be reflected in the articles which, although they include standard bilateral situations of responsibility, are not limited to them.

(5) Thus the term "international responsibility" in article 1 covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law, and whether they are centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of countermeasures.

(6) The fact that under article 1 every internationally wrongful act of a State entails the international responsibility of that State does not mean that other States may not also be held responsible for the conduct in question, or for injury caused as a result. Under chapter II the same conduct may be attributable to several States at the same time. Under chapter IV, one State may be responsible for the internationally wrongful act of another, for example if the act was carried out under its direction and control. Nonetheless the basic

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[45] [51] See, *e.g.*, R. Ago, "Le délit international", *Recueil des cours … , 1939–II* (Paris, Sirey, 1947), vol. 68, p. 415, at pp. 430–440; and L. Oppenheim, *International Law: A Treatise,* vol. I, *Peace,* 8th ed., H. Lauterpacht, ed. (London, Longmans, Green and Co., 1955), pp. 352–354.

[46] [52] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33.

[47] [53] *Ibid*., para. 34.

[48] [54] See *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 258, para. 83; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996,* p. 595, at pp. 615–616, paras. 31–32.

principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.

(7) The articles deal only with the responsibility of States. Of course, as ICJ affirmed in the *Reparation for Injuries* case, the United Nations "is a subject of international law and capable of possessing international rights and duties … it has capacity to maintain its rights by bringing international claims".[49] 55 The Court has also drawn attention to the responsibility of the United Nations for the conduct of its organs or agents.[50] 56 It may be that the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality. Nonetheless, special considerations apply to the responsibility of other international legal persons, and these are not covered in the articles.[51] 57

(8) As to terminology, the French term *fait internationalement illicite* is preferable to *délit* or other similar expressions which may have a special meaning in internal law. For the same reason, it is best to avoid, in English, such terms as "tort", "delict" or "delinquency", or in Spanish the term *delito*. The French term *fait internationalement illicite* is better than *acte internationalement illicite*, since wrongfulness often results from omissions which are hardly indicated by the term *acte*. Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reasons, the term *hecho internacionalmente ilícito* is adopted in the Spanish text. In the English text, it is necessary to maintain the expression "internationally wrongful act", since the French *fait* has no exact equivalent; nonetheless, the term "act" is intended to encompass omissions, and this is made clear in article 2.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Tribunal for the Former Yugoslavia

Prosecutor v. *Tihomir Blaškić ("Lasva Valley")*

In its 1997 decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum* in the *Blaškić* case, which was later submitted to review by the Appeals Chamber,[52] 8 Trial Chamber II of the International Tribunal for the Former Yugoslavia, in considering whether individuals could be subject to orders (more specifically *subpoe-*

[49] 55 *Reparation for Injuries* (footnote [32] 38 above), p. 179.

[50] 56 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at pp. 88–89, para. 66.

[51] 57 For the position of international organizations, see article 57 and commentary.

[52] 8 In this decision, Trial Chamber II considered that "it is incumbent upon an individual acting in an official capacity to comply with the orders of the International Tribunal" (International Tribunal for the Former Yugoslavia, Trial Chamber II, *Prosecutor* v. *Tihomir Blaškić ("Lasva Valley"), Decision on the Objection of the Republic of Croatia to the Issuance of* Subpoenae Duces Tecum, Case No. IT-95–14, 18 July 1997, para. 96) and therefore reinstated the *subpoena duces tecum* issued on 15 January 1997 by Judge McDonald to the Republic of Croatia and the Croatian Defence Minister, Mr. Gojko Susak (*ibid*., disposition). The Appeals Chamber, on the contrary, later found that "the International Tribunal may not address binding orders under Article 29 to State officials acting in their official capacity" and thus quashed the *subpoena duces tecum* (International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor* v. *Tihomir Blaškić ("Lasva Valley"), Judgement on the Request of the Republic of Croatia for*

nae duces tecum) from the Tribunal, quoted the text of draft article 1 adopted on first reading,[53] 9 which it considered to be an "established rule of international law":

If the individual complies with the order in defiance of this government, he may face the loss of his position and possibly far greater sanctions than need be mentioned here. Given the International Tribunal's lack of police power, it would be very difficult to provide adequate protection for an official who so defied his State. Based on the principle *ultra posse nemo tenetur*, which states that one should not be compelled to engage in a behaviour that is nearly impossible, it may not be proper to compel an individual to comply with such an order in his official capacity in such circumstances. However, these concerns must be balanced with the need of the International Tribunal to obtain the information necessary for a just and fair adjudication of the criminal charges before it. Due to these concerns and noting the established rule of international law that "[e]very internationally wrong act of a State entails the international responsibility of that State", the duty to comply in such a scenario must be placed on the State, with appropriate sanctions or penalties for non-compliance … [54] 10

[A/62/62, para. 8]

International arbitral tribunal

Eureko B.V. v. *Republic of Poland*

In its 2005 partial award, the arbitral tribunal constituted to hear the *Eureko BV* v. *Republic of Poland* case, in support of its finding that a State may be responsible for omissions by its organs, quoted the commentary to article 1 finally adopted by the International Law Commission in 2001.[55] 11

[A/62/62, para. 9]

International arbitral tribunal (under the ICSID Convention)

El Paso Energy International Company v. *The Argentine Republic*

The arbitral tribunal in *El Paso Energy International Company* v. *The Argentine Republic* referred to articles 1 and 3 of the State responsibility articles in determining that "the primary governing law in this case is the BIT, supplemented by international law to which the BIT itself makes reference in various provisions".[56] 16

[A/68/72, para. 18]

Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95–14, 29 October 1997, disposition). On the Appeals Chamber judgement, see [pp. 52–53] below.

[53] 9 This provision was reproduced without change in article 1 finally adopted by the International Law Commission in 2001.

[54] 10 ICTY, Trial Chamber II, *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum* (footnote [52] 8 above), para. 95 (footnotes omitted).

[55] 11 Partial Award, 19 August 2005, para. 188. The arbitral tribunal referred in particular to paragraphs (1) and (8) of the commentary to article 1 (*Yearbook of the International Law Commission, 2001,* vol. II (Part Two), para. 77).

[56] 16 ICSID, Case No. ARB/03/15, Award, 31 October 2011, para. 130.

Swisslion DOO Skopje v. *The Former Yugoslav Republic of Macedonia*

In its award, the arbitral tribunal in *Swisslion DOO Skopje* v. *The Former Yugoslav Republic of Macedonia* referred to articles 1 and 6 of the State responsibility articles in support of the assertion that, “under customary international law, every wrongful act of a State entails the international responsibility of that State. This covers the conduct of any State organ, including the judiciary”.[57] [17]

[A/68/72, para. 19]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

The M/V “Virginia G” Case (Panama/Guinea-Bissau)

In *The M/V “Virginia G” Case (Panama/Guinea-Bissau)*, the International Tribunal for the Law of the Sea noted that articles 1 and 31, paragraph 1, of the State responsibility articles reaffirmed that “every internationally wrongful act of a State entails the international responsibility of that State”.[58] [11] The Tribunal noted that the Seabed Disputes Chamber of the Tribunal, in its advisory opinion on *Responsibilities and Obligations of States with Respect to Activities in the Area*, had indicated the customary international law status of article 31,[59] [12] and added that article 1 “also reflects customary international law”.[60] [13]

[A/71/80, para. 14]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Gold Reserve Inc. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Gold Reserve Inc.* v. *Bolivarian Republic of Venezuela* agreed with the respondent that the State responsibility articles “primarily concern internationally wrongful acts against States, not individuals or other non-state actors, and some prominent commentators have warned against uncritical conflation of the two”.[61] [14]

[A/71/80, para. 15]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission

In *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission*, the International Tribunal for the Law of the Sea found that articles 1, 2 and 31, paragraph 1 “are the rules of general international law relevant to the second question”, namely

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[57] [17] ICSID, Case No. ARB/09/16, Award, 6 July 2012, para. 261, footnote 323.

[58] [11] ITLOS, Judgment, *ITLOS Reports 2014*, p. 4, at para. 429.

[59] [12] See footnote [12] 10 above, para. 194.

[60] [13] See footnote [58] 11 above, para. 430.

[61] [14] ICSID, (Additional Facility), Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 679.

to what extent the flag State shall be held liable for illegal, unreported and unregulated fishing activities conducted by vessels sailing under its flag.[62] 15

[A/71/80, para. 16]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. *The Argentine Republic*

In *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *The Argentine Republic*, the arbitral tribunal noted, based on the commentary to article 1, that "the term 'international responsibility' … covers the new legal relations which arise under international law by the internationally wrongful act of a State".[63] 16 It further observed that "Argentina, by reason of its international wrong in not respecting its obligations under the three BITs, is therefore subject to a new relationship toward the Claimants".[64] 17

[A/71/80, para. 17]

Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. *Plurinational State of Bolivia*

In *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún* v. *Plurinational State of Bolivia*, the arbitral tribunal noted that the principle enshrined in article 1, which is that States incur responsibility for their internationally wrongful acts, was "a basic principle of international law".[65] 18

[A/71/80, para. 18]

International Criminal Court

Prosecutor (on the application of Victims) v. *Ruto (William Samoei) and Sang (Joshua Arap)*

In *Prosecutor (on the application of Victims)* v. *Ruto (William Samoei) and Sang (Joshua Arap)*, the International Criminal Court referred to article 1 of the State responsibility articles in discussing whether it does "amount to an internationally wrongful act for the government of a State to set out to meddle with an on-going case before an international criminal court, with the view to occasioning its abortion without proper consideration of the charges".[66] 9

[A/74/83, p. 6]

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[62] 15 ITLOS, Advisory Opinion, 2 April 2015, para. 144.

[63] 16 ICSID, Case No. ARB/03/19, Award, 9 April 2015, para. 25. Hereinafter this reference to *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *The Argentine Republic* includes the reference to the identical award in *AWG Group Ltd.* v. *The Argentine Republic*, Award, 9 April 2015.

[64] 17 *Ibid.*

[65] 18 ICSID, Case No. ARB/06/2, Award, 16 September 2015, para. 327.

[66] 9 International Criminal Court, Trial Chamber V(A), Decision on defence applications for judgments of acquittal, ICC-01/09–01/11–2027-Red, Case No. ICC-01/09–01/11, 5 April 2016, paras. 207–210.

International Tribunal for the Law of the Sea

Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)

In *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, a Special Chamber of the International Tribunal for the Law of the Sea observed that the Seabed Disputes Chamber of the Tribunal, in its advisory opinion on *Responsibilities and Obligations of States with Respect to Activities in the Area*, established the customary international law status of several articles of the State responsibility articles, and added that article 1 "also reflects customary international law".[67] [10]

[A/74/83, p. 6]

European Court of Human Rights

Abu Zubaydah v. *Lithuania*

The European Court of Human Rights, in *Abu Zubaydah* v. *Lithuania*, recited articles 1, 2, 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[68] [11]

[A/74/83, p. 7]

Al Nashiri v. *Romania*

The European Court of Human Rights, in *Al Nashiri* v. *Romania*, referred to articles 1, 2, 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[69] [12]

[A/74/83, p. 7]

International Court of Justice

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965

In its advisory opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the International Court of Justice referred to article 1 in concluding that,

> [t]he Court having found that the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State.[70] [10]

[A/77/74, p. 6]

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[67] [10] ITLOS, Judgment of 23 September 2017, para. 558, citing Seabed Disputes Chamber, Advisory Opinion (footnote [12] 10 above), para. 169.

[68] [11] ECHR, First Section, Application No. 46454/11, Judgment, 31 May 2018, para. 232.

[69] [12] ECHR, First Section, Application No. 33234/12, Judgment, 31 May 2018, para. 210.

[70] [10] ICJ, *Advisory Opinion, I.C.J. Reports 2019*, p. 95, at pp. 138–139, para. 177.

International arbitral tribunal (under the ICSID Convention)

B3 Croatian Courier Coöperatief U.A. v. *Republic of Croatia*

In *B3 Croatian Courier Coöperatief U.A.* v. *Republic of Croatia*, the arbitral tribunal considered "it to be uncontroversial that an expropriation claim may be based not only on positive acts of the State, but also on omissions", referring to the commentary to article 1.[71] [11]

[A/77/74, p. 7]

International Tribunal for the Law of the Sea

M/V "Norstar" (Panama v. *Italy)*

In *M/V "Norstar" (Panama* v. *Italy)*, the International Tribunal for the Law of the Sea noted that, as stated in article 1, "[e]very internationally wrongful act of a State entails the international responsibility of that State", and observed that article 1 "also reflects customary international law".[72] [12]

[A/77/74, p. 7]

[International arbitral tribunal (under UNCITRAL Rules)

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[73] [42] The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[74] [43]

[A/77/74, p. 11]]

[Inter-American Court of Human Rights

Cesti Hurtado v. *Peru*

In an order in *Cesti Hurtado* v. *Peru*, the Inter-American Court of Human Rights cited articles 1 and 31, recalling that "whenever a State is found responsible for an internationally wrongful act that has caused damage, an obligation arises for that State to make full reparation for the damage".[75] [130]

[A/77/74, p. 24]]

[71] [11] ICSID, Case No. ARB/15/5, Award, 5 April 2019, para. 1050.

[72] [12] ITLOS, *Judgment, ITLOS Reports 2018–2019*, p. 10, at p. 94, para. 317, citing *M/V "Virginia G" (Panama/Guinea-Bissau)* (footnote [58] 11 above), para. 430.

[73] [[42] Final Award, 26 March 2021, para. 72.]

[74] [[43] *Ibid*., paras. 72 and 134–135.]

[75] [[130] IACHR, Order (Request for Provisional Measures and Monitoring Compliance with Judgment), 14 October 2019, para. 30.]

[*Galindo Cárdenas et al.* v. *Peru*

In a provisional measures order in the case of *Galindo Cárdenas et al.* v. *Peru*, the Inter-American Court of Human Rights cited articles 1 and 31, noting that "under international law, whenever a State is found responsible for an internationally wrongful act that has caused damage, an obligation arises for that State to make full reparation for the damage".[76] 139

[A/77/74, p. 26]]

[International arbitral tribunal (under the ICSID Convention)

Silver Ridge Power B.V. v. *Italian Republic*

The arbitral tribunal in *Silver Ridge Power B.V.* v. *Italian Republic* considered that under article 31, paragraph 1,

> which represents customary international law, the State responsible for an internationally wrongful act is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Hence, there can be no doubt that, under general international law, the existence of a causal link between the alleged infringement of obligations under international law and the damage ensuing from it is an indispensable prerequisite for a compensation claim.[77] 143

The tribunal also cited articles 1 and 2.[78] 144

[A/77/74, p. 26]]

[76] [139 IACHR, Order (Request for Provisional Measures and Monitoring Compliance with Judgment), 3 September 2020, para. 17.]

[77] [143 ICSID, Case No. ARB/15/37, Award, 26 February 2021, para. 513.]

[78] [144 *Ibid*., para. 512.]

Article 2. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(*a*) is attributable to the State under international law; and

(*b*) constitutes a breach of an international obligation of the State.

Commentary

(1) Article 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, *i.e.* the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.

(2) These two elements were specified, for example, by PCIJ in the *Phosphates in Morocco* case. The Court explicitly linked the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty right[s] of another State".[79] 58 ICJ has also referred to the two elements on several occasions. In the *United States Diplomatic and Consular Staff in Tehran* case, it pointed out that, in order to establish the responsibility of the Islamic Republic of Iran:

> [f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.[80] 59

Similarly in the *Dickson Car Wheel Company* case, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is "that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard".[81] 60

(3) The element of attribution has sometimes been described as "subjective" and the element of breach as "objective", but the articles avoid such terminology.[82] 61 Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be "subjective". For example, article II of the Convention on the Prevention and Punishment of the Crime of Genocide states that: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such … " In other cases, the standard for breach of an obligation may be "objective", in the sense that the advertence

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[79] 58 See footnote [28] 34 above.

[80] 59 *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 29, para. 56. Cf. page 41, para. 90. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), pp. 117–118, para. 226; and *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 54, para. 78.

[81] 60 See footnote [36] 42 above.

[82] 61 Cf. *Yearbook … 1973*, vol. II, p. 179, document A/9010/Rev.1, paragraph (1) of the commentary to article 3.

or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is "objective" or "subjective" in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

(4) Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two. Moreover, it may be difficult to isolate an "omission" from the surrounding circumstances which are relevant to the determination of responsibility. For example, in the *Corfu Channel* case, ICJ held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.[83] [62] In the *United States Diplomatic and Consular Staff in Tehran* case, the Court concluded that the responsibility of the Islamic Republic of Iran was entailed by the "inaction" of its authorities which "failed to take appropriate steps", in circumstances where such steps were evidently called for.[84] [63] In other cases it may be the combination of an action and an omission which is the basis for responsibility.[85] [64]

(5) For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An "act of the State" must involve some action or omission by a human being or group: "States can act only by and through their agents and representatives."[86] [65] The question is which persons should be considered as acting on behalf of the State, *i.e.* what constitutes an "act of the State" for the purposes of State responsibility.

(6) In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is

[83] [62] *Corfu Channel, Merits* (footnote [29] 35 above), pp. 22–23.

[84] [63] *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), pp. 31–32, paras. 63 and 67. See also *Velásquez Rodríguez* v. *Honduras* case, Inter-American Court of Human Rights, Series C, No. 4, para. 170 (1988): "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions"; and *Affaire relative à l'acquisition de la nationalité polonaise*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 401, at p. 425 (1924).

[85] [64] For example, under article 4 of the Convention relative to the Laying of Automatic Submarine Contact Mines (Hague Convention VIII of 18 October 1907), a neutral Power which lays mines off its coasts but omits to give the required notice to other States parties would be responsible accordingly.

[86] [65] *German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6*, p. 22.

crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.

(7) The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations. In its judgment on jurisdiction in the *Factory at Chorzów* case, PCIJ used the words "breach of an engagement".[87] [66] It employed the same expression in its subsequent judgment on the merits.[88] [67] ICJ referred explicitly to these words in the *Reparation for Injuries* case.[89] [68] The arbitral tribunal in the *"Rainbow Warrior"* affair referred to "any violation by a State of any obligation".[90] [69] In practice, terms such as "non-execution of international obligations", "acts incompatible with international obligations", "violation of an international obligation" or "breach of an engagement" are also used.[91] [70] All these formulations have essentially the same meaning. The phrase preferred in the articles is "breach of an international obligation" corresponding as it does to the language of Article 36, paragraph 2 (*c*), of the ICJ Statute.

(8) In international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others. PCIJ spoke of an act "contrary to the treaty right[s] of another State" in its judgment in the *Phosphates in Morocco* case.[92] [71] That case concerned a limited multilateral treaty which dealt with the mutual rights and duties of the parties, but some have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole). But different incidents may attach to a right which is held in common by all other subjects of international law, as compared with a specific right of a given State or States. Different States may be beneficiaries of an obligation in different ways, or may have different interests in respect of its performance. Multilateral obligations may thus differ from bilateral ones, in view of the diversity of legal rules and institutions and the wide variety of interests sought to be protected by them. But whether any obligation has been breached still raises the two basic questions identified in article 2, and this is so whatever the character or provenance of the obligation breached. It is a separate question who may invoke the responsibility arising from the breach of an obligation: this question is dealt with in Part Three.[93] [72]

(9) Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes

[87] [66] *Case concerning the Factory at Chorzów, Jurisdiction* (footnote [28] 34 above).

[88] [67] *Factory at Chorzów, Merits* (*ibid.*).

[89] [68] *Reparation for Injuries* (footnote [32] 38 above), p. 184.

[90] [69] *"Rainbow Warrior"* (footnote [40] 46 above), p. 251, para. 75.

[91] [70] At the Conference for the Codification of International Law, held at The Hague in 1930, the term "any failure … to carry out the international obligations of the State" was adopted (see *Yearbook … 1956*, vol. II, p. 225, document A/CN.4/96, annex 3, article 1).

[92] [71] See footnote [28] 34 above.

[93] [72] See also article 33, paragraph 2, and commentary.

said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, "damage" to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.[94] 73

(10) A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by "fault" one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.

(11) Article 2 introduces and places in the necessary legal context the questions dealt with in subsequent chapters of Part One. Subparagraph (*a*)—which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act—corresponds to chapter II, while chapter IV deals with the specific cases where one State is responsible for the internationally wrongful act of another State. Subparagraph (*b*)—which states that such conduct must constitute a breach of an international obligation—corresponds to the general principles stated in chapter III, while chapter V deals with cases where the wrongfulness of conduct, which would otherwise be a breach of an obligation, is precluded.

(12) In subparagraph (*a*), the term "attribution" is used to denote the operation of attaching a given action or omission to a State. In international practice and judicial decisions, the term "imputation" is also used.[95] 74 But the term "attribution" avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is "really" that of someone else.

(13) In subparagraph (*b*), reference is made to the breach of an international obligation rather than a rule or a norm of international law. What matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State. The term "obligation" is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities. The reference to an "obligation" is limited to an obligation under international law, a matter further clarified in article 3.

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[94] 73 For examples of analysis of different obligations, see *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), pp. 30–33, paras. 62–68; *"Rainbow Warrior"* (footnote [40] 46 above), pp. 266–267, paras. 107–110; and WTO, Report of the Panel, United States–Sections 301–310 of the Trade Act of 1974 (WT/DS152/R), 22 December 1999, paras. 7.41 *et seq*.

[95] 74 See, *e.g.*, *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 29, paras. 56 and 58; and *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 51, para. 86.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

Amco Asia Corporation and Others v. *Republic of Indonesia*

In its 1984 award on the merits, the arbitral tribunal constituted to hear the *Amco Indonesia Corporation and Others* v. *Indonesia* case considered that draft article 3 provisionally adopted by the International Law Commission[96] 12 (as well as articles 5 and 10 provisionally adopted), which it quoted *in extenso*, constituted "an expression of accepted principles of international law":

It is a generally accepted rule of international law, clearly stated in international awards and judgements and generally accepted in the literature, that a State has a duty to protect aliens and their investments against unlawful acts committed by some of its citizens … If such acts are committed with the active assistance of state-organs a breach of international law occurs. In this respect, the Tribunal wants to draw attention to the draft articles on State responsibility formulated in 1979 by the International Law Commission and presented to the General Assembly of the United Nations as an expression of accepted principles of international law.[97] 13

[A/62/62, para. 10]

Ad hoc committee (under the ICSID Convention)

Compañia de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie générale des eaux) v. *Argentine Republic*

In its 2002 decision on annulment in the *CAA and Vivendi Universal* v. *Argentina* case, the *ad hoc* committee noted that,

[i]n considering the [arbitral] Tribunal's findings on the merits [in the award involved in the annulment proceedings], it is necessary to distinguish between what the Tribunal referred to as, on the one hand, claims 'based directly on alleged actions or failures to act of the Argentine Republic' and, on the other hand, claims relating to conduct of the [Argentine province of] Tucumán authorities which are nonetheless brought against Argentina and 'rely … upon the principle of attribution'.[98] 14

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[96] 12 This provision was amended and incorporated in article 2 adopted by the International Law Commission in 2001. The text of draft article 3 provisionally adopted read as follows:

Article 3

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when:

(*a*) Conduct consisting of an action or omission is attributable to the State under international law; and

(*b*) That conduct constitutes a breach of an international obligation of the State. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[97] 13 ICSID, Award on the merits, 20 November 1984, para. 172 reproduced in *International Law Reports*, vol. 89, p. 457.

[98] 14 ICSID, Case No. ARB/97/3, Decision of Annulment, 3 July 2002, para. 16 (footnote omitted), reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 19, No. 1, 2004, p. 100.

In a footnote, the *adhoc* committee criticized the arbitral tribunal's terminology on the basis of the text of and commentaries to articles 2, 4 and 12 finally adopted by the International Law Commission:

… The terminology employed by the Tribunal in this regard is not entirely happy. All international claims against a state are based on attribution, whether the conduct in question is that of a central or provincial government or other subdivision. *See* International Law Commission articles on responsibility of States for internationally wrongful acts, annexed to General Assembly resolution 54/83, 12 December 2001 … , articles 2(*a*), 4 and the Commission's commentary to article 4, paras. (8)-(10). A similar remark may be made concerning the Tribunal's later reference to "a strict liability of attribution" … Attribution has nothing to do with the standard of liability or responsibility. The question whether a State's responsibility is "strict" or is based on due diligence or on some other standard is a separate issue from the question of attribution (cf. International Law Commission articles, arts. 2, 12). It does not, however, appear that either of these terminological issues affected the reasoning of the Tribunal, and no more need be said of them.[99] 15

[A/62/62, para. 11]

International arbitral tribunal

Eureko B.V. v. *Republic of Poland*

In its 2005 partial award, the arbitral tribunal constituted to hear the *Eureko BV* v. *Republic of Poland* case, in support of its finding that a State may be responsible for omissions by its organs, quoted the commentary to article 2 finally adopted by the International Law Commission in 2001.[100] 16

[A/62/62, para. 12]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Fireman's Fund Insurance Company v. *The United Mexican States*

In its 2006 award, the arbitral tribunal constituted to hear the *Fireman's Fund Insurance Company* v. *The United Mexican States* case, in the first case under NAFTA to be heard under Chapter Fourteen devoted to cross-border investment in Financial Services, considered the meaning of the term "expropriation" in article 1110(1) of NAFTA. Upon a review of prior decisions and "customary international law in general", the tribunal identified a number of elements, including that expropriation requires a taking (which may include destruction) by a government-type authority of an investment by an investor covered by NAFTA. In a footnote citing article 2 of the State responsibility articles, the tribunal added that:

[a] failure to act (an 'omission') by a host State may also constitute a State measure tantamount to expropriation under particular circumstances, although those cases will be rare and seldom concern the omission alone.[101] 17

[A/65/76, para. 12]

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[99] 15 *Ibid.*, p. 100, para. 16, footnote 17.

[100] 16 See footnote [55] 11 above, para. 188. The arbitral tribunal referred in particular to paragraph (4) of the commentary to article 2 (*Yearbook of the International Law Commission, 2001,* vol. II (Part Two), para. 77).

[101] 7 ICSID, Case No. ARB(AF)/ 02/01, Award, 17 July 2006, para. 176(*a*), footnote 155.

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 2 as reflecting a rule applicable under customary international law.[102] [8]

[A/65/76, para. 13]

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, considered the question as to whether actual economic loss or damage was necessary for a cause of action relating to expropriation. The tribunal held that "the suffering of substantive and quantifiable economic loss by the investor [was] not a pre-condition for the finding of an expropriation" under the bilateral investment treaty in question, but that where there had been "substantial interference with an investor's rights, so as to amount to an expropriation … there may be scope for a non-compensatory remedy for the expropriation (*e.g.* injunctive, declaratory or restitutionary relief)". In coming to that conclusion, the tribunal referred to the commentary to article 2 of the State responsibility articles, where the Commission stated:

> It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, 'damage' to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect.[103] [9]

[A/65/76, para. 14]

International arbitral tribunal (under UNCITRAL Rules)

Merrill & Ring Forestry L.P. v. *The Government of Canada*

The arbitral tribunal constituted to hear the *Merrill & Ring Forestry L.P.* v. *The Government of Canada* case indicated that, although the commentary to article 2 provides that whether damage is "'required depends on the content of the primary obligation, and there is no general rule in this respect'[,] … in the case of conduct that is said to constitute a breach of the standards applicable to investment protection, the primary obligation is quite clearly inseparable from the existence of damage".[104] [19]

[A/68/72, para.20]

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[102] [8] *Archer Daniels Midland Company* (footnote [3] 4 above), para. 275.

[103] [9] *Biwater Gauff* (footnote [5] 6 above), para. 466, citing paragraph (9) of the commentary to article 2.

[104] [19] Award, 31 March 2010, para. 245 (quoting James Crawford, *The International Law Commission's Articles on State Responsibility*, 2002, at 84).

International arbitral tribunal (under the ICSID Convention)

Gustav F W Hamester GmbH & Co KG v. *Republic of Ghana*

The arbitral tribunal in *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* indicated that article 2 is "not an autonomous basis for attribution", but rather "only articulates the elements of the definition an internationally wrongful act of a State", which "must be attributable to the State and violate an international obligation of the State".[105] [20]

[A/68/72, para. 21]

Permanent Court of Arbitration (under UNCITRAL Rules)

Frontier Petroleum Services LTD. v. *The Czech Republic*

In its final award, the arbitral tribunal in *Frontier Petroleum Services LTD.* v. *The Czech Republic* referred to article 2 and its accompanying commentary in support of the assertion that "[t]here is little doubt that the term 'measure' generally encompasses both actions and omissions of a state in international law".[106] [21]

[A/68/72, para. 22]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area

In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber indicated that a provision of UNCLOS constitutes an exception to the customary international law rule reflected in the commentary to article 2, which provides that "a State may be held liable … even if no material damage results from its failure to meet its international obligations".[107] [22]

[A/68/72, para. 23]

[Inter-American Court of Human Rights

Castillo González et al. v. *Venezuela*

In its judgment in *Castillo González et al.* v. *Venezuela,* the Inter-American Court of Human Rights indicated that articles 2 and 4 constituted part of "the basic principle of the law on international State responsibility".[108] [51]

[See A/68/72, footnote 18 and para. 41]]

[105] [20] ICSID, Case No. ARB/07/24, Award, 18 June 2010, para. 173.

[106] [21] PCA, Final Award, 12 November 2010, para. 223.

[107] [22] See footnote [12] 10 above, para. 178 (citing para. (9) of the commentary to article 2) and para. 210.

[108] [[51] IACHR, Judgment, Series C, No. 256, 27 November 2012, para. 110, footnote 51 (quoting articles 2 and 4 of the State responsibility articles).]

[International Tribunal for the Law of the Sea

Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission

In *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission*, the International Tribunal for the Law of the Sea found that articles 1, 2 and 31, paragraph 1 "are the rules of general international law relevant to the second question", namely to what extent the flag State shall be held liable for illegal, unreported and unregulated fishing activities conducted by vessels sailing under its flag.[109] [15]

[A/71/80, para. 16]]

European Court of Human Rights

Likvidējamā P/S Selga and Lūcija Vasiļevska v. *Latvia*

In *Likvidējamā P/S Selga and Lūcija Vasiļevska* v. *Latvia*, the European Court of Human Rights considered article 2 of the State responsibility articles and excerpts of the commentary thereto as relevant international law.[110] [20] In assessing the responsibility of Latvia, the Court relied on article 2 to note that the two conditions of attribution of conduct and breach "form a cornerstone of State responsibility under international law".[111] [21]

[A/71/80, para. 19]

Inter-American Court of Human Rights

Gutiérrez and Family v. *Argentina*

In *Gutiérrez and Family* v. *Argentina*, the Inter-American Court of Human Rights referred to article 2 when recalling that

> in order to establish that a violation of the rights embodied in the Convention has occurred, it is not necessary to determine, as under domestic criminal law, the guilt of the authors or their intentions, nor is it necessary to identify, individually, the agents to which the violations are attributed. It is sufficient that the State has an obligation that it has failed to comply with; in other words, that this unlawful act is attributed to it.[112] [22]

[A/71/80, para. 20]

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[109] [[15] ITLOS, Advisory Opinion, 2 April 2015, para. 144.]

[110] [20] ECHR, Fourth Section, Application Nos. 17126/02 and 24991/02, Decision, 1 October 2013, paras. 64–65.

[111] [21] *Ibid*., para. 95.

[112] [22] IACHR, Judgment, 25 November 2013, para. 78, footnote 163 (footnotes omitted).

International arbitral tribunal (under the ICSID Convention)

Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. *The Argentine Republic*

The arbitral tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *The Argentine Republic* referred to article 2 as being "generally considered as a statement of customary international law".[113] 23

[A/71/80, para. 21]

Bernhard von Pezold and others v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal noted that a "[b]reach of the BIT would be an internationally wrongful act within Article 2 of the ILC Articles as a 'breach of an international obligation', which can include treaty obligations".[114] 24

[A/71/80, para. 22]

Ad hoc committee (under the ICSID Convention)

Tulip Real Estate and Development Netherlands B.V. v. *Republic of Turkey*

In *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey*, the [*ad hoc* Committee], constituted to decide an application to annul the award, observed that article 2 of the State responsibility articles "codifies customary international law".[115] 25

[A/71/80, para. 23]

[European Court of Human Rights

Jaloud v. *The Netherlands*

The European Court of Human Rights in *Jaloud* v. *The Netherlands* cited articles 2, 6 and 8 of the State responsibility articles, as well as the respective commentaries, as relevant international law.[116] 80 In establishing jurisdiction in respect of the Netherlands, the Court could not find that

> the Netherlands' troops were placed 'at the disposal' of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were 'under the exclusive direction or control' of any other State (compare, *mutatis mutandis*, Article 6 of the International Law Commission's Articles on State Responsibility).[117] 81

[A/71/80, para. 65]]

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[113] 23 See footnote [63] 16 above, para. 24.

[114] 24 ICSID, Case No. ARB/10/15, Award, 28 July 2015, para. 722. See also the reference to article 2 in the text accompanying footnote [1518] 189 below.

[115] 25 ICSID, Case No. ARB/11/28, Decision on Annulment, 30 December 2015, para. 183.

[116] [80 ECHR, Grand Chamber, Application No. 47708/08, Judgment, 20 November 2014, para. 98.]

[117] [81 *Ibid.*, para. 151.]

International arbitral tribunal (under the ICSID Convention)

Vestey Group Limited Ltd. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Vestey Group Limited Ltd.* v. *Bolivarian Republic of Venezuela*, also relying on articles 1 and 31 of the State responsibility articles, found that "Venezuela has committed an internationally wrongful act as defined by Article 2 of the ILC Articles on State Responsibility, which entails the international responsibility of the state, and gives rise to an obligation to make full reparation for the injury caused by the illicit act".[118] [14]

[A/74/83, p. 7]

Permanent Court of Arbitration (under UNCITRAL Rules)

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. *The Republic of India*

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*, the arbitral tribunal stated that

> [i]t is important to note that Article 2 of the ILC Articles states that two conditions must be met for the attribution to a State of an internationally wrongful act: (i) the act must be attributable to the State under international law; and (ii) it must constitute a breach of an international obligation of the State.[119] [15]

[A/74/83, p. 7]

Arbitration Institute of the Stockholm Chamber of Commerce

Busta and Busta v. *The Czech Republic*

In *Busta and Busta* v. *The Czech Republic*, the arbitral tribunal referred to article 2 of the State responsibility articles, when noting that "a State's international responsibility can be engaged by both action and inaction of its organs".[120] [16]

[A/74/83, p. 7]

Economic Community of West African States Court of Justice

Benson Olua Okomba v. *Republic of Benin*

In *Benson Olua Okomba* v. *Republic of Benin*, the Economic Community of West African States Court of Justice observed, in considering articles 1 and 2 of State responsibility articles, that "[t]he rules of state responsibility appl[y] to international human rights law".[121] [17]

[A/74/83, p. 7]

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[118] [14] ICSID, Case No. ARB/06/4, Award, 15 April 2016, para. 326 and footnote 306.

[119] [15] PCA, Case No. 2013–09, Award on Jurisdiction and the Merits, 25 July 2016, para. 283.

[120] [16] SCC, Case No. V (2015/014), Final Award, 10 March 2017, para. 399.

[121] [17] ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/05/17, Judgment, 10 October 2017, p. 20.

International arbitral tribunal (under the ICSID Convention)

UAB E Energija (Lithuania) v. *Republic of Latvia*

In *UAB E Energija (Lithuania)* v. *Republic of Latvia*, the arbitral tribunal stated, with reference to article 2 of the State responsibility articles, that "[t]he issue for the purposes of the present Award is the threshold question whether the conduct of which the Claimant complains is attributable to the Respondent under international law".[122] [18] The arbitral tribunal found that

> [t]he Respondent's breaches of Article 3(1) of the BIT amount to an internationally wrongful act as this provision gives rise to an international obligation on the Respondent and the Tribunal has found the breaches of this provision to be attributable to the Respondent (Article 2 of the ILC Articles).[123] [19]

[A/74/83, p. 7]

Economic Community of West African States Court of Justice

Chief Damian Onwuham and Others v. *Federal Republic of Nigeria and Imo State Government*

In *Chief Damian Onwuham and Others* v. *Federal Republic of Nigeria and Imo State Government*, the Economic Community of West African States Court of Justice, quoting articles 1 and 2 of the State responsibility articles, observed that

> [i]t is trite that the rules of state responsibility appl[y] to international human rights law. […] This implies that states will be responsible for acts done without due care and diligence in preventing human right[s] violations and for failure to investigate and punish acts violating those rights.[124] [20]

[A/74/83, p. 8]

Permanent Court of Arbitration (under UNCITRAL Rules)

Consutel Group S.P.A. in liquidazione (Italy) v. *People's Democratic Republic of Algeria*

In *Consutel Group S.P.A. in liquidazione (Italy)* v. *People's Democratic Republic of Algeria*, the arbitral tribunal stated that "the attribution to the State of acts or omissions committed by a public entity has no consequences, under international law, with regard to the lawfulness of those acts", noting that article 2 "stipulates, in that regard, that two separate conditions must be met in order for there to be an 'internationally wrongful act of a State': there must be (i) an act attributable to the State and (ii) a breach of an international obligation of the State".[125] [13]

[A/77/74, p. 7]

[122] [18] ICSID, Case No. ARB/12/33, Award, 22 December 2017, para. 795.

[123] [19] *Ibid*., para. 1127.

[124] [20] ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/22/18, Judgment, 3 July 2018, pp. 24–25.

[125] [13] PCA, Case No. 2017–33, Final Award, 3 February 2020, para. 317.

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* recalled that "attribution is a concept of international law firmly rooted in the rules on State responsibility".[126] 14 Thus,

[w]here there is a claim of a breach of an international obligation of a State under a BIT, the claimant has to prove (i) that the conduct complained of is, under international law, attributable to a State, *i.e.*, under international law it is considered to be the conduct of a State; and (ii) that the obligation allegedly breached is an obligation which that State has undertaken under the applicable BIT.[127] 15

[A/77/74, p. 7]

International arbitral tribunal (under the ICSID Convention)

Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. *Turkmenistan*

The arbitral tribunal in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti.* v. *Turkmenistan* noted that, in many respects, the articles "codify customary international law".[128] 16 The tribunal referred to article 2, which "provides that an internationally wrongful act of a State occurs when two cumulative conditions are met: (i) the act can be attributed to the State under international law; and (ii) the act constitutes a breach of an international obligation".[129] 17 Thus, the tribunal stated that "one must first determine whether an act is attributable to the State before assessing whether the act can be deemed to be in breach of an international obligation",[130] 18 and recalled that "under international law, the State is treated as a unity".[131] 19

[A/77/74, p. 7]

[*Silver Ridge Power B.V.* v. *Italian Republic*

The arbitral tribunal in *Silver Ridge Power B.V.* v. *Italian Republic* considered that under article 31, paragraph 1,

which represents customary international law, the State responsible for an internationally wrongful act is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Hence, there can be no doubt that, under general international law, the existence of a causal link between the alleged infringement of obligations under international law and the damage ensuing from it is an indispensable prerequisite for a compensation claim.[132] 143

The tribunal also cited articles 1 and 2.[133] 144

[A/77/74, p. 26]]

[126] 14 PCA, Case No. 2013–34, Partial Award (Jurisdiction and Liability), 5 February 2021, para. 154.

[127] 15 *Ibid*., para. 155.

[128] 16 ICSID, Case No. ARB/12/6, Award, 4 May 2021, para. 736 (footnote 628), citing *Tulip Real Estate Investment and Development Netherlands B.V.* v. *Republic of Turkey* (footnote [210] 40 below).

[129] 17 *Ibid*., para. 736.

[130] 18 *Ibid*., para. 737, citing para. (5) of the commentary to article 2.

[131] 19 *Ibid*., para. 742, citing para. (6) of the commentary to article 2.

[132] [143 ICSID, Case No. ARB/15/37, Award, 26 February 2021, para. 513.]

[133] [144 *Ibid*., para. 512.]

Article 3. Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Commentary

(1) Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law—even if, under that law, the State was actually bound to act in that way.

(2) As to the first of these elements, perhaps the clearest judicial decision is that of PCIJ in the *Treatment of Polish Nationals* case.[134] 75 The Court denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the Constitution of the Free City of Danzig, on the ground that:

> according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted … [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force … The application of the Danzig Constitution may … result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law … However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City.[135] 76

(3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled. International judicial decisions leave no doubt on that subject. In particular, PCIJ expressly recognized the principle in its first judgment, in the *S.S. "Wimbledon"* case. The Court rejected the argument of the German Government that the passage of the ship through the Kiel Canal would have constituted a violation of the German neutrality orders, observing that:

> a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace. … under Article 380 of the Treaty of Versailles, it was [Germany's] definite duty to allow [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article.[136] 77

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[134] 75 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44,* p. 4.

[135] 76 *Ibid.*, pp. 24–25. See also *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 24.

[136] 77 *S.S. "Wimbledon"* (footnote [28] 34 above), pp. 29–30.

The principle was reaffirmed many times:

it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty;[137] 78

… it is certain that France cannot rely on her own legislation to limit the scope of her international obligations;[138] 79

… a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.[139] 80

A different facet of the same principle was also affirmed in the advisory opinions on *Exchange of Greek and Turkish Populations*[140] 81 and *Jurisdiction of the Courts of Danzig*.[141] 82

(4) ICJ has often referred to and applied the principle.[142] 83 For example, in the *Reparation for Injuries* case, it noted that "[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible … the Member cannot contend that this obligation is governed by municipal law".[143] 84 In the *ELSI* case, a Chamber of the Court emphasized this rule, stating that:

Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.[144] 85

Conversely, as the Chamber explained:

the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness … Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.[145] 86

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[137] 78 *Greco-Bulgarian "Communities", Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 32.

[138] 79 *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 12; and *ibid.*, *Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 167.

[139] 80 *Treatment of Polish Nationals* (footnote [134] 75 above), p. 24.

[140] 81 *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 20.

[141] 82 *Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, P.C.I.J., Series B, No. 15*, pp. 26–27. See also the observations of Lord Finlay in *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 26.

[142] 83 See *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116, at p. 132; *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111, at p. 123; *Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1958*, p. 55, at p. 67; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12, at pp. 34–35, para. 57.

[143] 84 *Reparation for Injuries* (footnote [32] 38 above), at p. 180.

[144] 85 *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15, at p. 51, para. 73.

[145] 86 *Ibid.*, p. 74, para. 124.

The principle has also been applied by numerous arbitral tribunals.[146] 87

(5) The principle was expressly endorsed in the work undertaken under the auspices of the League of Nations on the codification of State responsibility,[147] 88 as well as in the work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. The Commission's draft Declaration on Rights and Duties of States, article 13, provided that:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.[148] 89

(6) Similarly this principle was endorsed in the 1969 Vienna Convention, article 27 of which provides that:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.[149] 90

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the

[146] 87 See, *e.g.*, the Geneva Arbitration (the *"Alabama"* case), in Moore, *History and Digest*, vol. IV, p. 4144, at pp. 4156 and 4157 (1872); *Norwegian Shipowners' Claims (Norway* v. *United States of America)*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 307, at p. 331 (1922); *Aguilar-Amory and Royal Bank of Canada Claims* (*Tinoco* case) (*Great Britain* v. *Costa Rica*), *ibid.*, p. 369, at p. 386 (1923); *Shufeldt Claim*, *ibid.*, vol. II (Sales No. 1949.V.1), p. 1079, at p. 1098 ("it is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject") (1930); *Wollemborg Case*, *ibid.*, vol. XIV (Sales No. 65.V.4), p. 283, at p. 289 (1956); and *Flegenheimer*, *ibid.*, p. 327, at p. 360 (1958).

[147] 88 In point I of the request for information on State responsibility sent to States by the Preparatory Committee for the 1930 Hague Conference it was stated:

"In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law."

In their replies, States agreed expressly or implicitly with this principle (see League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (document C.75.M.69.1929.V), p. 16). During the debate at the 1930 Hague Conference, States expressed general approval of the idea embodied in point I and the Third Committee of the Conference adopted article 5 to the effect that "A State cannot avoid international responsibility by invoking the state of its municipal law" (document C.351(*c*) M.145(*c*).1930.V; reproduced in *Yearbook … 1956*, vol. II, p. 225, document A/CN.4/96, annex 3).

[148] 89 See General Assembly resolution 375 (IV) of 6 December 1949, annex. For the debate in the Commission, see *Yearbook … 1949*, pp. 105–106, 150 and 171. For the debate in the Assembly, see *Official Records of the General Assembly, Fourth Session, Sixth Committee*, 168th–173rd meetings, 18–25 October 1949; 175th–183rd meetings, 27 October–3 November 1949; and *ibid.*, *Fourth Session, Plenary Meetings*, 270th meeting, 6 December 1949.

[149] 90 Article 46 of the Convention provides for the invocation of provisions of internal law regarding competence to conclude treaties in limited circumstances, viz., where the violation of such provisions "was manifest and concerned a rule of … internal law of fundamental importance".

provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, *e.g.* by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(8) As regards the wording of the rule, the formulation "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law", which is similar to article 5 of the draft adopted on first reading at the 1930 Hague Conference and also to article 27 of the 1969 Vienna Convention, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, such a formulation sounds like a rule of procedure and is inappropriate for a statement of principle. Issues of the invocation of responsibility belong to Part Three, whereas this principle addresses the underlying question of the origin of responsibility. In addition, there are many cases where issues of internal law are relevant to the existence or otherwise of responsibility. As already noted, in such cases it is international law which determines the scope and limits of any reference to internal law. This element is best reflected by saying, first, that the characterization of State conduct as internationally wrongful is governed by international law, and secondly by affirming that conduct which is characterized as wrongful under international law cannot be excused by reference to the legality of that conduct under internal law.

(9) As to terminology, in the English version the term "internal law" is preferred to "municipal law", because the latter is sometimes used in a narrower sense, and because the 1969 Vienna Convention speaks of "internal law". Still less would it be appropriate to use the term "national law", which in some legal systems refers only to the laws emanating from the central legislature, as distinct from provincial, cantonal or local authorities. The principle in article 3 applies to all laws and regulations adopted within the framework of the State, by whatever authority and at whatever level.[150] [91] In the French version the expression *droit interne* is preferred to *législation interne* and *loi interne*, because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.

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[150] [91] Cf. *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 9, at p. 16, para. 28.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

Maffezini v. *Kingdom of Spain*

In its 2000 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *Maffezini* v. *Spain* case, in deciding whether the acts of the private corporation *Sociedad para el Desarrollo Industrial de Galicia* (with which the claimant had made various contractual dealings) were imputable to Spain, referred in a footnote to draft article 4 adopted by the International Law Commission on first reading in support of its assertion that "[w]hether an entity is to be regarded as an organ of the State and whether this might ultimately engage its responsibility, is a question of fact and law to be determined under the applicable principles of international law".[151] [17]

[A/62/62, para. 13]

Ad hoc committee (under the ICSID Convention)

Compañia de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie générale des eaux) v. *Argentine Republic*

In its 2002 decision on annulment in the *CAA and Vivendi Universal* v. *Argentina* case, the *ad hoc* committee, in considering the relation between the breach of a contract and the breach of a treaty in the said instance, referred to article 3 finally adopted by the International Law Commission in 2001, which it considered to be "undoubtedly declaratory of general international law". The *ad hoc* committee further quoted passages of the commentary of the Commission to that provision:

> 95. As to the relation between breach of contract and breach of treaty in the present case, it must be stressed that Articles 3 and 5 of the bilateral investment treaty [Agreement between the Government of the Argentine Republic and the Government of the Republic of France for Reciprocal Protection and Promotion of Investments of 3 July 1991] do not relate directly to breach of a municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the bilateral investment treaty. The point is made clear in article 3 of the International Law Commission articles, which is entitled 'Characterization of an act of a State as internationally wrongful': …
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> 96. In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the bilateral investment treaty and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the bilateral investment treaty, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.

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[151] [17] ICSID, Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, para. 82, footnote 64, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 16, No. 1, 2001, p. 31.

97. The distinction between the role of international and municipal law in matters of international responsibility is stressed in the commentary to article 3 of the International Law Commission articles, which reads in relevant part as follows:

> (4) The International Court has often referred to and applied the principle. For example in the *Reparation for Injuries* case, it noted that "[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible … the Member cannot contend that this obligation is governed by municipal law." In the *ELSI* case, a Chamber of the Court emphasized this rule, stating that:
>
> > Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.
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> Conversely, as the Chamber explained:
>
> > … the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness … Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.
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> …
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> (7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, *e.g.* by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.[152] [18]

[A/62/62, para. 14]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Técnicas Medioambientales Tecmed S.A. v. *United Mexican States*

In its 2003 award, the arbitral tribunal constituted to hear the *Técnicas Medioambientales Tecmed S.A.* v. *Mexico* case, having stated that the fact "[t]hat the actions of the Respondent are legitimate or lawful or in compliance with the law from the standpoint of the Respondent's domestic laws does not mean that they conform to the Agreement

[152] [18] ICSID, *Ad Hoc* Committee, Case No. ARB/97/3, Decision of Annulment, 3 July 2002 (footnotes omitted), reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 19, No. 1, 2004, pp. 127–129.

[at issue in the case] or to international law", quoted the following passage taken from the commentary to article 3 finally adopted by the International Law Commission:

An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law—even if, under that law, the State was actually bound to act in that way.[153] [19]

[A/62/62, para. 15]

International arbitral tribunal (under the ICSID Convention)

SGS Société générale de Surveillance S.A. v. *Islamic Republic of Pakistan*

In its 2003 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *SGS* v. *Pakistan* case, in the context of its interpretation of article 11 of the bilateral investment agreement between Switzerland and Pakistan,[154] [20] quoted *in extenso* the passage of the decision on annulment in the *Vivendi* case, reproduced [on pages 38–39] above, to illustrate the statement according to which "[a]s a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders".[155] [21] The tribunal thus considered that claims under the bilateral investment treaty at issue and contract claims were reasonably distinct in principle.

[A/62/62, para. 16]

SGS Société générale de Surveillance S.A. v. *Republic of the Philippines*

In its 2004 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *SGS* v. *Philippines* case, in the context of its interpretation of article X(2) of the bilateral investment treaty between Switzerland and the Philippines,[156] [22] recognized the "well established" principle that "a violation of a contract entered into by a State with an investor of another State is not, by itself, a violation of international law", as it was affirmed in the *Vivendi* case and relied upon by the tribunal in the *SGS* v. *Pakistan* case (see passages quoted [on pages 38–39] above). It noted however, that, contrary to the *ad hoc* committee in the *Vivendi* case, the tribunal in the *SGS* v. *Pakistan* case, as the tribunal in this case, needed to "consider whether a clause in a treaty requiring a State to observe specific domestic commitments has effect in international law". In this respect, it considered that "it might do so, as the International Law Commission observed in its commentary to article 3

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[153] [19] ICSID, Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 120 (unofficial English translation of the Spanish original). The quoted passage is taken from paragraph (1) of the International Law Commission's commentary to article 3 (*Yearbook of the International Law Commission, 2001,* vol. II (Part Two), para. 77).

[154] [20] That provision stipulated that "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party".

[155] [21] ICSID, Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003, para. 147, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 18, No. 1, 2003, pp. 352–355.

[156] [22] That provision, similar to article 11 of the Switzerland-Pakistan bilateral investment treaty referred to above, stipulated that "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party".

of the International Law Commission articles on responsibility of States for internationally wrongful acts", adding that "the question is essentially one of interpretation, and does not seem to be determined by any presumption".[157] 23

[A/62/62, para. 17]

Noble Ventures, Inc. v. *Romania*

In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc.* v. *Romania* case, in the context of its interpretation of article II(2)(*c*) of the bilateral investment treaty at issue, noted that the distinction between municipal law and international law as two separate legal systems was reflected, *inter alia*, in article 3 finally adopted by the International Law Commission in 2001:

> … The Tribunal recalls the well established rule of general international law that in normal circumstances *per se* a breach of a contract by the State does not give rise to direct international responsibility on the part of the State. This derives from the clear distinction between municipal law on the one hand and international law on the other, two separate legal systems (or orders) the second of which treats the rules contained in the first as facts, as is reflected in *inter alia* Article Three of the International Law Commission's Articles on State Responsibility adopted in 2001.[158] 24

[A/62/62, para. 18]

Permanent Court of Arbitration (under UNCITRAL Rules)

Hulley Enterprises Limited v. *The Russian Federation, Yukos Universal Limited* v. *The Russian Federation and Veteran Petroleum Limited* v. *The Russian Federation*

In its interim award on jurisdiction and admissibility in *Hulley Enterprises Limited* v. *The Russian Federation*,[159] 24 *Yukos Universal Limited* v. *The Russian Federation*[160] 25 and *Veteran Petroleum Limited* v. *The Russian Federation*,[161] 26 the arbitral tribunal, as part of its consideration of the relationship between international and domestic law in the treaty context, accepted an expert opinion, submitted by James Crawford, which cited articles 3 and 32 in support of the proposition that there existed "a strong presumption of the separation of international from national law".[162] 27

[A/68/72, para. 24]

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[157] 23 ICSID, Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, para. 122 and footnote 54. The tribunal was referring more particularly to paragraph (7) of the commentary to article 3, mentioning the possibility that "the provisions of internal law are actually incorporated in some form, conditionally or unconditionally, into [the international] standard".

[158] 24 ICSID, Case No. ARB/01/11, Award, 12 October 2005, para. 53.

[159] 24 PCA, Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009.

[160] 25 *Ibid*., *Yukos Universal Limited* v. *The Russian Federation*, Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009.

[161] 26 *Ibid*., *Veteran Petroleum Limited* v. *The Russian Federation*, Case No. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009.

[162] 27 See footnotes [159] 24, [160] 25 and [161] 26 above, para. 316.

Ad hoc committee (under the ICSID Convention)

Helnan International Hotels A/S v. *Arab Republic of Egypt*

The *ad hoc* committee constituted to consider the Application for Annulment of the Award rendered in the *Helnan International Hotels A/S* v. *Arab Republic of Egypt* case relied upon article 3 in finding that "a decision by a municipal court … could not preclude the international tribunal from coming to another conclusion applying international law".[163] 28

[A/68/72, para. 25]

Total S.A. v. *Argentine Republic*

The arbitral tribunal in *Total S.A.* v. *Argentine Republic* referred to article 3 as a restatement of the "general principle of customary international law according to which, for the purpose of State responsibility for the commission of an internationally wrongful act, the characterization of an act as lawful under the State's law is irrelevant".[164] 29

[A/68/72, para. 26]

International arbitral tribunal

Claimant v. *The Slovak Republic*

The arbitral tribunal constituted to hear the *Claimant* v. *The Slovak Republic* case referred to article 3 in support of the assertion that, even where municipal law may be relevant to the merits, it was "not the 'governing' law, but it constitute[d] a factual circumstance to be considered for ascertaining whether the host State committed a breach of its international duties in the enforcement of its own law".[165] 30

[A/68/72, para. 27]

International arbitral tribunal (under the ICSID Convention)

[*El Paso Energy International Company* v. *The Argentine Republic*

The arbitral tribunal in *El Paso Energy International Company* v. *The Argentine Republic* referred to articles 1 and 3 of the State responsibility articles in determining that "the primary governing law in this case is the BIT, supplemented by international law to which the BIT itself makes reference in various provisions".[166] 16

[See A/68/72, footnote 23 and para. 18]]

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[163] 28 ICSID, Case No. ARB/05/19, Decision of the *Ad Hoc* Committee, 14 June 2010, para. 51, footnote 48.

[164] 29 ICSID, Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 40, footnote 21.

[165] 30 *Ad hoc* Arbitration, Award, 5 March 2011, para. 197, footnote 217 (citing ICSID, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal* v. *The Argentine Republic,* Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 94 and footnotes (commenting on article 3)).

[166] [16 See footnote [56] 16, para. 130.]

EDF International S.A., et al. v. *Argentine Republic*

In its award, the arbitral tribunal in *EDF International S.A., et al.* v. *Argentine Republic* referred to article 3 in support of the assertion that "the legality of the Respondent's acts under national law does not determine their lawfulness under international legal principles".[167] 31

[A/68/72, para. 28]

Iberdrola Energía S.A. v. *The Republic of Guatemala*

The arbitral tribunal in *Iberdrola Energía S.A.* v. *The Republic of Guatemala* referred to article 3 in agreeing that "the legality of the conduct of a State under its domestic law does not necessarily lead to the legality of such conduct under international law".[168] 32

[A/68/72, para. 29]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Luigiterzo Bosca v. *Lithuania*

The arbitral tribunal in *Luigiterzo Bosca* v. *Lithuania* relied on article 3 to explain that it "ha[d] to base its conclusions on the substantive provisions of that Agreement [Between the Government of the Republic of Lithuania and the Government of the Italian Republic on the Promotion and Protection of Investments of 1994]".[169] 26

[A/71/80, para. 24]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

The Rompetrol Group N.V. v. *Romania*

The arbitral tribunal in *The Rompetrol Group N.V.* v. *Romania* cited article 3 and the commentary thereto when outlining

> two elementary propositions: first, that it is well established that a breach of local law injuring a foreigner does not, in and of itself, amount to a breach of international law; second, that the provisions or requirements of local law cannot be advanced as an excuse for non-compliance with an international obligation.[170] 27

[A/71/80, para. 25]

Convial Callao S.A. and CCI v. *Peru*

In *Convial Callao S.A. and CCI* v. *Peru*, the arbitral tribunal cited article 3 when it indicated that:

> Es un principio bien establecido del derecho internacional, que se trate de la responsabilidad internacional del Estado o de la validez de normas o de figuras jurídicas de derecho interno en derecho

[167] 31 ICSID, Case No. ARB/03/23, Award, 11 June 2012, paras. 906–907.

[168] 32 ICSID, Case No. ARB/09/5, Award, 17 August 2012, para. 367, footnote 354.

[169] 26 PCA, Case No. 2011–05, Award, 17 May 2013, para. 199.

[170] 27 See note [17] 5 above, para. 174, footnote 299.

internacional, que este último es independiente del primero cuando se trata de analizar la validez y el alcance internacionales del derecho interno o de los comportamientos estatales de carácter interno. Así, en el terreno de la responsabilidad, la violación de derecho interno no significa necesariamente que el derecho internacional resulte violado, y en el terreno de la validez de normas y figuras jurídicas internas en el derecho internacional, tampoco significa que aquellas gocen de plena validez en el derecho internacional y sean oponibles a terceros Estados.[171] 28

[A/71/80, para. 26]

Inter-American Court of Human Rights

Case of the Ituango Massacres v. *Colombia*

In *Case of the Ituango Massacres* v. *Colombia*, the Inter-American Court of Human Rights, in an order regarding compliance of the State with its previous judgment, referred to the State responsibility articles in conjunction with the principle codified in article 27 of the Vienna Convention on the Law of Treaties that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[172] 29

[A/71/80, para. 27]

European Court of Human Rights

Anchugov and Gladkov v. *Russia*

In *Anchugov and Gladkov* v. *Russia*, the European Court of Human Rights referred to article 3 and excerpts of the commentary thereto as relevant international law.[173] 30

[A/71/80, para. 28]

Permanent Court of Arbitration (under UNCITRAL Rules)

ECE Projektmanagement v. *The Czech Republic*

The arbitral tribunal, in *ECE Projektmanagement* v. *The Czech Republic*, noted that the principle that an unlawful act under domestic law does not necessarily mean that the act was unlawful under international law

forms part of the more general principle, recognised in Article 27 of the Vienna Convention on the Law of Treaties, and more generally in Article 3 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts, that the characterisation of a given act as internationally wrongful is independent of its characterisation as lawful under the internal law of a State.[174] 31

The arbitral tribunal further noted that, "[a]s indicated in the ILC's Commentary, the principle embodies two elements", first that only a breach of an international obligation can be characterized as internationally wrongful, and second, that a State cannot escape

[171] 28 ICSID, Case No. ARB/10/2, Final Award, 21 May 2013, para. 405, footnote 427 (footnotes omitted).

[172] 29 IACHR, Order, 21 May 2013, para. 27, footnote 20 (quoting article 27 of the Vienna Convention on the Law of Treaties).

[173] 30 ECHR, First Section, Application No. 11157/04, Judgment, 4 July 2013, para 37.

[174] 31 PCA, Case No. 2010–5, Award, 19 September 2013, para. 4.749.

that characterization as internationally wrongful "by pleading that its conduct conforms to the provisions of its internal law".[175] [32]

[A/71/80, para. 29]

Inter-American Court of Human Rights

Gutiérrez and Family v. *Argentina*

In *Gutiérrez and Family* v. *Argentina*, the Inter-American Court of Human Rights cited article 3 when "reiterat[ing] that, in cases such as this one, it must rule on the conformity of the State's actions with the American Convention".[176] [33]

[A/71/80, para. 30]

Rights and guarantees of children in the context of migration and/or in need of international protection

In its advisory opinion on *Rights and guarantees of children in the context of migration and/or in need of international protection*, the Inter-American Court of Human Rights, citing article 3, stated that its mandate "consists, essentially, in the interpretation and application of the American Convention or other treaties for which it has jurisdiction, in order to determine … the international responsibility of the State under international law".[177] [34]

[A/71/80, para. 31]

International arbitral tribunal (under the ICSID Convention)

Perenco Ecuador Ltd. v. *Ecuador*

In *Perenco Ecuador Ltd.* v. *Ecuador*, the arbitral tribunal noted, on the basis of the "well-established principle" recognized in article 3, that international law prevails in case of conflict with internal law.[178] [35] It further noted that

> under well-established principles of international law, as codified in Article 3 of the ILC Articles on State Responsibility, the fact that a law has been declared constitutional by the local courts, even by the highest court of the land, is not dispositive of whether it was in conformity with international law.[179] [36]

[A/71/80, para. 32]

Vigotop Limited v. *Hungary*

In *Vigotop Limited* v. *Hungary*, the arbitral tribunal, referring to article 3, agreed with the claimant's submission that "even though a finding that the termination violated the

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[175] [32] *Ibid*., para. 4.750 (quoting para. (1) of the commentary to article 3).

[176] [33] See note [112] 22 above, footnote 242.

[177] [34] IACHR, Advisory Opinion, 19 August 2014, footnote 52 (footnotes omitted).

[178] [35] ICSID, Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, para. 534.

[179] [36] *Ibid*., para. 583.

terms of the Concession Contract or provisions of Hungarian law may be relevant to its expropriation analysis, such a finding is neither necessary nor sufficient to conclude that Article 4 of the Treaty was violated".[180] 37

[A/71/80, para. 33]

International Court of Justice

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

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, the International Court of Justice noted that

in either of these situations [of showing that genocide as defined in the Genocide Convention has been committed], the Court applies the rules of general international law on the responsibility of States for internationally wrongful acts. Specifically, Article 3 of the ILC Articles on State Responsibility, which reflects a rule of customary law, states that '[t]he characterization of an act of a State as internationally wrongful is governed by international law'.[181] 38

[A/71/80, para. 34]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Crystallex International Corporation v. *Bolivarian Republic of Venezuela*

In *Crystallex International Corporation* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal cited article 3 when noting that "[a]s is well-established in investment treaty jurisprudence, treaty and contract claims are distinct issues".[182] 21

[A/74/83, p. 8]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Vestey Group Limited Ltd. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Vestey Group Limited Ltd.* v. *Bolivarian Republic of Venezuela* decided "not [to] consider the provisions of the Land Law in assessing [applicant's] ownership over allegedly expropriated land", noting that this was also in line with article 3 of the State responsibility articles as a "cornerstone rule of international law".[183] 22

[A/74/83, p. 8]

[180] 37 ICSID, Case No. ARB/11/22, Award, 1 October 2014, para. 327.

[181] 38 ICJ, Judgment of 3 February 2015, para. 128.

[182] 21 ICSID, (Additional Facility), Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 474, citing *Compañía de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentina Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 95–96.

[183] 22 ICSID, Case No. ARB/06/4, Award, 15 April 2016, para. 254 and footnote 234.

Permanent Court of Arbitration (under UNCITRAL Rules)

Flemingo DutyFree Shop Private Limited v. *The Republic of Poland*

In *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland*, the arbitral tribunal cited article 3 to emphasize that "the circumstance that an entity is not considered a State organ under domestic law does not prevent that entity from being considered as such under international law for State responsibility purposes".[184] [23]

[A/74/83, p. 8]

International arbitral tribunal (under the ICSID Convention)

Pac Rim Casado Llc v. *Republic of El Salvador*

In *Pac Rim Casado Llc* v. *Republic of El Salvador*, the arbitral tribunal, citing article 3, noted that "[i]t is well established that a State cannot justify the non-observance of its international obligations in an international arbitration by invoking provisions of its domestic law".[185] [24]

[A/74/83, p. 8]

Ad hoc committee (under the ICSID Convention)

Venezuela Holdings BV and ors v. *Venezuela*

In *Venezuela Holdings BV and ors* v. *Venezuela*, the *ad hoc* committee constituted to decide on the annulment of the award referred to the commentary to article 3 of the State responsibility when stating that it seemed "obvious that in an appropriate case the resolution of a disputed issue under international law can itself entail the application of national law, simply because that is what the international rule requires".[186] [25]

[A/74/83, p. 9]

Arbitration Institute of the Stockholm Chamber of Commerce

SunReserve Luxco Holdings S.R.L. v. *Italy*

The arbitral tribunal in *SunReserve Luxco Holdings S.R.L.* v. *Italy* considered that article 3 of the State responsibility articles and article 27 of the Vienna Convention on the Law of Treaties "codify the principles that a State cannot invoke its domestic law to either (i) influence or affect the characterization of an internationally wrongful act; or (ii) justify its failure to perform a treaty obligation".[187] [20]

[A/77/74, p. 8]

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[184] [23] PCA, Award, IIC 883 (2016), 12 August 2016, para. 433.

[185] [24] ICSID, Case No. ARB/09/12, Award, 14 October 2016, para. 5.62.

[186] [25] ICSID, Case No. ARB/07/27, Decision on annulment, 9 March 2017, paras. 161 and 181.

[187] [20] SCC, Case No. 132/2016, Final Award, 25 March 2020, para. 982.

International arbitral tribunal (under the ICSID Convention)

Addiko Bank AG and Addiko Bank d.d. v. *Republic of Croatia*

In *Addiko Bank AG and Addiko Bank d.d.* v. *Republic of Croatia*, the arbitral tribunal analysed the role of domestic law and whether investments had to be carried out under Croatian law to qualify for protection under the investment treaty. The tribunal recalled that in the decision on annulment in *Azurix* v. *Argentine Republic*, the committee had used article 3 and its commentary as the framework for a similar analysis, under which "'internal law is relevant to the question of international responsibility', but 'this is because the rule of international law makes it relevant'", particularly when the provisions of internal law "'are actually incorporated in some form, conditionally or unconditionally, into that standard', but international law remains the governing law of the dispute".[188] 21

[A/77/74, p. 8]

Court of Justice of the European Union

European Commission v. *Hungary*

In *European Commission* v. *Hungary*, the Grand Chamber of the Court of Justice of the European Union referred to article 3,

> which codif[ies] customary international law and [is] applicable to the Union, the characterization of an act of a State as being 'internationally wrongful' is governed solely by international law. Consequently, that characterization cannot be affected by any characterization of the same act that might be made under [European Union] law.[189] 22

[A/77/74, p. 8]

International arbitral tribunal (under the ICSID Convention)

BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. *Kingdom of Spain*

In *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH* v. *Kingdom of Spain*, the arbitral tribunal referred to article 3 in stating that, "[i]n an international forum such as the present one, a host State may not rely on its domestic law as a ground for non-fulfilment of its international obligations".[190] 23

[A/77/74, p. 8]

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[188] 21 ICSID, Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU *Acquis*, 12 June 2020, para. 263, citing *Azurix Corp.* v. *Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment, 1 September 2009, para. 149.

[189] 22 CJEU, Grand Chamber, Case No. C-66/18, Judgment, 6 October 2020, para. 88.

[190] 23 ICSID, Case No. ARB/15/16, Award, 25 January 2021, para. 569 (*a*).

International arbitral tribunal (under the ICSID Additional Facility Rules)

América Móvil S.A.B. de C.V. v. *Colombia*

The arbitral tribunal in *América Móvil S.A.B. de C.V.* v. *Colombia* noted that "it is undisputable … that international law does not permit States to shield themselves behind their domestic law in order to evade their responsibility under international law, since international law excludes the possibility of the international lawfulness of the conduct of a State being assessed on the basis of domestic law", a "fundamental principle" that was codified in article 27 of the Vienna Convention on the Law of Treaties and article 3 of the State responsibility articles.[191] 24 Furthermore, the arbitral tribunal noted that "referring to Colombian law to determine the existence of a right to non-reversion clearly does not violate the principle codified in article 3 of the articles on State responsibility, which prevent a State from using its internal law to absolve itself of its international responsibility".[192] 25

[A/77/74, p. 8]

International arbitral tribunal (under the ICSID Convention)

Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. *Argentine Republic*

In *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft* v. *Argentine Republic*, the arbitral tribunal quoted article 3,[193] 26 going on to explain "[t]hat a treaty claim remains governed by treaty law does not mean, however, that domestic law is wholly irrelevant for the determination of compliance with, or liability under, a BIT, including the BIT governing the present dispute". The tribunal noted that an investment treaty "may expressly refer to domestic law" for the determination of questions such as the investor's nationality "or compliance with domestic law under an in-accordance-with-host-State-law clause", as "certain elements of a treaty can only be determined by recourse to domestic law (such as whether an investor has title to a certain asset or what the treatment afforded under domestic law is for purposes of assessing compliance with a national treatment provision)".[194] 27

[A/77/74, p. 9]

[191] 24 ICSID, Case No. ARB(AF)/16/5, Award, 7 May 2021, para. 417.

[192] 25 *Ibid*., para. 422.

[193] 26 ICSID, Case No. ARB/14/32, Award, 5 November 2021, para. 315.

[194] 27 *Ibid*., para. 316.

Chapter II

ATTRIBUTION OF CONDUCT TO A STATE

Commentary

(1) In accordance with article 2, one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. Chapter II defines the circumstances in which such attribution is justified, *i.e.* when conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.

(2) In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, *i.e.* as agents of the State.[195] 92

(3) As a corollary, the conduct of private persons is not as such attributable to the State. This was established, for example, in the *Tellini* case of 1923. The Council of the League of Nations referred to a Special Commission of Jurists certain questions arising from an incident between Italy and Greece.[196] 93 This involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. In reply to question five, the Commission stated that:

> The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.[197] 94

(4) The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual

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[195] 92 See, *e.g.*, I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), pp. 132–166; D. D. Caron, "The basis of responsibility: attribution and other transsubstantive rules", *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. Magraw, eds. (Irvington-on-Hudson, N.Y., Transnational, 1998), p. 109; L. Condorelli, "L'imputation à l'État d'un fait internationalement illicite : solutions classiques et nouvelles tendances", *Recueil des cours … , 1984–VI* (Dordrecht, Martinus Nijhoff, 1988), vol. 189, p. 9; H. Dipla, *La responsabilité de l'État pour violation des droits de l'homme: problèmes d'imputation* (Paris, Pedone, 1994); A. V. Freeman, "Responsibility of States for unlawful acts of their armed forces", *Recueil des cours … , 1955–II* (Leiden, Sijthoff, 1956), vol. 88, p. 261; and F. Przetacznik, "The international responsibility of States for the unauthorized acts of their organs", *Sri Lanka Journal of International Law*, vol. 1 (June 1989), p. 151.

[196] 93 League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1349.

[197] 94 *Ibid.*, 5th Year, No. 4 (April 1924), p. 524. See also the *Janes* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 82 (1925).

causality. As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.[198] 95 In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.

(5) The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. Thus the Head of State or Government or the minister of foreign affairs is regarded as having authority to represent the State without any need to produce full powers.[199] 96 Such rules have nothing to do with attribution for the purposes of State responsibility. In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.[200] 97 Thus the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government.

(6) In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (*e.g.* the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.[201] 98 Conduct engaged in by organs of the State in excess of their competence may also be attributed to the State under international law, whatever the position may be under internal law.[202] 99

(7) The purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. In internal law, it is common for the "State" to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under

[198] 95 See *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above).

[199] 96 See articles 7, 8, 46 and 47 of the 1969 Vienna Convention.

[200] 97 The point was emphasized, in the context of federal States, in *LaGrand* (footnote [150] 91 above). It is not of course limited to federal States. See further article 5 and commentary.

[201] 98 See paragraph (11) of the commentary to article 4; see also article 5 and commentary.

[202] 99 See article 7 and commentary.

internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.

(8) Chapter II consists of eight articles. Article 4 states the basic rule attributing to the State the conduct of its organs. Article 5 deals with conduct of entities empowered to exercise the governmental authority of a State, and article 6 deals with the special case where an organ of one State is placed at the disposal of another State and empowered to exercise the governmental authority of that State. Article 7 makes it clear that the conduct of organs or entities empowered to exercise governmental authority is attributable to the State even if it was carried out outside the authority of the organ or person concerned or contrary to instructions. Articles 8 to 11 then deal with certain additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State in international law. Article 8 deals with conduct carried out on the instructions of a State organ or under its direction or control. Article 9 deals with certain conduct involving elements of governmental authority, carried out in the absence of the official authorities. Article 10 concerns the special case of responsibility in defined circumstances for the conduct of insurrectional movements. Article 11 deals with conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own.

(9) These rules are cumulative but they are also limitative. In the absence of a specific undertaking or guarantee (which would be a *lex specialis*[203] [100]), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter. As the Iran-United States Claims Tribunal has affirmed, “in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State”.[204] [101] This follows already from the provisions of article 2.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Tribunal for the Former Yugoslavia

Prosecutor v. *Tihomir Blaškić (“Lasva Valley”)*

In its 1997 judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997 in the *Blaškić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia considered the situation in which, following the issue of a binding order of the Tribunal to a State for the production of documents necessary for trial, “a State official who holds evidence in his official capacity, having been requested by his authorities to surrender it to the International Tribunal … refuses

[203] [100] See article 55 and commentary.

[204] [101] *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, Iran–U.S. C.T.R., vol. 17 , p. 92, at pp. 101–102 (1987).

to do so, and the central authorities [do] not have the legal or factual means available to enforce the International Tribunal's request".[205] 25 The Appeals Chamber observed that

> in this scenario, the State official, in spite of the instructions received from his Government, is deliberately obstructing international criminal proceedings, thus jeopardizing the essential function of the International Tribunal: dispensation of justice. It will then be for the Trial Chamber to determine whether or not also to call to account the State; the Trial Chamber will have to decide whether or not to make a judicial finding of the State's failure to comply with article 29 (on the basis of article 11 of the International Law Commission's draft articles on State responsibility) and ask the President of the International Tribunal to forward it to the Security Council.[206] 26

[A/62/62, para. 19]

World Trade Organization panel

United States—Certain Country of Origin Labelling (COOL) Requirements

The panel in *United States—Certain Country of Origin Labelling (COOL) Requirements* observed that the "relevant provisions" of the State responsibility articles are consistent with the notion that acts or omissions attributable to a WTO member are "in the usual case, the acts or omissions of the organs of the state, including those of the executive branch".[207] 33

[A/68/72, para. 30]

European Court of Human Rights

Kotov v. *Russia*

In *Kotov* v. *Russia*, the European Court of Human Rights referred to the commentary to Chapter II in describing the law relevant to the attribution of international responsibility to States.[208] 34

[A/68/72, para. 31]

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[205] 25 ICTY, Appeals Chamber, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95–14, 29 October 1997, para. 51.

[206] 26 *Ibid.* Draft article 11, as adopted by the International Law Commission on first reading, was deleted on second reading on the understanding that its "negative formulation" rendered it "unnecessary" in the codification of State responsibility (*Yearbook … 1998*, vol. II (Part Two), p. 85, para. 419). However, the principles reflected in that provision are referred to in paragraphs (3) and (4) of the introductory commentary to chapter II of the articles finally adopted in 2001 (see *Yearbook of the International Law Commission, 2001,* vol. II (Part Two), para. 77). The text of draft article 11 adopted on first reading was the following:

Article 11

Conduct of persons not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

[207] 33 WTO, Panel Reports, WT/DS384/R and WT/DS386/R, 18 November 2011, para. 7.16, footnote 41.

[208] 34 See footnote [16] 14 above, para. 30 (citing paragraph (6) of the commentary to Chapter II).

Permanent Court of Arbitration (under UNCITRAL Rules)

Hulley Enterprises Limited (Cyprus) v. *The Russian Federation*

In *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation*, the arbitral tribunal noted

[t]he ILC Articles on State Responsibility are in point. … Chapter II, 'Attribution of Conduct to a State,' in its introductory commentary, observes that, 'the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, *i.e.*, as agents of the State'.[209] 39

[A/71/80, para. 35]

International arbitral tribunal (under the ICSID Convention) and *Ad Hoc* Committee (under the ICSID Convention)

Tulip Real Estate and Development Netherlands B.V. v. *Republic of Turkey*

In *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey*, the arbitral tribunal "accept[ed] that the ILC Articles constitute a codification of customary international law with respect to the issue of attribution of conduct to the State and apply to the present dispute".[210] 40 The *ad hoc* committee subsequently constituted to decide upon an application to annul the award in the case, noted that "[i]nternational law contains rules on attribution which the ILC codified and developed in Chapter II of its Articles on State Responsibility (Articles 4–11)".[211] 41

[A/71/80, para. 36]

European Court of Human Rights

Tagayeva and Others v. *Russia*

In *Tagayeva and Others* v. *Russia*, the European Court of Human Rights took note of the State responsibility articles, in particular of the principle stated in paragraph 3 of the commentary to chapter II, when indicating that "the conduct of private persons is not as such attributable to the State". As such, "human rights violations committed by private persons are outside of the Court's competence *ratione personae*".[212] 42

[A/71/80, para. 37]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mr. Kristian Almås and Mr. Geir Almås v. *The Republic of Poland*

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås* v. *The Republic of Poland* cited the commentary to Chapter II of the State responsibility when stating that

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[209] 39 See footnote [19] 7 above, para. 1466.

[210] 40 ICSID, Case No. ARB/11/28, Award, 10 March 2014, para. 281. (See also footnote [128] 16 above.)

[211] 41 See footnote [115] 25 above, para. 184.

[212] 42 ECHR, First Section, Application No. 26562, Decision, 9 June 2015, para. 581.

"ANR [the Polish Agricultural Property Agency] does not meet the criteria usually applied to determine whether an entity is a *de facto* State organ".[213] [26]

[A/74/83, p. 9]

International arbitral tribunal (under the ICSID Convention)

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, noted that it

> does not have to decide whether CVG Bauxilum's conduct is attributable to Respondent under the ILC Draft Articles and whether a breach of contract could give rise to Respondent's liability under international law in light of CVG Bauxilum's State-granted monopoly over the supply of bauxite in Venezuela.[214] [27]

[A/74/83, p. 9]

Masdar Solar & Wind Cooperatief U.A. v. *Kingdom of Spain*

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* characterized resolution 56/83 of 12 December 2001, containing the State responsibility articles, as "as a statement of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which is applicable by analogy to the responsibility of States towards private parties".[215] [28]

[A/74/83, p. 9]

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia* observed that

> the ILC Articles are the relevant rules on attribution that are widely considered to reflect international law. They concern the responsibility of States for their internationally wrongful acts, given the existence of a primary rule establishing an obligation. These principles of attribution do not operate to attach responsibility for 'non-wrongful acts' for which the State is assumed to have knowledge.[216] [29]

The tribunal also noted that

> the rules of attribution under international law as codified in the ILC Articles do not operate to define the content of primary obligations, the breach of which gives rise to responsibility. Rather, the

[213] [26] PCA, Case No. 2015–13, Award, 27 June 2016, para. 210 (original emphasis).

[214] [27] ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para. 536.

[215] [28] ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 167.

[216] [29] ICSID, Case No. ARB/12/39, Award, 26 July 2018, paras. 779 and 804.

rules concern the responsibility of States for their internationally wrongful acts. It follows that the rules of attribution cannot be applied to create primary obligations for a State under a contract.[217] [30]

[A/74/83, p. 9]

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal "determine[d] the issues of attribution by reference to Articles 4, 5, 8 and 11 of the ILC's Articles on State Responsibility, being declaratory of customary international law, as argued by the Parties".[218] [31]

[A/74/83, p. 10]

[217] [30] *Ibid*., para. 856.

[218] [31] ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 9.49 (see also para. 9.90).

Article 4. Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Commentary

(1) Paragraph 1 of article 4 states the first principle of attribution for the purposes of State responsibility in international law—that the conduct of an organ of the State is attributable to that State. The reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.

(2) Certain acts of individuals or entities which do not have the status of organs of the State may be attributed to the State in international law, and these cases are dealt with in later articles of this chapter. But the rule is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, under article 8 conduct which is authorized by the State, so as to be attributable to it, must have been authorized by an organ of the State, either directly or indirectly.

(3) That the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions. In the *Moses* case, for example, a decision of a Mexico-United States Mixed Claims Commission, Umpire Lieber said: "An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority".[219] [102] There have been many statements of the principle since then.[220] [103]

(4) The replies by Governments to the Preparatory Committee for the 1930 Hague Conference[221] [104] were unanimously of the view that the actions or omissions of organs of the State must be attributed to it. The Third Committee of the Conference adopted unanimously on first reading an article 1, which provided that international responsibility shall be incurred by a State as a consequence of "any failure on the part of its organs to carry out the international obligations of the State".[222] [105]

(5) The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international

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[219] [102] Moore, *History and Digest*, vol. III, p. 3127, at p. 3129 (1871).

[220] [103] See, *e.g.*, *Claims of Italian Nationals* (footnote [35] 41 above); *Salvador Commercial Company*, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455, at p. 477 (1902); and *Finnish Shipowners (Great Britain/Finland)*, *ibid*., vol. III (Sales No. 1949.V.2), p. 1479, at p. 1501 (1934).

[221] [104] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote [147] 88 above), pp. 25, 41 and 52; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points; Replies of Canada and the United States of America* (document C.75(*a*) M.69(*a*).1929.V), pp. 2–3 and 6.

[222] [105] Reproduced in *Yearbook … 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

responsibility. It goes without saying that there is no category of organs specially designated for the commission of internationally wrongful acts, and virtually any State organ may be the author of such an act. The diversity of international obligations does not permit any general distinction between organs which can commit internationally wrongful acts and those which cannot. This is reflected in the closing words of paragraph 1, which clearly reflect the rule of international law in the matter.

(6) Thus the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs. Thus, in the *Salvador Commercial Company* case, the tribunal said that:

> a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.[223] [106]

ICJ has also confirmed the rule in categorical terms. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it said:

> According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule … is of a customary character.[224] [107]

In that case the Court was principally concerned with decisions of State courts, but the same principle applies to legislative and executive acts.[225] [108] As PCIJ said in *Certain German Interests in Polish Upper Silesia (Merits):*

> From the standpoint of International Law and of the Court which is its organ, municipal laws … express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.[226] [109]

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[223] [106] See *Salvador Commercial Company* (footnote [220] 103 above). See also *Chattin* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 282, at pp. 285–286 (1927); and *Dispute concerning the interpretation of article 79 of the Treaty of Peace*, *ibid*., vol. XIII (Sales No. 64.V.3), p. 389, at p. 438 (1955).

[224] [107] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (footnote [50] 56 above), p. 87, para. 62, referring to the draft articles on State responsibility, article 6, now embodied in article 4.

[225] [108] As to legislative acts, see, *e.g.*, *German Settlers in Poland* (footnote [86] 65 above), at pp. 35–36; *Treatment of Polish Nationals* (footnote [134] 75 above), at pp. 24–25; *Phosphates in Morocco* (footnote [28] 34 above), at pp. 25–26; and *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 176, at pp. 193–194. As to executive acts, see, *e.g.*, *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above); and *ELSI* (footnote [144] 85 above). As to judicial acts, see, *e.g.*, *"Lotus"* (footnote [135] 76 above); *Jurisdiction of the Courts of Danzig* (footnote [141] 82 above); and *Ambatielos, Merits, Judgment, I.C.J. Reports 1953,* p. 10, at pp. 21–22. In some cases, the conduct in question may involve both executive and judicial acts; see, *e.g.*, *Application of the Convention of 1902* (footnote [142] 83 above), at p. 65.

[226] [109] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, at p. 19.

Thus article 4 covers organs, whether they exercise "legislative, executive, judicial or any other functions". This language allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character. Moreover, the term is one of extension, not limitation, as is made clear by the words "or any other functions".[227] 110 It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as *acta iure gestionis*. Of course, the breach by a State of a contract does not as such entail a breach of international law.[228] 111 Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4,[229] 112 and it might in certain circumstances amount to an internationally wrongful act.[230] 113

(7) Nor is any distinction made at the level of principle between the acts of "superior" and "subordinate" officials, provided they are acting in their official capacity. This is expressed in the phrase "whatever position it holds in the organization of the State" in article 4. No doubt lower-level officials may have a more restricted scope of activity and they may not be able to make final decisions. But conduct carried out by them in their official capacity is nonetheless attributable to the State for the purposes of article 4. Mixed commissions after the Second World War often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officers, and consistently treated the acts of such persons as attributable to the State.[231] 114

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units. This principle has long been recognized. For example, the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise* case said:

For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State

[227] 110 These functions might involve, *e.g.* the giving of administrative guidance to the private sector. Whether such guidance involves a breach of an international obligation may be an issue, but as "guidance" it is clearly attributable to the State. See, *e.g.*, GATT, Report of the Panel, Japan–Trade in Semi-conductors, 24 March 1988, paras. 110–111; and WTO, Report of the Panel, Japan–Measures affecting Consumer Photographic Film and Paper (WT/DS44/R), paras. 10.12–10.16.

[228] 111 See article 3 and commentary.

[229] 112 See, *e.g.*, the decisions of the European Court of Human Rights in *Swedish Engine Drivers' Union* v. *Sweden*, *Eur. Court H.R., Series A, No. 20* (1976), at p. 14; and *Schmidt and Dahlström* v. *Sweden*, *ibid.*, *Series A, No. 21* (1976), at p. 15.

[230] 113 The irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the Commission (see *Yearbook … 1998*, vol. II (Part Two), p. 17, para. 35).

[231] 114 See, *e.g.*, the *Currie* case, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 21, at p. 24 (1954); *Dispute concerning the interpretation of article 79* (footnote [223] 106 above), at pp. 431–432; and *Mossé* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 486, at pp. 492–493 (1953). For earlier decisions, see the *Roper* case, *ibid.*, vol. IV (Sales No. 1951.V.1), p. 145 (1927); *Massey*, *ibid.*, p. 155 (1927); *Way*, *ibid.*, p. 391, at p. 400 (1928); and *Baldwin*, *ibid.*, vol. VI (Sales No. 1955.V.3), p. 328 (1933). Cf. the consideration of the requisition of a plant by the Mayor of Palermo in *ELSI* (footnote [144] 85 above), *e.g.* at p. 50, para. 70.

is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.[232] 115

This principle was strongly supported during the preparatory work for the 1930 Hague Conference. Governments were expressly asked whether the State became responsible as a result of "[a]cts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, *etc.*)". All answered in the affirmative.[233] 116

(9) It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations. The award in the "*Montijo*" case is the starting point for a consistent series of decisions to this effect.[234] 117 The French-Mexican Claims Commission in the *Pellat* case reaffirmed "the principle of the international responsibility … of a federal State for all the acts of its separate States which give rise to claims by foreign States" and noted specially that such responsibility "… cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law".[235] 118 That rule has since been consistently applied. Thus, for example, in the *LaGrand* case, ICJ said:

> Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.[236] 119

(10) The reasons for this position are reinforced by the fact that federal States vary widely in their structure and distribution of powers, and that in most cases the constituent units have no separate international legal personality of their own (however limited), nor any treaty-making power. In those cases where the constituent unit of a federation is able to enter into international agreements on its own account,[237] 120 the other party may well have agreed to limit itself to

[232] 115 UNRIAA, vol. XIII (Sales No. 64.V.3), p. 150, at p. 161 (1951). For earlier decisions, see, *e.g.*, the *Pieri Dominique and Co.* case, *ibid.*, vol. X (Sales No. 60.V.4), p. 139, at p. 156 (1905).

[233] 116 League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote [147] 88 above), p. 90; *Supplement to Vol. III …* (footnote [221] 104 above), pp. 3 and 18.

[234] 117 See Moore, *History and Digest*, vol. II, p. 1440, at p. 1440 (1874). See also *De Brissot and others*, Moore, *History and Digest*, vol. III, pp. 2967, at pp. 2970–2971 (1855); *Pieri Dominique and Co.* (footnote [232] 115 above), at pp. 156–157; *Davy* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 467, at p. 468 (1903); *Janes* case (footnote [197] 94 above); *Swinney*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 101 (1925); *Quintanilla*, *ibid.*, p. 101, at p. 103 (1925); *Youmans*, *ibid.*, p. 110, at p. 116 (1925); *Mallén*, *ibid.*, p. 173, at p. 177 (1927); *Venable*, *ibid.*, p. 218, at p. 230 (1925); and *Tribolet*, *ibid.*, p. 598, at p. 601 (1925).

[235] 118 UNRIAA, vol. V (Sales No. 1952.V.3), p. 534, at p. 536 (1929).

[236] 119 *LaGrand, Provisional Measures* (footnote [150] 91 above). See also *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 466, at p. 495, para. 81.

[237] 120 See, *e.g.*, articles 56, paragraph 3, and 172, paragraph 3, of the Constitution of the Swiss Confederation of 18 April 1999.

recourse against the constituent unit in the event of a breach. In that case the matter will not involve the responsibility of the federal State and will fall outside the scope of the present articles. Another possibility is that the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty.[238] [121] This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty and in the matters which the treaty covers. It has effect by virtue of the *lex specialis* principle, dealt with in article 55.

(11) Paragraph 2 explains the relevance of internal law in determining the status of a State organ. Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law will not itself perform the task of classification. Even if it does so, the term "organ" used in internal law may have a special meaning, and not the very broad meaning it has under article 4. For example, under some legal systems the term "government" refers only to bodies at the highest level such as the Head of State and the cabinet of ministers. In others, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the State.[239] [122] Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word "includes" in paragraph 2.

(12) The term "person or entity" is used in article 4, paragraph 2, as well as in articles 5 and 7. It is used in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, *etc*. The term "entity" is used in a similar sense[240] [123] in the draft articles on jurisdictional immunities of States and their property, adopted in 1991.

(13) Although the principle stated in article 4 is clear and undoubted, difficulties can arise in its application. A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct of a State organ and purely private conduct has been clearly drawn in international arbitral decisions. For example, the award of the Mexico-United States General Claims Commission in the *Mallén* case involved, first, the act of an official acting in a private capacity and, secondly, another act committed by the same official in his official capacity, although in an abusive way.[241] [124] The latter action was, and the former was not, held attributable to the

[238] [121] See, *e.g.*, article 34 of the Convention for the Protection of the World Cultural and Natural Heritage.

[239] [122] See, *e.g.*, the *Church of Scientology* case, Germany, Federal Supreme Court, Judgment of 26 September 1978, case No. *VI ZR* 267/76, *Neue Juristische Wochenschrift*, No. 21 (May 1979), p. 1101; ILR, vol. 65, p. 193; and *Propend Finance Pty Ltd.* v. *Sing*, England, Court of Appeal, ILR, vol. 111, p. 611 (1997). These were State immunity cases, but the same principle applies in the field of State responsibility.

[240] [123] See *Yearbook … 1991*, vol. II (Part Two), pp. 14–18.

[241] [124] *Mallén* (footnote [234] 117 above), at p. 175.

State. The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where "the act had no connexion with the official function and was, in fact, merely the act of a private individual".[242] [125] The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.[243] [126] In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Iran-United States Claims Tribunal

International Technical Products Corporation and ITP Export Corporation, its wholly-owned subsidiary v. *Islamic Republic of Iran and its agencies, The Islamic Republic Iranian Air Force, and the Ministry of National Defense, acting for the Civil Aviation Organization*

In its 1985 award in the *International Technical Products Corp.* v. *Islamic Republic of Iran* case, the Tribunal, in examining the issue whether Bank Tejarat, a Government-owned bank with a separate legal personality, had acted in its capacity as a State organ in taking control of a building owned by the claimants, referred in a footnote to the text of draft article 5 provisionally adopted by the International Law Commission[244] [27] and the commentary thereto.[245] [28] The Tribunal found, with regard to the taking of property, that Bank Tejarat had not acted on instructions of the Government of the Islamic Republic of Iran or otherwise performed governmental functions.

[A/62/62, para. 20]

Yeager v. *Islamic Republic of Iran*

In its 1987 award in the *Yeager* v. *Islamic Republic of Iran* case, the tribunal, in determining whether its jurisdiction over the case was precluded by paragraph 11 of the Dec-

[242] [125] UNRIAA, vol. V (Sales No. 1952.V.3), p. 516, at p. 531 (1929). See also the *Bensley* case in Moore, *History and Digest*, vol. III, p. 3018 (1850) ("a wanton trespass … under no color of official proceedings, and without any connection with his official duties"); and the *Castelain* case *ibid.*, p. 2999 (1880). See further article 7 and commentary.

[243] [126] See paragraph (7) of the commentary to article 7.

[244] [27] This provision was amended and incorporated in article 4 finally adopted by the International Law Commission in 2001. The text of draft article 5 provisionally adopted by the Commission was the following:

Article 5

Attribution to the State of the conduct of its organs

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[245] [28] IUSCT, Award No. 196–302–3, 24 October 1985, Iran-United States Claims Tribunal Reports, vol. 9 (1985-II), p. 238, footnote 35.

laration of the Government of Algeria of 19 January 1981 (also known as the "General Declaration"),[246] [29] referred in the following terms to draft articles 5 *et seq*. of the articles provisionally adopted by the International Law Commission:

… the exclusion [referred to in paragraph 11(*d*) of the General Declaration] would only apply to acts "which are not an act of the Government of Iran". The Claimant relies on acts which he contends are attributable to the Government of Iran. Acts "attributable" to a State are considered "acts of State". *See* draft articles on State responsibility adopted by the International Law Commission on first reading ("ILC-Draft", articles 5 *et seq*., *1980 Yearbook International Law Commission*, vol. II, Part 2, at pp. 30–34, United Nations doc. A/CN.4/SER.A/1980/Add.1 (Part 2). Therefore, paragraph 11 of the General Declaration does not effectively restrict the Tribunal's jurisdiction over this Claim.[247] [30]

[A/62/62, para. 21]

International arbitral tribunal (under the ICSID Convention)

Amco Asia Corporation and Others v. *Republic of Indonesia*

In its 1984 award on the merits, the arbitral tribunal constituted to hear the *Amco Indonesia Corporation and Others* v. *Indonesia* case considered that draft article 5 provisionally adopted by the International Law Commission (as well as articles 3 and 10 provisionally adopted), which it quoted *in extenso*, constituted "an expression of accepted principles of international law". The relevant passage is reproduced [on page 25] above.

[A/62/62, para. 22]

International Tribunal for the Former Yugoslavia

Prosecutor v. *Tihomir Blaškić ("Lasva Valley")*

In its 1997 decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum* in the *Blaškić* case, Trial Chamber II, in examining the question whether individuals could be subject to orders (more specifically *subpoenae duces tecum*) from the International Tribunal, quoted in a footnote, without any comment, but together with draft article 1,[248] [31] the text of draft article 5 adopted by the International Law Commission on first reading.[249] [32]

[A/62/62, para. 23]

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[246] [29] Under paragraph 11 of the Declaration of the Government of Algeria of 19 January 1981, the United States of America agreed to "bar and preclude prosecution against Iran of any pending or future claim … arising out of events occurring before the date of this Declaration related to … (*d*) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran".

[247] [30] IUSCT, Award No. 324–10199–1, 2 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), pp. 100–101, para. 33. (See also footnote [204] 101 above.)

[248] [31] See footnote [54] 10 and accompanying text above.)

[249] [32] ICTY, Trial Chamber II, *Decision on the Objection of the Republic of Croatia to the Issuance of Supoenae Duces Tecum*, Case No. IT-95–14, 18 July 1997, para. 95, footnote 156. The text of draft article 5 adopted by the International Law Commission on first reading (see *Yearbook … 1996*, vol. II (Part Two), para. 65) was identical to that of draft article 5 provisionally adopted (see footnote [244] 27 above).

Prosecutor v. *Tihomir Blaškić ("Lasva Valley")*

The decision of the *Blaškić* case (above) was later submitted, on request by the Republic of Croatia, to review by the Appeals Chamber.[250] 33 In its 1997 judgement on this matter in the *Blaškić* case, the Appeals Chamber observed that Croatia had submitted in its brief that the International Tribunal could not issue binding orders to State organs acting in their official capacity. The Appeals Chamber noted that, in support of this contention, Croatia had argued, *inter alia*,

> that such a power, if there is one, would be in conflict with well-established principles of international law, in particular the principle, restated in article 5 of the draft articles on State responsibility adopted by the International Law Commission, whereby the conduct of any State organ must be considered as an act of the State concerned, with the consequence that any internationally wrongful act of a State official entails the international responsibility of the State as such and not that of the official.[251] 34

In dealing with this issue, the Appeals Chamber did not refer explicitly to the draft articles adopted by the International Law Commission. It observed nevertheless that:

> It is well known that customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions.[252] 35

The Appeals Chamber considered that there were no provisions or principles of the Statute of the International Tribunal which justified a departure from this well-established rule of international law and concluded that, both under general international law and the Statute itself, judges or a trial chamber could not address binding orders to State officials.[253] 36

[A/62/62, para. 24]

International Court of Justice

Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights

In its 1999 advisory opinion on the *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*, the Court considered that the principle embodied in draft article 6 adopted by the International Law Commission on first reading[254] 37 was "of a customary character" and constituted "a well-established rule of international law":

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[250] 33 See footnote [52] 8 above.

[251] 34 ICTY, Appeals Chamber, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No. IT-95–14, 29 October 1997, para. 39. Croatia was referring to draft article 5 adopted by the International Law Commission on first reading.

[252] 35 *Ibid*., para. 41.

[253] 36 *Ibid*., paras. 42–43.

[254] 37 This provision was amended and incorporated in article 4 finally adopted by the International Law Commission in 2001. The text of draft article 6 adopted on first reading was the following:

According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in article 6 of the draft articles on State responsibility adopted provisionally by the International Law Commission on first reading … [255] 38

[A/62/62, para. 25]

International Tribunal for the Former Yugoslavia

Prosecutor v. *Duško Tadić*

In its 1999 judgement in the *Tadić* case, the Appeals Chamber, in commenting on the 1986 judgment of the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* case, took note of the further statement made by the International Court of Justice in its 1999 advisory opinion quoted above in the following terms:

It would … seem that in *Nicaragua* the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as 'a well-established rule of international law' [see the advisory opinion on the *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights* quoted […] above], that a State incurs responsibility for acts in breach of international obligations committed by individuals who enjoy the status of organs under the national law of that State or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority.[256] 39

In a footnote to this passage, the Appeals Chamber observed that "customary law on the matter is correctly restated in article 5 of the draft articles on State responsibility adopted in its first reading by the United Nations International Law Commission".[257] 40 It further quoted the text of that provision, as well as of the corresponding draft article provisionally adopted by the Commission's Drafting Committee in 1998,[258] 41 which it considered "even clearer" in that regard.

[A/62/62, para. 26]

Article 6

Irrelevance of the position of the organ in the organization of the State

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[255] 38 See footnote [50] 56 above, para. 62.

[256] 39 ICTY, Appeals Chamber, Case No. IT-94–1-A, 15 July 1999, para. 109 (footnotes omitted).

[257] 40 *Ibid*., para. 109, footnote 129.

[258] 41 The text of draft article 4 adopted by the Drafting Committee in 1998 was the following:

1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State. (*Yearbook … 2000*, vol. II (Part Two), p. 65.)

World Trade Organization panel

Korea—Measures Affecting Government Procurement

In its 2000 report on *Korea—Measures Affecting Government Procurement*, the panel rejected the Republic of Korea's argument according to which it would not be responsible for the answer given by its ministry of commerce to questions asked by the United States during the negotiations for the Republic of Korea's accession to the Agreement on Government Procurement based on the fact that the issues dealt with were under the competence of the ministry of transportation. The panel considered that its finding according to which such answer was given on behalf of the whole Korean Government was "supported by the long established international law principles of State responsibility" by which "the actions and even omissions of State organs acting in that capacity are attributable to the State as such and engage its responsibility under international law". In a footnote, the panel then referred to draft articles 5 and 6, and the commentary thereto, as adopted by the International Law Commission on first reading, which it considered applicable to the context of negotiations of a multilateral agreement such as the Agreement on Government Procurement.[259] [42]

[A/62/62, para. 27]

Ad hoc arbitral tribunal (MERCOSUR)

Import Prohibition of Remolded Tires from Uruguay

In its 2002 award, the *ad hoc* arbitral tribunal of MERCOSUR constituted to hear the dispute presented by Uruguay against Brazil on the import prohibition of remolded tires from Uruguay, in response to Brazil's argument according to which some of the relevant norms, rulings, reports and other acts from administrative organs were opinions from various sectors of the public administration that had no specific competence regarding the regulation of the country's foreign trade policy, invoked the articles finally adopted by the International Law Commission in 2001, and more particularly article 4, which it considered a codification of customary law:

> It should be recalled that the draft articles of the International Law Commission on State responsibility, that codify customary law, state that, under international law, the conduct of any State organ shall be considered an act of that State, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State (see article 4 of the draft articles on State responsibility, adopted by the International Law Commission at its fifty-third session …)[260] [43]

The tribunal thus considered that all the said acts of the administration were attributable to Brazil.

[A/62/62, para. 28]

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[259] [42] WTO, Panel Report, WT/DS163/R, 1 May 2000, para. 6.5, footnote 683.

[260] [43] MERCOSUR, *Ad Hoc* Tribunal, 9 January 2002, p. 39 (unofficial English translation).

Ad Hoc Committee (under the ICSID Convention)

Compañia de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie générale des eaux) v. *Argentine Republic*

In its 2002 decision on annulment in the *CAA and Vivendi Universal* v. *Argentina* case, the ICSID *ad hoc* committee referred to the text and commentaries to articles 2, 4 and 12 finally adopted by the International Law Commission. The relevant passage is quoted [on page 26 above]. Later in the same decision, when commenting on a passage of the challenged award which "appears to imply that conduct of Tucumán carried out in the purported exercise of its rights as a party to the Concession Contract could not, a priori, have breached" the bilateral investment treaty concerned, the *ad hoc* committee again referred to the commentaries to articles 4 and 12 in support of the statement that "there is no basis for such an assumption: whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights."[261] 44

[A/62/62, para. 29]

International arbitral tribunal (under ICSID Additional Facility Rules)

Mondev International Ltd. v. *United States of America*

In its 2002 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *Mondev* v. *United States* case noted that the United States had not disputed that the decisions of the City of Boston, the Boston Redevelopment Authority and the Massachusetts courts that were at stake in that case were attributable to it for purposes of NAFTA. In a footnote, it referred to article 105 of NAFTA and to article 4 of the International Law Commission articles as finally adopted in 2001.[262] 45

[A/62/62, para. 30]

ADF Group Inc. v. United States of America

In its 2003 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *ADF Group Inc.* v. *United States* case, after having found that an "existing non-conforming measure" of a "Party" saved by article 1108(1) of NAFTA might "not only be a federal government measure but also a state or provincial government measure and even a measure of a local government",[263] 46 considered that its view was "in line with

[261] 44 ICSID, *Ad Hoc* Committee, Case No. ARB/97/3, Decision of Annulment, 3 July 2002, para. 110 and footnote 78, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 19, No. 1, 2004, p. 134. The committee referred, in particular, to paragraph (6) of the commentary to article 4 and paragraphs (9) and (10) of the commentary to article 12 (see *Yearbook of the International Law Commission, 2001,* vol. II (Part Two), para. 77).

[262] 45 NAFTA (ICSID Additional Facility), Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 67, footnote 12, reproduced in *International Law Reports*, vol. 125, p. 130.

[263] 46 NAFTA (ICSID Additional Facility), Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 165, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 18, No. 1, 2003, pp. 269–270. As noted by the tribunal, the pertinent part of article 1108(1) of NAFTA states that articles 1102, 1103, 1106 and 1107 of the agreement do not apply to any "existing non-conforming measure" main-

the established rule of customary international law", formulated in article 4 finally adopted by the International Law Commission in 2001, that "acts of all its governmental organs and entities and territorial units are attributable to the State and that that State as a subject of international law is, accordingly, responsible for the acts of all its organs and territorial units".[264] 47 The tribunal then quoted the text of that provision and observed in a footnote, with reference to the commentary thereto, that

> [t]he international customary law status of the rule is recognized in, *inter alia*, *Differences relating to immunity from legal process of a special rapporteur of the Commission on Human Rights* … [see page 65 above]. See also paras. (8), (9) and (10) of the commentary of the International Law Commission [to article 4], stressing that "the principle in article 4 applies equally to organs of the central government and to those of regional or local units" (para. (8) ([*Yearbook of the International Law Commission, 2001,* vol. II (Part Two)],, para. 77)), and that "[i]t does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations. (para. (9) [*ibid.*]).[265] 48

[A/62/62, para. 31]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Técnicas Medioambientales Tecmed S.A. v. *United Mexican States*

In its 2003 award, the arbitral tribunal constituted to hear the *Técnicas Medioambientales Tecmed S.A.* v. *United Mexican States* case referred to the text of article 4 finally adopted by the International Law Commission in 2001, as well as to the commentary thereto, in support of its finding that actions by the National Ecology Institute of Mexico, an entity of the United Mexican States in charge of designing Mexican ecological and environmental policy and of concentrating the issuance of all environmental regulations and standards, were attributable to Mexico.[266] 49

[A/62/62, para. 32]

International arbitral tribunal

Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. *United Kingdom)*

In its 2003 final award, the arbitral tribunal established to resolve the dispute between Ireland and the United Kingdom concerning access to information under article 9 of the OSPAR Convention explained that its proposed interpretation of article 9(1) of the Convention was "consistent with contemporary principles of State responsibility", and in par-

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tained "by (i) a Party at the federal level, as set out in its Schedule to Annex I or III, [or] (ii) a state or province, for two years after the date of entry into force of [NAFTA] … , or (iii) a local government".

[264] 47 *Ibid.*, p. 270, para. 166.

[265] 48 *Ibid.*, p. 270, para. 166, footnote 161.

[266] 49 ICSID, Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 120 (unofficial English translation of the Spanish original).

ticular with the principle according to which "[a] State is internationally responsible for the acts of its organs".[267] [50] It added that:

> … this submission is confirmed by articles 4 and 5 of the International Law Commission draft articles on the responsibility of States for internationally wrongful acts, providing for rules of attribution of certain acts to States. On the international plane, acts of "competent authorities" are considered to be attributable to the State as long as such authorities fall within the notion of state organs or entities that are empowered to exercise elements of the government authority. As the International Court of Justice stated in the *LaGrand* case, "the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be".[268] [51]

[A/62/62, para. 33]

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2003 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *CMS Transmission Company* v. *Argentina* case stated, with reference to article 4 as finally adopted by the International Law Commission in 2001:

> Insofar as the international liability of Argentina under the Treaty is concerned, it also does not matter whether some actions were taken by the judiciary and others by an administrative agency, the executive or the legislative branch of the State. Article 4 of the articles on State responsibility adopted by the International Law Commission is abundantly clear on this point. Unless a specific reservation is made in accordance with articles 19, 20 and 23 of the Vienna Convention on the Law of Treaties, the responsibility of the State can be engaged and the fact that some actions were taken by the judiciary and others by other State institutions does not necessarily make them separate disputes. No such reservation took place in connection with the [relevant bilateral investment treaty].[269] [52]

[A/62/62, para. 34]

Tokios Tokelés v. *Ukraine*

In its 2004 decision on jurisdiction, the arbitral tribunal constituted to hear the *Tokios Tokelés* v. *Ukraine* case found evidence of extensive negotiations between the claimant and municipal government authorities and, having recalled that "actions of municipal authorities are attributable to the central government", quoted in a footnote part of the text of article 4 finally adopted by the International Law Commission in 2001.[270] [53]

[A/62/62, para. 35]

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[267] [50] Decision, 2 July 2003, para. 144, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), p. 100.

[268] [51] *Ibid*., para. 145 (footnotes omitted), p. 101.

[269] [52] ICSID, Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, para. 108 (footnote omitted).

[270] [53] ICSID, Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 102 and footnote 113, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 20, No. 1, 2005, p. 242. In the original of the decision, the tribunal inadvertently indicates that the text it quotes, which is actually taken from article 4, belongs to article 17 of the International Law Commission articles.

World Trade Organization panel

United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services

In its 2004 report on *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, the panel considered that its finding according to which the actions taken by the United States International Trade Commission (an agency of the United States Government) pursuant to its responsibilities and powers were attributable to the United States was supported by article 4 and its commentary, as finally adopted by the International Law Commission in 2001, which it considered to be a "provision … not binding as such, but … reflect[ing] customary principles of international law concerning attribution":

> 6.128. This conclusion is supported by the International Law Commission articles on the responsibility for States for internationally wrongful acts. Article 4, which is based on the principle of the unity of the State, defines generally the circumstances in which certain conduct is attributable to a State. This provision is not binding as such, but does reflect customary principles of international law concerning attribution. As the International Law Commission points out in its commentary on the articles on State responsibility, the rule that "the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions". As explained by the International Law Commission, the term "State organ" is to be understood in the most general sense. It extends to organs from any branch of the State, exercising legislative, executive, judicial or any other functions.[271] [54]

[A/62/62, para. 36]

International arbitral tribunal

Eureko B.V. v. *Republic of Poland*

In its 2005 partial award, the arbitral tribunal constituted to hear the *Eureko BV* v. *Republic of Poland* case, in considering whether actions undertaken by the Minister of the State Treasury with respect to a shared purchase agreement with the claimant were attributable to Poland, observed that "it is now a well settled rule that the conduct of any State organ is considered an act of that State and that an organ includes any person or entity which has that status in accordance with the internal law of that State". It then quoted the text of article 4 finally adopted by the International Law Commission in 2001, which it considered "crystal clear" in that regard,[272] [55] and later referred to the commentary thereto.[273] [56]

[A/62/62, para. 37]

International arbitral tribunal (under the ICSID Convention)

Noble Ventures, Inc. v. *Romania*

In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc.* v. *Romania* case, in determining whether the acts of a Romanian "institution of public interest" (the State Ownership Fund, subsequently replaced by the Authority for Privatization and Management of the State Ownership), which were alleged to have constituted violations of the bilateral investment treaty at issue, were attributable to Romania, referred to

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[271] [54] WTO, Panel Report, WT/DS285/R, 10 November 2004, para. 6.128 (footnotes omitted).

[272] [55] See footnote [55] 11 above, paras. 127–128.

[273] [56] *Ibid.*, paras. 130–131. The arbitral tribunal referred in particular to paragraphs (6) and (7) of the commentary to article 4 (*Yearbook of the International Law Commission, 2001*, vol. II (Part Two), para. 77).

article 4 finally adopted by the International Law Commission in 2001, which it considered to lay down a "well-established rule":

As States are juridical persons, one always has to raise the question whether acts committed by natural persons who are allegedly in violation of international law are attributable to a State. The bilateral investment treaty does not provide any answer to this question. The rules of attribution can only be found in general international law which supplements the bilateral investment treaty in this respect. Regarding general international law on international responsibility, reference can be made to the draft articles on State responsibility as adopted on second reading in 2001 by the International Law Commission and as commended to the attention of Governments by the United Nations General Assembly in res. 56/83 of 12 December 2001 … While those draft articles are not binding, they are widely regarded as a codification of customary international law. The 2001 International Law Commission draft provides a whole set of rules concerning attribution. Article 4 of the 2001 International Law Commission draft lays down the well-established rule that the conduct of any State organ, being understood as including any person or entity which has that status in accordance with the internal law of the State, shall be considered an act of that State under international law. This rule concerns attribution of acts of so-called *de jure* organs which have been expressly entitled to act for the State within the limits of their competence.[274] [57]

Later in the award, in response to an argument by the respondent that a distinction should be drawn between attribution of governmental and commercial conduct, the latter not being attributable, the arbitral tribunal observed, with reference to the commentary of the International Law Commission to article 4, that

… in the context of responsibility, it is difficult to see why commercial acts, so called *acta iure gestionis*, should by definition not be attributable while governmental acts, so call *acta iure imperii*, should be attributable. The International Law Commission draft does not maintain or support such a distinction. Apart from the fact that there is no reason why one should not regard commercial acts as being in principle also attributable, it is difficult to define whether a particular act is governmental. There is a widespread consensus in international law, as in particular expressed in the discussions in the International Law Commission regarding attribution, that there is no common understanding in international law of what constitutes a governmental or public act. Otherwise there would not be a need for specified rules such as those enunciated by the International law Commission in its draft articles, according to which, in principle, a certain factual link between the State and the actor is required in order to attribute to the State acts of that actor.[275] [58]

[A/62/62, para. 38]

Jan de Nul NV and Dredging International NV v. *Arab Republic of Egypt*

In its 2006 decision on jurisdiction, the arbitral tribunal constituted to hear the *Jan de Nul NV and Dredging International NV* v. *Arab Republic of Egypt* case explained that, when assessing the merits of the dispute, it would rule on the issue of attribution under international law, especially by reference to the articles finally adopted by the International Law Commission in 2001 (more particularly articles 4 and 5), which it considered "a codification of customary international law". The tribunal briefly described the contents of the two provisions it intended to apply.[276] [59]

[A/62/62, para. 39]

[274] [57] ICSID, Case No. ARB/01/11, Award, 12 October 2005, para. 69.

[275] [58] *Ibid*., para. 82.

[276] [59] ICSID, Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, para. 89.

World Trade Organization panel

European Communities—Selected Customs Matters

In its 2006 report on *European Communities—Selected Customs Matters*, the panel noted that the European Communities had invoked article 4, paragraph 1, finally adopted by the International Law Commission in 2001 as a statement of "international law", to contradict the United States allegation according to which only executive authorities, but not judicial authorities, of the member States should be recognized as authorities of the Community when implementing community law for the purposes of complying with article X.3(*b*) of GATT 1994.[277] 60 According to the European Communities (EC):

> 4.706. The US arguments are … incompatible with principles of general international law regarding responsibility for wrongful acts. In this regard, the EC would refer to article 4(1) of the articles on responsibility of States for internationally wrongful acts elaborated by the International Law Commission.
>
> 4.707. It follows clearly from this provision that, when it comes to the acts of a State under international law, there is no distinction between acts of the legislative, executive and judicial organs. For this very same reason, it would seem unjustifiable to consider that only the executive authorities of the member States, but not the judicial authorities of the member States, can act as EC organs.
>
> 4.708. Similarly, it follows from the International Law Commission's articles on state responsibility that the responsibility for internationally wrongful acts extends not only to organs of the central government, but also to organs of territorial units. Accordingly, the EC has never contested that it is responsible in international law for the compliance by EC member States with the obligations of the EC under the WTO Agreements.[278] 61

The panel found that "the European Communities may comply with its obligations under Article X.3(*b*) of GATT 1994 through organs of its member States", on the basis of an interpretation of the terms of that provision. It further observed, in a footnote, that this finding also followed article 4 of the International Law Commission articles.[279] 62

[A/62/62, para. 40]

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[277] 60 Under that provision:

> Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

[278] 61 WTO, Panel Report, WT/DS315/R, 16 June 2006, paras. 4.706–4.708.

[279] 62 *Ibid.*, para. 7.552 and footnote 932. This aspect of the panel report was not reversed on appeals: see WTO, Appellate Body, *European Communities—Selected Customs Matters*, WT/DS315/AB/R, 13 November 2006.

International arbitral tribunal (under the ICSID Convention)

Azurix Corp. v. *Argentina Republic*

In its 2006 award, the arbitral tribunal constituted to hear the *Azurix Corp.* v. *Argentina* case observed that the claimant, in arguing that Argentina was responsible for the actions of the Argentine Province of Buenos Aires under the 1991 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America and customary international law, had referred in particular to "the responsibility of the State for acts of its organs under customary international law and [had] cite[d], as best evidence, articles 4 and 7 of the draft articles on responsibility of States for internationally wrongful acts of the International Law Commission".[280] 63 The tribunal considered, in this regard, that

> [t]he responsibility of States for acts of its organs and political subdivisions is well accepted under international law. The draft articles, as pointed out by the Claimant, are the best evidence of such acceptance and as such have been often referred to by international arbitral tribunals in investor-State arbitration.[281] 64

[A/62/62, para. 41]

International arbitral tribunal (under UNCITRAL Rules)

Grand River Enterprises Six Nations Ltd. et al. v. *United States*

In its 2006 decision on objections to jurisdiction, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA under the UNCITRAL rules to hear the *Grand River Enterprises Six Nations Ltd.* et al. v. *United States* case, having noted that the defendant acknowledged its responsibility under NAFTA for actions taken by states of the United States, referred in a footnote, *inter alia*, to the text and commentary to article 4 finally adopted by the International Law Commission in 2001.[282] 65

[A/62/62, para. 42]

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, in examining the question whether the massacres committed at Srebrenica (which it had found to be a crime of genocide within the meaning of articles II and III, paragraph (*a*), of the Genocide Convention) were attributable, in whole or in part, to the Respondent, considered the question whether those acts had been perpetrated by organs of the latter. The Court referred to article 4 finally adopted by the International Law Commission in 2001, stating that this question

[280] 63 ICSID, Case No. ARB/01/12, Award, 14 July 2006, para. 46.

[281] 64 *Ibid*., para. 50.

[282] 65 NAFTA, Decision on Objections to Jurisdiction, 20 July 2006, para. 1, footnote 1. The arbitral tribunal referred in particular to paragraph (4) of the commentary to article 4 (*Yearbook of the International Law Commission*, *2001*, vol. II (Part Two), para. 77).

relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility … . [283] 3

The Court thereafter applied this rule to the facts of the case. In that context, it observed *inter alia* that "[t]he expression 'State organ', as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (cf. ILC commentary to Art. 4, para. (1))".[284] 4 The Court concluded that "the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent's international responsibility"[285] 5 and it went on to consider the question of attribution of the Srebrenica genocide to the Respondent on the basis of direction or control (see [pages 144–146] below).

[A/62/62/Add.1, para. 2]

World Trade Organization panel

Brazil—Measures Affecting Imports of Retreaded Tyres

In its 2007 report, the panel in the *Brazil—Measures Affecting Imports of Retreaded Tyres* case, cited, in a footnote, article 4 of the State responsibility articles, in support of its finding that Brazilian domestic court rulings did not exonerate Brazil from its obligation to comply with the requirements of article XX of the General Agreement on Tariffs and Trade 1994.[286] 10

[A/65/76, para. 15]

World Trade Organization Appellate Body

United States—Measures Relating to Zeroing and Sunset Reviews, recourse to Article 21.5 of the DSU by Japan

In its 2009 report in the *United States—Measures Relating to Zeroing and Sunset Reviews* case, the WTO Appellate Body referred to article 4 of the State responsibility articles in support of its assertion that:

[i]rrespective of whether an act is defined as "ministerial" or otherwise under United States law, and irrespective of any discretion that the authority issuing such instructions or taking such action may have, the United States, as a Member of the WTO, is responsible for those acts in accordance with the covered agreements and international law.[287] 11

[A/65/76, para. 16]

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[283] 3 [ICJ, Judgment, *I.C.J. Reports 2007*, p. 43], para. 385.

[284] 4 *Ibid.*, para. 388.

[285] 5 *Ibid.*, para. 395.

[286] 10 WTO, Panel Report, WT/DS332/R, 12 June 2007, para. 7.305, footnote 1480.

[287] 11 WTO, Appellate Body, Case No. AB-2009–2, Report of the Appellate Body, 18 August 2009, para. 183 and footnote 466.

International arbitral tribunal (under the ICSID Convention)

Ioannis Kardassopoulos and Ron Fuchs v. *The Republic of Georgia*

The arbitral tribunal constituted to hear the *Ioannis Kardassopoulos and Ron Fuchs* v. *The Republic of Georgia* case determined that, although the tribunal invoked article 7 during the jurisdictional phase, articles 4, 5 and 11 were equally applicable to the dispute.[288] 36 The tribunal concluded that "there can be no real question in these arbitrations as to the attribution of any acts or omissions on the part of [the relevant entities] to the Respondent".[289] 37

[A/68/72, para. 32]

Ad hoc committee (under the ICSID Convention)

Helnan International Hotels A/S v. *Arab Republic of Egypt*

The *ad hoc* committee constituted to hear the annulment proceeding in the case of *Helnan International Hotels A/S* v. *Arab Republic of Egypt* referred to article 4 of the State responsibility articles in finding that: "the decision of a Government Minister, taken at the end of an administrative process … is one for which the State is undoubtedly responsible at international law, in the event that it breaches the international obligations of the State".[290] 38

[A/68/72, para. 33]

[International arbitral tribunal (under the ICSID Convention)

Gustav F W Hamester GmbH & Co KG v. *Republic of Ghana*

In its award, the arbitral tribunal constituted to hear the *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* case indicated that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[291] 56 Referring to articles 4, 5, and 8, the tribunal stated that such a link could result when

> the person performing the act is part of the State's organic structure (Article 4); or is utilising the State's specific governmental powers to perform such act, even if it is a separate entity (Article 5); or is acting under the effective control … of the State, even if it is a private or public party (Article 8).[292] 57

[See A/68/72, footnote 35 and para. 45]]

Alpha Projektholding GmbH v. *Ukraine*

The arbitral tribunal in *Alpha Projektholding GmbH* v. *Ukraine* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal concluded that the conduct of a "State organ … is clearly attributable to the State under Article 4(1) of the

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[288] 36 ICSID, Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, para. 274 (quoting articles 4, 5 and 11).

[289] 37 *Ibid*., paras. 274 and 280.

[290] 38 See footnote [163] 28 above, para. 51, footnote 47.

[291] [56 See footnote [105] 20 above, para. 172.]

[292] [57 *Ibid*.]

ILC Articles".[293] 39 The tribunal also relied upon the commentary to article 4 in finding that whether or not a State organ's conduct "was based on commercial or other reasons is irrelevant with respect to the question of attribution".[294] 40

[A/68/72, para. 34]

[World Trade Organization Appellate Body

United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China

In its report in the *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case, the Appellate Body considered whether the rules of attribution contained in the State responsibility articles are "relevant rules of international law applicable in the relations between the parties".[295] 64 The Appellate Body held that, "[t]o the extent that Articles 4, 5 and 8 of the ILC Articles concern[ed] the same subject matter as [a provision] of the SCM Agreement, they would be 'relevant' in the sense of the Vienna Convention [on the Law of Treaties]".[296] 65 The Appellate Body indicated that both the State responsibility articles and the SCM Agreement "set out rules relating to the question of attribution of conduct to a State", though it noted "certain differences" in their respective approach to attribution.[297] 66

Concerning whether the State responsibility articles are "rules of international law … applicable in the relations between the parties", the Appellate Body noted that "Articles 4, 5 and 8 are not binding *by virtue of* being part of an international treaty. However, insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties".[298] 67

[See A/68/72, paras. 50–51]]

International arbitral tribunal (under UNCITRAL Rules)

Sergei Paushok et al. v. *The Government of Mongolia*

The arbitral tribunal in the *Sergei Paushok et al.* v. *The Government of Mongolia* case referred to articles 4, 5 and 9 as constituting "international law rules of attribution" applicable to the dispute "which are generally considered as representing current customary international law".[299] 41 While noting that the State responsibility articles "do not contain a definition

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[293] 39 ICSID, Case No. ARB/07/16, Award, 8 November 2010, para. 401.

[294] 40 *Ibid*., para. 402.

[295] [64 See footnote [13] 11 above, paras. 307 *et seq*. (quoting the Vienna Convention on the Law of Treaties, 1963, art. 31(3)(*c*)).]

[296] [65 *Ibid*., para. 308.]

[297] [66 *Ibid*., para. 309.]

[298] [67 *Ibid*., para. 308; see below the text accompanying footnote [2156] 203 for discussion of the Appellate Body's consideration of whether articles 4, 5 and 8 of the State responsibility articles would "be superseded by … the SCM Agreement as *lex specialis* regarding attribution pursuant to Article 55 of the ILC Articles"; *ibid*., para. 314.]

[299] 41 Award on jurisdiction and liability, 28 April 2011, paras. 576 and 577.

of what constitutes an organ of the State",[300] 42 the tribunal pointed to the commentary to article 4 which indicates the activities covered by the article's reference to "State organ".[301] 43

The tribunal also indicated that the distinction between articles 4 and 5 was "of particular relevance in the determination of potential liability of the State".[302] 44

[A/68/72, paras. 35 and 36]

[*White Industries Australia Limited* v. *The Republic of India*

In its award, the arbitral tribunal in *White Industries Australia Limited* v. *The Republic of India* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal found that the claimant properly conceded that it was not relying on articles 4 or 5 as the entity in question was "patently[] not an organ of the state within the meaning of Article 4, nor [did] it exercise elements of Governmental authority within the meaning of Article 5."[303] 87

[See A/68/72, footnote 35 and para. 67]]

PERMANENT COURT OF ARBITRATION

Chevron Corporation and Texaco Petroleum Company v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* referred to the State responsibility articles and recalled that, "as a matter of international law, a State may be responsible for the conduct of its organs, including its judicial organs … ".[304] 45

[A/68/72, para. 37]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER UNCITRAL RULES)

Claimants v. *Slovak Republic*

The arbitral tribunal in *Claimants* v. *Slovak Republic*, indicated that "there are three possible bases for attribution of wrongful acts to a State. They are found in Articles 4, 5 and 8 of the Articles on State Responsibility of the International Law Commission … ".[305] 46 Upon consideration of article 4, Slovak law and the relevant factual circumstances, the tribunal determined that certain entities and individuals were State organs, "responsible for the actions they have performed in their official capacity in accordance with Article 4 of the ILC Articles",[306] 47 while others were not.[307] 48

[A/68/72, para. 38]

[300] 42 *Ibid*., para. 581.

[301] 43 *Ibid*., para. 582.

[302] 44 *Ibid*., para. 580.

[303] [87 Final Award, 30 November 2011, para. 8.1.2.]

[304] 45 PCA, Case No. 2009–23, First Interim Award on Interim Measures, 25 January 2012, para. [2.10.2].

[305] 46 Final Award, 23 April 2012, paras. 150–151.

[306] 47 *Ibid*., para. 152.

[307] 48 *Ibid*., paras. 155 and 163.

Permanent Court of Arbitration (under UNCITRAL Rules)

Ulysseas, Inc. v. *The Republic of Ecuador*

The arbitral tribunal constituted to hear the *Ulysseas, Inc.* v. *The Republic of Ecuador* case relied upon article 4 in determining that certain entities were not organs of the Ecuadorian State, notwithstanding that they were "part of the Ecuadorian public sector and [were] subject to a system of controls by the State in view of the public interests involved in their activity … ".[308] 49

[A/68/72, para. 39]

International arbitral tribunal (under the ICSID Convention)

Occidental Petroleum Corporation and Occidental Exploration and Production Company v. *The Republic of Ecuador*

The arbitral tribunal in *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *The Republic of Ecuador* noted that, "[u]nder international law, a State can be found to have discriminated either by law, regulation or decree. Article 4.1 of the Articles on Responsibility of States for Internationally Wrongful Acts … is controlling".[309] 50

[A/68/72, para. 40]

[*Bosh International, Inc.* v. *B & P Ltd. Foreign Investments Enterprise*

In its 2012 award, the arbitral tribunal constituted to hear the *Bosh International, Inc.* v. *B & P Ltd. Foreign Investments Enterprise* case referred to article 4 in its analysis of a claim brought under the relevant bilateral investment treaty umbrella clause. The tribunal concluded that the term "Party", as used in the umbrella clause, referred "to any situation where the Party is acting *qua* State", namely "where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility) … ".[310] 75

The tribunal also stated, in dictum, that it "could not agree that the [university in question] is a 'State organ' within the meaning of Article 4 of the ILC Articles".[311] 77

[See A/68/72, footnote 35 and para. 60]]

Inter-American Court of Human Rights

Castillo González et al. v. *Venezuela*

In its judgment in *Castillo González et al.* v. *Venezuela, the Inter-American Court of Human Rights* indicated that articles 2 and 4 constituted part of "the basic principle of the law on international State responsibility".[312] 51

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[308] 49 PCA, Final Award, 12 June 2012, paras. 135 and 126.

[309] 50 ICSID, Case No. ARB/06/11, Award, 5 October 2012, para. 559.

[310] [75 ICSID, Case No. ARB/08/11, Award, 25 October 2012, para. 246.]

[311] [77 *Ibid*., para. 163. For additional discussion regarding the tribunal's treatment of the University and the question of attribution, see below under article 5.]

[312] 51 See footnote [108] 51 (quoting articles 2 and 4 of the State responsibility articles).

The Court also referred to article 4 in finding that "it is for the Court to determine whether or not the actions of a State organ, such as those in charge of the investigations, constitute a wrongful international act … ".[313] 52

[A/68/72, paras. 41–42]

International arbitral tribunal (under the ICSID Convention)

Electrabel S.A. v. *The Republic of Hungary*

The arbitral tribunal constituted to hear the *Electrabel S.A.* v. *The Republic of Hungary* case determined that "[t]here is no question that the acts of the Hungarian Parliament are attributable to the Hungarian State, in accordance with Article 4 of the ILC Articles … ".[314] 53

[A/68/72, para. 43]

[*Teinver S.A., et al.* v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., et al.* v. *The Argentine Republic*, in its 2012 decision on jurisdiction, referred to articles 4, 5 and 8 as part of its consideration of whether the acts of certain labour unions were attributable to the Argentine Republic. As a result of the "fact-intensive nature of [the claimants'] allegations", the tribunal decided to postpone adjudication of the attribution issue until the merits phase.[315] 99 Nonetheless, the tribunal accepted the assertion of both parties "that article 8, and not articles 4 and 5, would be relevant to the analysis of the unions' conduct … ".[316] 100

[See A/68/72, footnote 35 and para. 73]]

Vannessa Ventures Ltd. v. *The Bolivarian Republic of Venezuela*

In its January 2013 award, the arbitral tribunal in *Vannessa Ventures Ltd.* v. *The Bolivarian Republic of Venezuela* cited the commentary to article 4 in support of the assertion that "[i]t is well established that, in order to amount to an expropriation under international law, it is necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt".[317] 54

[A/68/72, para. 44]

[313] 52 *Ibid*., para. 160, footnote 94 (citing article 4.1 of the State responsibility articles) (internal footnote omitted).

[314] 53 ICSID, Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.89. For an extended account of the tribunal's consideration of the State responsibility articles and the question of attribution under international law, see below p. 150.

[315] [99 ICSID, Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, para. 274.]

[316] [100 *Ibid*., para. 275.]

[317] 54 ICSID (Additional Facility), Case No. ARB/(AF)/04/6, Award, 16 January 2013, para. 209, note 209 (citing para. (6) of the commentary to article 4).

Permanent Court of Arbitration (under UNCITRAL Rules)

Chevron Corporation and Texaco Petroleum Corporation v. *The Republic of Ecuador*

In *Chevron Corporation and Texaco Petroleum Corporation* v. *The Republic of Ecuador*, the arbitral tribunal confirmed and restated its Third Order on Interim Measures,[318] [44] providing that

> as a matter of international law, a State may be responsible for the conduct of its organs, including its judicial organs, as expressed in Chapter II of Part One [of the State responsibility articles] … If it were established that any judgment made by an Ecuadorian court in the Lago Agrio Case was a breach of an obligation by the Respondent owed to the Claimants as a matter of international law, the Tribunal records that any loss arising from the enforcement of such judgment (within and without Ecuador) may be losses for which the Respondent would be responsible to the Claimants under international law, as expressed in Part Two of the International Law Commission's Articles on State Responsibility.[319] [45]

[A/71/80, para. 38]

International arbitral tribunal (under the ICSID Convention)

Mr Franck Charles Arif v. *Republic of Moldova*

The arbitral tribunal in *Mr Franck Charles Arif* v. *Republic of Moldova* found

> that as a matter of principle, in accordance with Article 4 of the ILC Articles on State Responsibility, court decisions can engage a State's responsibility, including for unlawful expropriation, without there being any requirement to exhaust local remedies (unless claims for denial of justice have been made).[320] [46]

[A/71/80, para. 39]

The Rompetrol Group N.V. v. *Romania*

The arbitral tribunal in *The Rompetrol Group N.V.* v. *Romania* referred to articles 4 and 7 when affirming that "there was no dispute that all of the authorities and agencies in question were at all material times organs of the Romanian State, and that their conduct was accordingly attributable to the Romanian State for the purposes of the law of State responsibility".[321] [47]

[A/71/80, para. 40]

TECO Guatemala Holdings LLC v. *Republic of Guatemala*

In *TECO Guatemala Holdings LLC* v. *Republic of Guatemala*, the arbitral tribunal acknowledged, citing the text of article 4, that "[t]he conduct of a state organ such as the CNEE [National Commission of Electric Energy] is indeed attributable to the State".[322] [48]

[A/71/80, para. 41]

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[318] [44] PCA, Case No. 2009–23, Third Order on Interim Measures, 28 January 2011, paras. 2–3.

[319] [45] PCA, Case No. 2009–23, Fourth Interim Award on Interim Measures, 7 February 2013, paras. 55 and 77.

[320] [46] ICSID, Case No. ARB/11/23, Award, 8 April 2013, para. 347.

[321] [47] See footnote 17 5 above, para. 173, footnote 298.

[322] [48] ICSID, Case No. ARB/10/23, Award, 19 December 2013, para. 479.

European Court of Human Rights

Jones and Others v. *the United Kingdom*

In *Jones and Others* v. *the United Kingdom*, the European Court of Human Rights referred to article 4 as relevant international law[323] 49 and stated that the State responsibility articles "for their part, provide for attribution of acts to a State, on the basis that they were carried out … by organs of the State as defined in Article 4".[324] 50

[A/71/80, para. 42]

International arbitral tribunal (under the ICSID Convention)

Renee Rose Levy de Levi v. *Republic of Peru*

The arbitral tribunal in *Renee Rose Levy de Levi* v. *Republic of Peru* considered it "important to reproduce Article 4(1) of the International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts".[325] 51

[A/71/80, para. 43]

Tulip Real Estate and Development Netherlands B.V. v. *Republic of Turkey*

In *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey*, the arbitral tribunal quoted article 4, paragraph 2, which establishes that an "organ includes any person or entity which has that status in accordance with the internal law of the State".[326] 52 The tribunal accepted the submission of the respondent "that there is no 'quasi-state' organ for the purposes of Art. 4".[327] 53

[A/71/80, para. 44]

Permanent Court of Arbitration (under UNCITRAL Rules)

Hulley Enterprises Limited (Cyprus) v. *The Russian Federation*

In *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation*, the arbitral tribunal stated that the respondent's argument that the acts of a State organ were not in breach of the Energy Charter Treaty because it was acting only in a commercial capacity "runs up … against the ILC Articles on State Responsibility". With reference to the text of article 4, the arbitral tribunal further explained that "[t]he commentary to this article specifies that '[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as "*acta iure gestionis*"'".[328] 54

[A/71/80, para. 45]

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[323] 49 ECHR, Fourth Section, Application Nos. 34356/06 and 40528/06, Judgment, 14 January 2014, para. 107.

[324] 50 *Ibid*., para. 207.

[325] 51 ICSID, Case No. ARB/10/17, Award, 26 February 2014, para. 157.

[326] 52 See footnote [210] 40 and [128] 16 above, para. 285 (quoting article 4).

[327] 53 *Ibid*., para. 288.

[328] 54 See footnote [19] 7 above, para. 1479 (quoting para. (6) of the commentary to article 4).

African Court on Human and Peoples' Rights

Lohé Issa Konaté v. *Burkina Faso*

The African Court on Human and Peoples' Rights in *Lohé Issa Konaté* v. *Burkina Faso* relied on article 4 as support for the finding that "the conduct of the Burkinabé courts fall[s] squarely on the Respondent State".[329] [55]

[A/71/80, para. 46]

European Court of Human Rights

Čikanović v. *Croatia*

In *Čikanović* v. *Croatia*, the European Court of Human Rights listed article 4 as relevant international law.[330] [56] In stating that "[m]unicipalities are public-law entities which exercise public authority and whose acts or failures to act, notwithstanding the extent of their autonomy *vis-à-vis* the central organs, can engage the responsibility of the State under the Convention", the Court referred to the State responsibility articles, in particular article 4, as reflecting customary international law.[331] [57]

[A/71/80, para. 47]

International arbitral tribunal (under the ICSID Convention)

Mr Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. *Romania*

The arbitral tribunal in *Mr Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation* v. *Romania* determined that "AVAS' [Authority for State Assets Recovery] acts under the Contract are attributable to the State under international law based on Article 4" of the State responsibility articles.[332] [58]

[A/71/80, para. 48]

Permanent Court of Arbitration (under UNCITRAL Rules)

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. *Government of Canada*

In *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.* v. *Government of Canada*, the arbitral tribunal indicated with regard to articles 4 and 5 that

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[329] [55] African Court on Human and Peoples' Rights, Application No. 004/2013, Judgment, 5 December 2014, para. 170, footnote 36 (quoting article 4).

[330] [56] ECHR, First Section, Application No. 27630/07, Judgment, 5 February 2015, para. 37.

[331] [57] *Ibid*., para. 53.

[332] [58] ICSID, Case No. ARB/10/13, Award, 2 March 2015, para. 323.

the ILC Articles quoted here are considered as statements of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which are applicable by analogy to the responsibility of States towards private parties.[333] 59

The tribunal observed that "[a] body that exercises impartial judgment, however, can well be an organ of the state; Article 4 of the ILC Articles, just quoted, specifically includes those exercising 'judicial' functions".[334] 60 The tribunal further quoted the commentary to article 4 to explain that "a state cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law".[335] 61

[A/71/80, para. 49]

International arbitral tribunal (under the ICSID Convention)

Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. *The Argentine Republic*

The arbitral tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *The Argentine Republic* cited article 4 of the State responsibility articles in concluding that the relevant wrongful acts, as "actions done by state organs, were clearly attributable to the Argentine State".[336] 62

[A/71/80, para. 50]

Bernhard von Pezold and others v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal stated that "[i]t is clear under Article 4 of the ILC Articles and the Commentary thereon that organs of State include, for the purposes of attribution, the President, Ministers, provincial government, legislature, Central Bank, defence forces and the police, *inter alia*, as argued by the Claimants", and that "[r]esponsibility for the actions of these State organs is unlimited provided the act is performed in an official capacity (*i.e.* it includes *ultra vires* acts performed in an official capacity). Only acts performed in a purely private capacity would not be attributable".[337] 63 The tribunal also noted that "indirect liability for the acts of others can also occur under Article 4—for example, the failure to stop someone doing something that violated an obligation. It does not matter that a third party actually undertook the action, if a State organ (such as the police) was aware of it and did nothing to prevent it".[338] 64

[A/71/80, para. 51]

[333] 59 PCA, Case No. 2009–04, Award on Jurisdiction and Liability, 17 March 2015, paras. 306–307.

[334] 60 *Ibid*., para. 308.

[335] 61 *Ibid*., para. 315 (quoting para. (11) of the commentary to article 4).

[336] 62 See footnote [63] 16 above, para. 25, footnote 14.

[337] 63 See footnote [114] 24 above, paras. 443–444.

[338] 64 *Ibid*., para. 445.

Inter-American Court of Human Rights

Case of Ruano Torres et. Al. v. *El Salvador*

In the *Case of Ruano Torres et. Al.* v. *El Salvador*, the Inter-American Court of Human Rights referred to the State responsibility articles in support of its assertion that

> en el diseño institucional de El Salvador, la Unidad de Defensoría Pública se inserta dentro de la Procuraduría General de la República y puede ser asimilada a un órgano del Estado, por lo que su conducta debe ser considerada como un acto del Estado en el sentido que le otorga el proyecto de artículos sobre responsabilidad del Estado por hechos internacionalmente ilícitos realizados por auxiliares de la administración de justicia.[339] 65

[A/71/80, para. 52]

International arbitral tribunal (under the ICSID Convention)

Adel A Hamadi Al Tamimi v. *Sultanate of Oman*

The arbitral tribunal in *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman* referenced article 4 as support for the assertion that the attribution of the conduct of State organs to the State is "broadly supported in international law".[340] 66

[A/71/80, para. 53]

Electrabel S.A. v. *Republic of Hungary*

In *Electrabel S.A.* v. *Republic of Hungary*, the arbitral tribunal referred to article 4 in finding that there was "no question that the acts of the Hungarian Parliament [were] attributable to the Hungarian State".[341] 67

[A/71/80, para. 54]

Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal, "[o]n the basis of all the materials available to it … concludes that CVG FMO [Ferrominera del Orinoco] is not an organ of the State for the purposes of ILC Article 4 of the ILC Articles".[342] 68

[A/71/80, para. 55]

Joseph Houben v. *Republic of Burundi*

In *Joseph Houben* v. *Republic of Burundi*, the arbitral tribunal referred to article 4 of the State responsibility articles as a reflection of customary international law when finding

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[339] 65 IACHR, Judgment, 5 October 2015, para. 160.

[340] 66 ICSID, Case No. ARB/11/33, Award, 3 November 2015, para. 344, footnote 706.

[341] 67 See footnote [22] 10 above, para. 7.89.

[342] 68 ICSID, Case No. ARB/12/23, Award, 29 January 2016, paras. 412–413.

that the Burundian authorities, who were aware of the damage on Claimant's investment, had not only failed to take the minimum measures necessary to protect this investment, but had also directly contributed to the damage.[343] 33

[A/74/83, p. 10]

Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal, agreeing with the respondent, "conclude[d] that CVG FMO is not an organ of the State for the purposes of ILC Article 4…".[344] 34

[A/74/83, p. 10]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mesa Power Group v. *Government of Canada*

In *Mesa Power Group* v. *Government of Canada*, the arbitral tribunal found "no basis for holding that the OPA [the Ontario Power Authority], Hydro One and the IESO [the Independent Electricity System Operator] are organs of Canada under Article 4 of the ILC Articles".[345] 35

[A/74/83, p. 10]

Caribbean Court of Justice

Maurice Tomlinson v. *The State of Belize and The State of Trinidad and Tobago*

In *Maurice Tomlinson* v. *The State of Belize and The State of Trinidad and Tobago*, the Caribbean Court of Justice observed that:

> Article 4 clarifies that an act of State may be constituted by conduct of the legislature, executive or the judiciary. Accordingly, in deciding whether a State has breached its international obligation, it is necessary to examine the relevant acts of the State, that is to say, the relevant State practice, to ascertain whether those acts are inconsistent with the international obligation of the State. In this regard, acts of the legislature constitute important indications of State practice and as such warrant close examination.[346] 36

[A/74/83, p. 10]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mr. Kristian Almås and Mr. Geir Almås v. *The Republic of Poland*

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås* v. *The Republic of Poland* concluded, referring to article 4 and the commentary thereto, that "[i]n light of its

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[343] 33 ICSID, Case No. ARB/13/7, Award, 12 January 2016, paras. 172 and 175.

[344] 34 ICSID, Case No. ARB/11/26, Award, 29 January 2016, para. 413.

[345] 35 PCA, Case No. 2012–17, Award, 24 March 2016, para. 345.

[346] 36 CCJ, Judgment, [2016] CCJ 1 (OJ), 10 June 2016, para. 22.

autonomous management and financial status, ANR [Polish Agricultural Property Agency] is not a *de facto* organ of the Polish State".[347] 37

[A/74/83, p. 11]

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. *The Republic of India*

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*, the arbitral tribunal concluded that "when entering into the Agreement, Antrix was not acting as an organ of the Respondent, whether under the provisions of Articles 4 and 5 of the ILC Articles".[348] 38

[A/74/83, p. 11]

Flemingo Duty Free Shop Private Limited v. *The Republic of Poland*

The arbitral tribunal in *Flemingo Duty Free Shop Private Limited* v. *The Republic of Poland* observed that the conduct of the Governor of Mazovia, the Polish courts, and the Polish custom authorities as State organs "can trigger Poland's international responsibility under Article 4 of the ILC articles".[349] 39 Holding that the Polish Airports State Enterprise (PPL) is a *de facto* State organ,[350] 40 the tribunal explained that "Article 4(2) of the ILC Articles, however, only provides that entities, which in accordance with the internal law of a State are qualified as State-organs, are State organs for purpose of State responsibility; it does not *per se* exclude entities which are not qualified as State organs under domestic law".[351] 41

[A/74/83, p. 11]

Arbitration Institute of the Stockholm Chamber of Commerce

Busta and Busta v. *The Czech Republic*

In *Busta and Busta* v. *The Czech Republic*, the arbitral tribunal cited article 4 of the State responsibility articles, noting that "it is undisputed between the Parties that a State's police authorities are organs of that State".[352] 42

[A/74/83, p. 11]

International arbitral tribunal (under UNCITRAL Rules)

Eli Lilly and Company v. *The Government of Canada*

In *Eli Lilly and Company* v. *The Government of Canada*, the arbitral tribunal, following a reference to article 4 of the State responsibility articles in the claimant's arguments,[353] 43

[347] 37 PCA, Case No. 2015–13, Award, 27 June 2016, para. 213 (original emphasis).

[348] 38 PCA, Case No. 2013–09, Award on Jurisdiction and Merits, 25 July 2016, para. 281.

[349] 39 PCA, Award, IIC 883 (2016), 12 August 2016, para. 424.

[350] 40 *Ibid*., para. 435.

[351] 41 *Ibid*., para. 433.

[352] 42 SCC, Case No. V (2015/014), Final Award, 10 March 2017, para. 400.

[353] 43 ICSID (UNCITRAL), Case No. UNCT/14/2, Final Award, 16 March 2017, para. 175.

stated that "the judiciary is an organ of the State. Judicial acts will therefore in principle be attributable to the State by reference to uncontroversial principles of attribution under the law of State responsibility".[354] [44]

[A/74/83, p. 11]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic* observed that "the Parties agree that insofar as the conduct of Mr. Cirielli as the Undersecretary of Air Transportation is concerned, the applicable principles are contained in Article IV of the ILC Articles on State Responsibility"[355] [45] and concluded "that the only conduct of Mr. Cirielli that was attributable to Respondent was his conduct while he was in office as Undersecretary of Air Transportation".[356] [46]

[A/74/83, p. 11]

ECONOMIC COMMUNITY OF WEST AFRICAN STATES COURT OF JUSTICE

Wing Commander Danladi A Kwasu v. *Republic of Nigeria*

In *Wing Commander Danladi A Kwasu* v. *Republic of Nigeria*, the Economic Community of West African States Court of Justice referred to article 4 of the State responsibility articles when stating that

> [i]nternational Law admits the duty of due diligence which enjoins States to take action to prevent violations of human rights of persons within its territory. This obligation cannot be derogated from nor even by any purported agreement or consent. All actions of institutions or officials of States are imputed to a State as its own conduct.[357] [47]

[A/74/83, p. 12]

Benson Olua Okomba v. *Republic of Benin*

In *Benson Olua Okomba* v. *Republic of Benin*, the Economic Community of West African States Court of Justice recalled its earlier decision *Tidjane Konte* v. *Republic of Ghana*, in which it had relied on article 4 of the State responsibility articles, and concluded that "it is well-established that the conduct of any organ of a state is regarded as act of that state".[358] [48]

[A/74/83, p. 12]

[354] [44] *Ibid*., para. 221.

[355] [45] ICSID, Case No. ARB/09/1, Award of the Tribunal, 21 July 2017, para. 702.

[356] [46] *Ibid*., para. 711.

[357] [47] ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/04/17, Judgment, 10 October 2017, p. 25.

[358] [48] ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/05/17, Judgment, 10 October 2017, pp. 21–22, citing Judgment No. ECW/CCJ/JUD/11/14.

Dorothy Chioma Njemanze and Others v. *Federal Republic of Nigeria*

In *Dorothy Chioma Njemanze and Others* v. *Federal Republic of Nigeria*, the Economic Community of West African States Court of Justice recalled its earlier decision *Tidjane Konte* v. *Republic of Ghana*, in which it had relied on article 4 of the State responsibility articles, noting that "[a]part from any other acts or omission alleged on the part of the State or its officials, failure to investigate such allegations [following formal complaints] itself constitutes a breach of the States duty under International law".[359] 49

[A/74/83, p. 12]

International arbitral tribunal (under the ICSID Convention)

UAB E Energija (Lithuania) v. *Republic of Latvia*

In *UAB E Energija (Lithuania)* v. *Republic of Latvia*, the arbitral tribunal citing article 4 and the commentary thereto, found that "[p]rovided that the acts in question are performed in an official capacity, they are attributable to the State. There is no dispute that the acts of the Municipality in this case were performed in an official capacity … All of the actions of the Municipality at issue in this case are therefore attributable to the Respondent".[360] 50 Moreover, the arbitral tribunal noted that "the nature of the Regulator as a State organ as understood under Article 4 of the ILC Articles may be inferred from provisions of the Public Utilities Regulators Act".[361] 51

[A/74/83, p. 12]

Masdar Solar & Wind Cooperatief U.A. v. *Kingdom of Spain*

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* referred to articles 4, 5 and 8 of the State responsibility articles when stating that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[362] 52

[A/74/83, p. 12]

Economic Community of West African States Court of Justice

Hembadoon Chia and Others v. *Federal Republic of Nigeria and Others*

In *Hembadoon Chia and Others* v. *Federal Republic of Nigeria and Others*, the Economic Community of West African States Court of Justice explained that "[a] state cannot take refuge on the notion that the act or omissions were not carried out by its agents in their official capacity or that the organ or official acted contrary to orders, or exceed its authority under internal law".[363] 53 Referring to its earlier decision in *Tidjane Konte* v.

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[359] 49 ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/08/17, Judgment, 12 October 2017, pp. 39–40, citing Judgment No. ECW/CCJ/JUD/11/14.

[360] 50 ICSID, Case No. ARB/12/33, Award, 22 December 2017, paras. 800–801.

[361] 51 *Ibid*., para. 804.

[362] 52 ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 168.

[363] 53 ECOWAS, Court of Justice, Case No. ECW/CCJ/JUD/21/18, Judgment, 3 July 2018, p. 15, citing Judgment No. ECW/CCJ/JUD/11/14.

Republic of Ghana in which it had relied on article 4 of the State responsibility articles, Community Court of Justice concluded that "the Nigerian Police and its officers are agents of the 1st Defendant who carried out the alleged act in their official capacity. Therefore, the 1st Defendant being responsible for the acts of its agents is a proper party in this suit".[364] [54]

[A/74/83, p. 13]

International arbitral tribunal (under the ICSID Convention)

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia* cited the text of article 4 of the State responsibility articles and the commentary thereto when observing that

> [the] conduct of an organ of the State in an apparently official capacity may be attributable to the State, even if the organ exceeded its competence under internal law or in breach of the rules governing its operations. The corollary of this is that acts that an organ commits in its purely private capacity are not attributable to the State, even if it has used the means placed at its disposal by the State for the exercise of its function."[365] [55] The tribunal concluded that "[i]t follows from Article 4 of the ILC Articles that the actions of the Bankruptcy Judge and the Bankruptcy Council are, at first sight, attributable to the Respondent.[366] [56]

[A/74/83, p. 13]

Marfin Investment Group Holding S.A., Alexandros Bakatselos and Others v. *Republic of Cyprus*

The arbitral tribunal in *Marfin Investment Group Holding S.A., Alexandros Bakatselos and Others* v. *Republic of Cyprus* recited the text of article 4 and

> agree[d] with Claimants that such organs [of Cyprus] include: the President of the Republic, the Attorney General and the Deputy Attorney General, the CBC, the CySEC, the Cypriot courts, the Minister of Finance and the Cypriot Parliament. Consequently, any and all acts committed by these organs are attributable to Respondent pursuant to ILC Article 4.[367] [57]

[A/74/83, p. 13]

Permanent Court of Arbitration (under UNCITRAL Rules)

Chevron Corporation and Texaco Petroleum Company v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* found that "by the acts of its judicial branch, attributable to the Respondent under Article 4 of the ILC Articles on State Responsibility, the Respondent violated its obligations under Article II(3)(*c*) of the Treaty, thereby committing international wrongs towards each of Chevron and TexPet".[368] [58]

[A/74/83, p. 13]

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[364] [54] *Ibid*.

[365] [55] ICSID, Case No. ARB/12/39, Award, 26 July 2018, para. 801.

[366] [56] *Ibid*., para. 803.

[367] [57] ICSID, Case No. ARB/13/27, Award, 26 July 2018, paras. 670–671.

[368] [58] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, para. 8.8.

International arbitral tribunal (under the ICSID Convention)

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal stated that

[a]rticle 4 of the ILC Articles on State Responsibility confirms that, under international law, the conduct of a State's executive branch shall be considered as an act of that State. Hence, the conduct of the Ministry of Petroleum, as with other Ministries and the Council of Ministers, is attributable to the Respondent.[369] [59]

The tribunal further stated that

[a]ccording to the ILC Commentary to Article 4, '[t]he reference to a 'State organ' covers all the individual or collective entities which make up the organization of the State and act on its behalf.' Of course, a State may become subject to obligations entered into on its behalf by entities other that organs of the State, but this is governed by general principles of the law of agency (not attribution).[370] [60]

The tribunal concluded that the Egyptian General Petroleum Corporation and the Egyptian Natural Gas Holding Company were not an organs of the respondent "within the meaning of Article 4 of the ILC Articles on State Responsibility".[371] [61]

[A/74/83, p. 13]

General Court of the European Union

Ahmed Abdelaziz Ezz et al. v. *Council*

In *Ahmed Abdelaziz Ezz et al.* v. *Council*, the General Court of the European Union did not accept:

[t]he applicants' argument that the Council's assessment does not comply with 'general international law'… . In that regard, it suffices to note that the applicants refer to the concept of 'organ of the State', as defined in the commentary of the United Nations International Law Commission on the 2001 Resolution on Responsibility of States for Internationally Wrongful Acts and in international arbitral decisions ruling on responsibility of States in the context of disputes between States and private companies. Thus, those references, for reasons similar to those set out in paragraph 268 above, are irrelevant in the present case.[372] [62]

[A/74/83, p. 14]

[369] [59] ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 9.92.

[370] [60] *Ibid*., para. 9.93.

[371] [61] *Ibid*., para. 9.112.

[372] [62] EU, General Court, *Ahmed Abdelaziz Ezz et al.* v. *Council*, Case T 288/15, Judgment of 27 September 2018, para. 272.

World Trade Organization Panel

Thailand—Customs And Fiscal Measures On Cigarettes From The Philippines

The panel established in *Thailand—Customs And Fiscal Measures On Cigarettes From The Philippines* "consider[ed] that Article 4(1) of these Articles [on State responsibility] is an expression of customary international law".[373] 63

[A/74/83, p. 14]

[Inter-American Court of Human Rights

Women Victims of Sexual Torture in Atenco v. *Mexico*

The Inter-American Court of Human Rights in *Women Victims of Sexual Torture in Atenco* v. *Mexico* recalled that under the State responsibility articles, internationally wrongful acts are attributable to the State not only when they are committed by organs of that State (under Article 4), but also when the conduct of persons or entities exercising elements of governmental authority is concerned.[374] 79

[A/74/83, p. 17]]

[World Trade Organization Panel

United States—Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia

In *United States—Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, the panel cited articles 4 and 7 of the State responsibility articles, and the commentary thereto, when stating that "it is well established under international law that an action or conduct of a government official or entity is attributable to the State even where that action or conduct is contrary to national law".[375] 83

[A/74/83, p. 17]]

International arbitral tribunal (under the ICSID Convention)

[*Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt*

The arbitral tribunal in *Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt* quoted articles 4, 5, 8 and 11 of the State responsibility articles and

formed the view that the acts or omissions of EGPC [Egyptian General Petroleum Corporation] or EGAS [Egyptian Natural Gas Holding Company] relevant to the conclusion and termination of the GSPA [Gas Sale Purchase Agreement] are attributable to the Respondent under the relevant provi-

[373] 63 WTO, Panel Report, WT/DS371/RW, 12 November 2018, paras. 7.636 and 7.771 (note 1654); see also WTO, Panel Report, *Thailand—Customs And Fiscal Measures On Cigarettes From The Philippines*, WT/DS371/R, 15 November 2010, para. 7.120.

[374] [79 IACHR, Preliminary Objection, Merits, Reparations and Costs. Series C No. 371 (Spanish), Judgment of 28 November 2018, para. 205 and footnote 303.]

[375] [83 WTO, Report of the Panel, WT/DS491/R, 6 December 2017, para. 7.179.]

sions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law.[376] 96

The tribunal further explained, referring to article 8 of the State responsibility articles, that EGPC and EGAS

were '*in fact acting on the instructions of, or under the direction or control of*' the Respondent in relation to the particular conduct. In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus '*acknowledge[d] and adopt[ed] the conduct in question as its own*' within the terms of Article 11.[377] 97

[A/74/83, p. 20]]

Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. *Republic of Latvia*

The arbitral tribunal in *Staur Eiendom AS, EBO Invest AS and Rox Holding AS* v. *Republic of Latvia* noted that "[i]t is common ground that under Article 4, the conduct of a State organ acting as such is attributable to the State".[378] 29 The tribunal added that "a person or entity may be characterized as an organ of the State as a matter of international law even if it does not possess that character under the State's internal law".[379] 30

[A/77/74, p. 9]

Iran-United States Claims Tribunal

Award No. 604-A15 (II:A)/A26 (IV)/B43-FT

In a partial award rendered in 2020, the Iran-United States Claims Tribunal noted that "[u]nder international law, as expressed in Article 4 of the ILC Articles, the conduct of a State's judiciary is attributable to the State, since the judiciary is a branch of the State".[380] 31

[A/77/74, p. 9]

International arbitral tribunal (under the ICSID Convention)

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

In *Ortiz Construcciones y Proyectos S.A.* v. *People's Democratic Republic of Algeria*, the arbitral tribunal referred to article 4 and the commentary thereto and noted that it was uncontested that "any person or entity having the status of a State organ under Algerian law is a *de jure* organ of the State of Algeria" and that "article 4 (2) does not exclude the possibility of a person or entity that does not have that status of a State organ under Algerian law nevertheless being a *de facto* organ, or of the acts or omissions of such a *de facto* organ being

[376] [96 ICSID, Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 135.]

[377] [97 *Ibid*., para. 146.]

[378] 29 ICSID, Case No. ARB/16/38, Award, 28 February 2020, para. 312.

[379] 30 *Ibid*., para. 313.

[380] 31 IUSCT, Award No. 604-A15 (II:A)/A26 (IV)/B43-FT, Partial Award, 10 March 2020, para. 1141.

attributable to the State of Algeria under article 4".[381] [32] The tribunal stressed that articles 4 to 11 reflected customary international law on the subject of State responsibility.[382] [33]

[A/77/74, p. 10]

[The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State responsibility "only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, *i.e.* only to those cases of attribution covered by articles 4, 5 and 6." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[383] [70]

[A/77/74, p. 14]]

International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

The "Enrica Lexie" Incident (Italy v. *India)*

The arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea in *The "Enrica Lexie" Incident (Italy* v. *India)* referred to article 4, suggesting that "there exists a presumption under international law that a State is right about the characterization of the conduct of its official as being official in nature".[384] [34]

[A/77/74, p. 10]

World Trade Organization Panel

Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights

The panel established in *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights* cited the text of article 4, noting that as a consequence of such rule

a [WTO] Member is responsible for actions at all levels of government (local, municipal, federal) and for all actions taken by any agency within any level of government. Thus, the responsibility of Members under international law applies irrespective of the branch of government at the origin of the action having international repercussions.[385] [35]

[A/77/74, p. 10]

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[381] [32] ICSID, Case No. ARB/17/1, Award, 29 April 2020, paras. 160–161.

[382] [33] *Ibid*., para. 155.

[383] [[70] *Ibid*., para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).]

[384] [34] PCA, Case No. 2015–28, Award, 21 May 2020, para. 858.

[385] [35] WTO, Panel Report, WT/DS567/R, 16 June 2020, para. 7.50.

International arbitral tribunal (under the ICSID Convention)

Carlos Ríos and Francisco Ríos v. *Republic of Chile*

In *Carlos Ríos and Francisco Ríos* v. *Republic of Chile*, the arbitral tribunal cited the commentary to article 4, noting that, except in the case of umbrella clauses contained in investment treaties, "in order for the international responsibility of a State to be engaged in connection with the breach of an investment treaty, the State must have acted in the exercise of sovereign prerogatives, not as a party in a contractual relationship".[386] [36]

[A/77/74, p. 10]

Arbitration Institute of the Stockholm Chamber of Commerce

State Development Corporation "VEB.RF" v. *Ukraine*

The arbitral tribunal in *State Development Corporation "VEB.RF"* v. *Ukraine* referred to article 4 in ascertaining whether the claimant investor should be characterized as an organ of the Russian Federation.[387] [37] The tribunal cited the commentary to article 4, paragraph 2, according to which "it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading".[388] [38] The tribunal concluded "that the internal law of the Russian Federation may be relevant in the characterization of the Claimant as a matter of international law, but it will not be determinative of that characterization".[389] [39]

[A/77/74, p. 10]

International arbitral tribunal (under UNCITRAL Rules)

Naturgy Energy Group, S.A., and Naturgy Electricidad Colombia, S.L. v. *Republic of Colombia*

In *Naturgy Energy Group, S.A., and Naturgy Electricidad Colombia, S.L.* v. *Republic of Colombia*, the arbitral tribunal analysed whether the national authorities could be responsible for the debt for non-payment of electricity bills by certain governmental entities to the investor's local company. The tribunal referred to article 4, noting that, "while the Tribunal recognizes that the concept of State organ is broadly defined in article 4 …, the Tribunal reads this article simply as attributing the debts of regional public entities to the State".[390] [40] However, it rejected the idea that all debts from decentralized entities, including city halls and clinics, could be considered attributable to the State.[391] [41]

[A/77/74, p. 11]

[386] [36] ICSID, Case No. ARB/17/16, Award, 11 January 2021, para. 259.

[387] [37] SCC, Case No. V2019/088, Partial Award on Preliminary Objections, 31 January 2021, para. 153.

[388] [38] *Ibid*., para. 154.

[389] [39] *Ibid*., para. 155.

[390] [40] ICSID (UNCITRAL), Case No. UNCT/18/1, Award, 12 March 2021, para. 423.

[391] [41] See, generally, *ibid*., paras. 421–423.

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[392] 42 The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[393] 43

[A/77/74, p. 11]

International arbitral tribunal (under the ICSID Additional Facility Rules)

América Móvil S.A.B. de C.V. v. *Colombia*

In *América Móvil S.A.B. de C.V.* v. *Colombia*, the arbitral tribunal recalled the duty of international judges to respect domestic judicial decisions concerning issues of domestic law, but noted that, pursuant to article 4, "in some cases, actions of the judiciary, like those of other branches of Government, may also give rise to State responsibility".[394] 44

[A/77/74, p. 11]

International arbitral tribunal (under the ICSID Convention)

Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. *Turkmenistan*

The arbitral tribunal in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti.* v. *Turkmenistan* recalled that "under international law, the State is treated as a unity".[395] 45 Furthermore, the tribunal pointed out that "the unity of the State in international law is the reason why all conduct of any State organ is attributable to the State under ILC Article 4 … Thus, the conduct of central and local State organs will be attributable to the State, as will be the conduct of legislative, judicial or executive organs".[396] 46

Furthermore, citing the commentary to article 4, the tribunal noted that "it is irrelevant if the State organ's conduct is sovereign or commercial in nature. While the nature of the conduct can be determinative for a liability analysis, for purposes of attribution under ILC Article 4, a State organ's commercial conduct will also be deemed an act of the State".[397] 47 It considered that

> the fact that an entity is not specifically classified as a State organ under domestic law, while relevant, is not outcome-determinative for the attribution inquiry under ILC Article 4, which is carried out pursuant to international law. Equally, the fact that an entity may have separate legal personality is not *per se* an impediment to that entity qualifying as a State organ.[398] 48

The tribunal considered a number of factors to determine "whether an entity can be deemed a State organ in international law":

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[392] 42 Final Award, 26 March 2021, para. 72.

[393] 43 *Ibid*., paras. 72 and 134–135.

[394] 44 See footnote [191] 24 above, para. 345.

[395] 45 See footnote [128] 16 above, para. 742.

[396] 46 *Ibid*., para. 743.

[397] 47 *Ibid*., para. 744.

[398] 48 *Ibid*., para. 745.

(i) whether the entity carries out an overwhelming governmental purpose; (ii) whether the entity relies on other State organs for making and implementing decisions; (iii) whether the entity is in a relationship of complete dependence on the State; and (iv) whether the entity carries out the role of an executive agency, merely implementing decisions taken by State organs.[399] 49

The tribunal concluded that "the conduct of State ministries and State agencies, and the conduct of subdivisions of State, such as provinces and municipalities, are always attributable to a State under ILC Article 4".[400] 50

[A/77/74, p. 11]

Eco Oro Minerals Corp. v. *Republic of Colombia*

The arbitral tribunal in *Eco Oro Minerals Corp.* v. *Republic of Colombia* referred to article 4 in the context of attribution, and found that "Colombia should have ensured that its various arms took the necessary steps to comply with [its] … obligation".[401] 51

[A/77/74, p. 12]

Pawlowski AG and Project Sever s.r.o. v. *Czech Republic*

In *Pawlowski AG and Project Sever s.r.o.* v. *Czech Republic*, the arbitral tribunal concluded that "[t]he Mayor of Benice represents an organ of the Czech Republic at a territorial level, and in accordance with Article 4 of the ILC Articles her conduct must be attributed to the Czech Republic".[402] 52

[A/77/74, p. 12]

Inter-American Court of Human Rights

Manuela et al. v. *El Salvador*

In *Manuela et al.* v. *El Salvador*, the Inter-American Court of Human Rights analysed whether the actions of public defenders could be attributable to the State. It referred to article 4, noting that

[t]he Public Defenders' Unit is part of the Office of the Attorney General and can be considered an organ of the State; therefore, its actions should be considered acts of the State in the sense accorded to this by the articles on Responsibility of States for Internationally Wrongful Acts drawn up by the International Law Commission.[403] 53

[A/77/74, p. 12

[399] 49 *Ibid*., para. 746.

[400] 50 *Ibid*., para. 749.

[401] 51 ICSID, Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, para. 821.

[402] 52 ICSID, Case No. ARB/17/11, Award, 1 November 2021, para. 373.

[403] 53 IACHR, Series C, No. 441, Judgment (Preliminary Objections, Merits, Reparations and Costs), 2 November 2021, para. 123.

Article 5. Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Commentary

(1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.

(2) The generic term "entity" reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the tribunal's jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.[404] [127]

(3) The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.

(4) Parastatal entities may be considered a relatively modern phenomenon, but the principle embodied in article 5 has been recognized for some time. For example, the replies to the request for information made by the Preparatory Committee for the 1930 Hague Conference indicated strong support from some Governments for the attribution to the State of the conduct of autonomous bodies exercising public functions of an administrative or legislative character. The German Government, for example, asserted that:

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[404] [127] *Hyatt International Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 9, p. 72, at pp. 88–94 (1985).

when, by delegation of powers, bodies act in a public capacity, *e.g.*, police an area … the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.[405] [128]

The Preparatory Committee accordingly prepared the following basis of discussion, though the Third Committee of the Conference was unable in the time available to examine it:

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such … autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.[406] [129]

(5) The justification for attributing to the State under international law the conduct of "parastatal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (*e.g.* the sale of tickets or the purchase of rolling-stock).

(6) Article 5 does not attempt to identify precisely the scope of "governmental authority" for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. On the other hand, article 5 does not extend to cover, for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; *i.e.* where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is

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[405] [128] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote [147] 88 above), p. 90. The German Government noted that these remarks would extend to the situation where "the State, as an exceptional measure, invests private organisations with public powers and duties or authorities [*sic*] them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force", *ibid.*

[406] [129] *Ibid.*, p. 92.

not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Iran-United States Claims Tribunal

Phillips Petroleum Co. Iran v. *Islamic Republic of Iran*

In its 1987 award in the *Phillips Petroleum Co. Iran* v. *Islamic Republic of Iran* case, the Tribunal, in determining whether the Islamic Republic of Iran was responsible for expropriation of goods of the claimant when it allegedly took the latter's property interests through the National Iranian Oil Company (NIOC), observed in a footnote, with reference to draft article 7 provisionally adopted by the International Law Commission:[407] 66

> International law recognizes that a State may act through organs or entities not part of its formal structure. The conduct of such entities is considered an act of the State when undertaken in the governmental capacity granted to it under the internal law. *See* article 7(2) of the draft articles on State responsibility adopted by the International Law Commission, *Yearbook International Law Commission 2 (1975)*, at p. 60. The 1974 Petroleum Law of Iran explicitly vests in NIOC "the exercise and ownership right of the Iranian nation on the Iranian Petroleum Resources". NIOC was later integrated into the newly-formed Ministry of Petroleum in October 1979.[408] 67

[A/62/62, para. 43]

World Trade Organization panel

Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products

In its 1999 reports on Canada—*Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, the panel referred to draft article 7, paragraph 2, adopted by the International Law Commission on first reading[409] 68 in support of its finding that

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[407] 66 This provision was amended and incorporated in article 5 finally adopted by the International Law Commission in 2001. The text of draft article 7 provisionally adopted was as follows:

Article 7

Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[408] 67 IUSCT, Award No. 326–10913–2, 3 November 1987, Iran-United States Claims Tribunal Reports, vol. 21 (1989), p. 79, para. 89, footnote 22.

[409] 68 Draft article 7 adopted on first reading was amended and incorporated in article 5 as finally adopted by the International Law Commission in 2001. The text of that provision (see *Yearbook … 1996*, vol. II

the Canadian provincial marketing boards acting under the explicit authority delegated to them by either the federal Government or a provincial Government were "agencies" of those Governments in the sense of article 9.1(*a*) of the Agreement on Agriculture, even if they were not formally incorporated as Government agencies. In a footnote, the panel reproduced the text of article 7, paragraph 2, and noted that this provision "might be considered as reflecting customary international law".[410] 69

[A/62/62, para. 44]

International Tribunal for the Former Yugoslavia

Prosecutor v. *Duško Tadić*

In its 1999 judgement in the *Tadić* case, the Appeals Chamber, in commenting on the 1986 judgment of the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* case, observed:

> It would … seem that in *Nicaragua* the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as "a well-established rule of international law" [see page 65 above], that a State incurs responsibility for acts in breach of international obligations committed by individuals who enjoy the status of organs under the national law of that State or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority.[411] 70

In a footnote,[412] 71 the Appeals Chamber quoted draft article 7 adopted by the International Law Commission on first reading, as well as the corresponding draft article provisionally adopted by the Commission's Drafting Committee in 1998.[413] 72

Later in the same judgement, the Appeals Chamber twice referred to draft article 7 adopted by the ILC on first reading in the context of its examination of the rules applicable for the attribution to States of acts performed by private individuals.[414] 73 In a footnote corresponding to the statement that "the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of indi-

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(Part Two), para. 65) was identical to that of article 7 provisionally adopted. (See footnote [407] 66 above.)

[410] 69 WTO, Panel Report, WT/DS103/R and WT/DS113/R, 17 May 1999, para. 7.77, footnote 427.

[411] 70 ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999, para. 109 (footnotes omitted).

[412] 71 *Ibid*., para. 109, footnote 130.

[413] 72 The text of draft article 5 (Attribution to the State of the conduct of entities exercising elements of the governmental authority) adopted by the International Law Commission Drafting Committee in 1998 was the following:

> The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question. (*Yearbook … 2000*, vol. II (Part Two), p. 65.)

[414] 73 For the complete passage of the Appeals Chamber's judgement on that issue, see [p. 128] below.

viduals must answer for their actions, even when they act contrary to their directives",[415] [74] the Appeals Chamber noted that

> [t]his sort of "objective" State responsibility also arises in a different case. Under the relevant rules on State responsibility as laid down in article 7 of the International Law Commission draft, a State incurs responsibility for acts of organs of its territorial governmental entities (regions, Länder, provinces, member states of federal States, *etc.*) even if under the national Constitution these organs enjoy broad independence or complete autonomy.[416] [75]

Subsequently, the Appeals Chamber also observed that

> [i]n the case envisaged by article 10 of the draft on State responsibility (as well as in the situation envisaged in article 7 of the same draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity.[417] [76]

[A/62/62, para. 45]

International arbitral tribunal (under the ICSID Convention)

Maffezini v. *Kingdom of Spain*

In its 2000 decision on objections to jurisdiction, the arbitral tribunal constituted to hear the *Maffezini* v. *Spain* case, in deciding whether the acts of the private corporation *Sociedad para el Desarrollo Industrial de Galicia* (with which the claimant had made various contractual dealings) were imputable to Spain, referred to draft article 7, paragraph 2, adopted by the International Law Commission on first reading:

> a State will not necessarily escape responsibility for wrongful acts or omissions by hiding behind a private corporate veil. Paragraph 2 of article 7 of the International Law Commission's draft articles on State responsibility supports this position.[418] [77]

[A/62/62, para. 46]

International arbitral tribunal

Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. *United Kingdom)*

In its 2003 final award, the arbitral tribunal established to resolve the dispute between Ireland and the United Kingdom concerning access to information under article 9 of the OSPAR Convention referred to article 5 (as well as article 4) finally adopted by the International Law Commission in 2001. The relevant passage is quoted [on page 69] above.

[A/62/62, para. 47]

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[415] [74] ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999, para. 122.

[416] [75] *Ibid*., para. 122, footnote 140.

[417] [76] ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999, para. 123 (footnotes omitted).

[418] [77] ICSID, Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, para. 78 (footnotes omitted), reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 16, No. 1, 2001, p. 29.

International arbitral tribunal

Eureko B.V. v. *Republic of Poland*

In its 2005 partial award, the arbitral tribunal constituted to hear the *Eureko BV* v. *Republic of Poland* case, in considering whether actions undertaken by the Minister of the State Treasury with respect to a shared purchase agreement with the claimant were attributable to Poland, referred to the commentary to article 5 finally adopted by the International Law Commission in 2001.[419] 78

[A/62/62, para. 48]

International arbitral tribunal (under the ICSID Convention)

Noble Ventures, Inc. v. *Romania*

In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc.* v. *Romania* case, in determining whether the acts of a Romanian "institution of public interest" (the State Ownership Fund, subsequently replaced by the Authority for Privatization and Management of the State Ownership), which were alleged to have constituted violations of the bilateral investment treaty at issue, were attributable to Romania, referred to article 5 finally adopted by the International Law Commission in 2001:

> The 2001 draft articles … attribute to a State the conduct of a person or entity which is not a *de jure* organ but which is empowered by the law of that State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance. This rule is equally well established in customary international law as reflected by article 5 of the 2001 International Law Commission draft.[420] 79

[A/62/62, para. 49]

Consorzio Groupement LESI-DIPENTA v. *People's Democratic Republic of Algeria and LESI, S.p.A. and Astaldi, S.p.A.* v. *People's Democratic Republic of Algeria*

In its 2005 and 2006 awards, the arbitral tribunal constituted to hear the Consorzio Groupement LESI-DIPENTA v. Algeria and the LESI and Astaldi v. Algeria cases referred, *inter alia*, to article 6 finally adopted by the International Law Commission in 2001 in support of its finding according to which "the responsibility of the State can be engaged in contracts signed by public enterprises distinct from the State, when the State still retains important or dominant influence".[421] 80

[A/62/62, para. 50]

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[419] 78 See footnote [55] 11 above, para. 132. The arbitral tribunal referred in particular to paragraph (1) of the commentary to article 5 (*Yearbook of the International Law Commission, 2001*, vol. II (Part Two), para. 77).

[420] 79 ICSID, Case No. ARB/01/11, Award, 12 October 2005, para. 70.

[421] 80 ICSID, Case No. ARB/03/08, Award, 10 January 2005, para. 19, reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 19, No. 2, 2004, pp. 455–456 (unofficial English translation by ICSID of the French original) and Case No. ARB/05/3, Award, 12 July 2006, para. 78. Although in these awards the tribunal inadvertently refers to article 8 (concerning the conduct of private persons directed or controlled by a State), the situation it was dealing with involved the conduct of a public entity

International arbitral tribunal (under UNCITRAL Rules)

Encana Corporation v. *Republic of Ecuador*

In its 2006 award, the arbitral tribunal constituted to hear the *EnCana Corp.* v. *Ecuador* case under the Canada-Ecuador investment treaty and the UNCITRAL arbitration rules, after having found that the conduct at issue of Petroecuador, a State-owned and State-controlled instrumentality of Ecuador, was attributable to the latter, noted that it "does not matter for this purpose whether this result flows from the principle stated in article 5 of the International Law Commission's articles on responsibility of States for internationally wrongful acts or that stated in article 8", and quoted the text of these provisions as finally adopted by the Commission in 2001.[422] 81

[A/62/62, para. 51]

International arbitral tribunal (under the ICSID Convention)

Jan de Nul NV and Dredging International NV v. *Arab Republic of Egypt*

In its 2006 decision on jurisdiction, the arbitral tribunal constituted to hear the *Jan de Nul NV and Dredging International NV* v. *Arab Republic of Egypt* case referred, *inter alia*, to article 5 finally adopted by the International Law Commission in 2001.

[A/62/62, para. 52]

Helnan International Hotels A/S v. *The Arab Republic of Egypt*

The arbitral tribunal in the *Helnan International Hotels A/S* v. *Egypt* case considered a challenge by the Respondent to its jurisdiction on the ground that the actions of the domestic entity under scrutiny in the case were not attributable to Egypt, despite the fact that the entity was wholly owned by the Government of Egypt. While the tribunal found that it did have jurisdiction on other grounds, it nonetheless proceeded to consider the Respondent's challenge and found that the claimant had convincingly demonstrated that the entity in question was "under the close control of the State". In making this finding, it referred to the commentary to article 5 of the State responsibility articles, first by way of acknowledgment that the

> fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State.[423] 12

Nonetheless, the tribunal noted that "[the domestic entity] was an active operator in the privatisation of the tourism industry on behalf of the Egyptian Government" and proceeded to recall article 5 (which is quoted in full) and then held that "[e]ven if [the domestic entity]

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exercising elements of governmental authority, which is covered by article 5 of the International Law Commission articles. These references are accordingly included under this section of the compilation.

[422] 81 London Court of International Arbitration, Case No. UN3481, Award, 3 February 2006, para. 154.

[423] 12 Paragraph (3) of the commentary to article 5.

has not been officially empowered by law to exercise elements of the governmental authority, its actions within the privatisation process are attributable to the Egyptian State".[424] 13

[A/65/76, para. 17]

Ioannis Kardassopoulos and Ron Fuchs v. *The Republic of Georgia*

The arbitral tribunal constituted to hear the *Ioannis Kardassopoulos and Ron Fuchs* v. *The Republic of Georgia* case determined that, although the tribunal invoked article 7 during the jurisdictional phase, articles 4, 5 and 11 were equally applicable to the dispute.[425] 36 The tribunal concluded that "there can be no real question in these arbitrations as to the attribution of any acts or omissions on the part of [the relevant entities] to the Respondent".[426] 37

[See A/68/72, footnote 55 and para. 32]

Gustav F W Hamester GmbH & Co KG v. *Republic of Ghana*

In its award, the arbitral tribunal constituted to hear the *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* case indicated that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[427] 56 Referring to articles 4, 5, and 8, the tribunal stated that such a link could result when "the person performing the act is part of the State's organic structure (Article 4); or is utilising the State's specific governmental powers to perform such act, even if it is a separate entity (Article 5); or is acting under the effective control … of the State, even if it is a private or public party (Article 8)".[428] 57 The tribunal noted that, under article 5, "[i]t is clear that two cumulative conditions have to be present [for attribution]: an entity empowered with governmental authority; and an act performed through the exercise of governmental authority".[429] 58

Upon consideration of the relevant law and facts, the tribunal concluded that, under article 5, the entity exercised "elements of governmental authority".[430] 59 Nonetheless, the tribunal indicated that such a conclusion

> in itself clearly does not resolve the issue of attribution … . [F]or an act of a separate entity exercising elements of governmental authority to be attributed to the State, it must be shown that the precise act in question was an exercise of such governmental authority and not merely an act that could be performed by a commercial entity. This approach has been followed in national as well as international case law.[431] 60

In applying article 5 to the particular acts at issue, the tribunal "concentrated on the utilisation of governmental power", and assessed whether the entity in question

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[424] 13 ICSID, Case No. ARB 05/19, Decision on Objection to Jurisdiction, 17 October 2006, paras. 92 and 93.

[425] [36 See footnote [288] 36, para. 274 (quoting articles 4, 5 and 11).]

[426] [37 *Ibid*., paras. 274 and 280.]

[427] 56 See footnote [105] 20 above, para. 172.

[428] 57 *Ibid*.

[429] 58 *Ibid*., paras. 175–177.

[430] 59 *Ibid*., para. 192.

[431] 60 *Ibid*., para. 193.

acted like any contractor/shareholder, or rather as a State entity enforcing regulatory powers … . It is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act.[432] [61]

The tribunal also distinguished the attribution analysis under article 5 from the analysis under article 8, indicating that "attribution or non-attribution under Article 8 [was] independent of the status of [the entity], and dependent only on whether the acts were performed 'on the instructions of, or under the direction or control' of that State".[433] [62]

[A/68/72, paras. 45–48]

[*Alpha Projektholding GmbH* v. *Ukraine*

The arbitral tribunal in *Alpha Projektholding GmbH* v. *Ukraine* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal concluded that the conduct of a "State organ … is clearly attributable to the State under Article 4(1) of the ILC Articles".[434] [39] The tribunal also relied upon the commentary to article 4 in finding that whether or not a State organ's conduct "was based on commercial or other reasons is irrelevant with respect to the question of attribution".[435] [40]

[See A/68/72, footnote 55 and para. 34]]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area

In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber indicated that certain rules on the liability of sponsoring States in UNCLOS

are in line with the rules of customary international law on this issue. Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility).[436] [63]

[A/68/72, para. 49]

World Trade Organization Appellate Body

United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China

In its report in the *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case, the Appellate Body considered whether the rules of

[432] [61] *Ibid*., para. 202; see also paras. 255, 266 and 284.

[433] [62] *Ibid*., para. 198.

[434] [[39] See footnote [293] 39, para. 401.]

[435] [[40] *Ibid*., para. 402.]

[436] [63] See footnote [12] 10 above, para. 182.

attribution contained in the State responsibility articles are “relevant rules of international law applicable in the relations between the parties”.[437] 64 The Appellate Body held that, “[t]o the extent that Articles 4, 5 and 8 of the ILC Articles concern[ed] the same subject matter as [a provision] of the SCM Agreement, they would be ‘relevant’ in the sense of the Vienna Convention [on the Law of Treaties]”.[438] 65 The Appellate Body indicated that both the State responsibility articles and the SCM Agreement “set out rules relating to the question of attribution of conduct to a State”, though it noted “certain differences” in their respective approach to attribution.[439] 66

Concerning whether the State responsibility articles are “rules of international law … applicable in the relations between the parties”, the Appellate Body noted that “Articles 4, 5 and 8 are not binding *by virtue of* being part of an international treaty. However, insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties”.[440] 67

The Appellate Body also indicated that, “despite certain differences between the attribution rules”, its interpretation of the term “public body” as found in the SCM Agreement “coincides with the essence of Article 5”.[441] 68

In the light of its determination that article 5 supported, rather than contradicted, its interpretation of the SCM Agreement, and “because the outcome of [its] analysis [did] … not turn on Article 5”, the Appellate Body indicated that it was “not necessary … to resolve definitively the question of to what extent Article 5 of the ILC Articles reflects customary international law”.[442] 69

[A/68/72, paras. 50–53]

International arbitral tribunal (under UNCITRAL Rules)

[*Sergei Paushok et al.* v. *The Government of Mongolia*

The arbitral tribunal in the *Sergei Paushok et al.* v. *The Government of Mongolia* case referred to articles 4, 5 and 9 as constituting “international law rules of attribution” applicable to the dispute “which are generally considered as representing current customary international law”.[443] 41 While noting that the State responsibility articles “do not contain a definition of what constitutes an organ of the State”,[444] 42 the tribunal pointed to the commentary to article 4 which indicates the activities covered by the article’s reference to “State organ”.[445] 43

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[437] 64 See footnote [13] 11 above, paras. 307 *et seq.* (quoting the Vienna Convention on the Law of Treaties, art. 31(3)(*c*)).

[438] 65 *Ibid.*, para. 308.

[439] 66 *Ibid.*, para. 309.

[440] 67 *Ibid.*, para. 308; see below, p. 537, for discussion of the Appellate Body’s consideration of whether articles 4, 5 and 8 of the State responsibility articles would “be superseded by … the SCM Agreement as *lex specialis* regarding attribution pursuant to Article 55 of the ILC Articles”; *ibid.*, para. 314.

[441] 68 *Ibid.*, para. 310.

[442] 69 *Ibid.*, para. 311.

[443] [41 See footnote [299] 41, paras. 576 and 577.]

[444] [42 *Ibid.*, para. 581.]

[445] [43 *Ibid.*, para. 582.]

The tribunal also indicated that the distinction between articles 4 and 5 was "of particular relevance in the determination of potential liability of the State".[446] [44]]

[See A/68/72, footnote 55 and paras. 35–36]

[*White Industries Australia Limited* v. *The Republic of India*

In its award, the arbitral tribunal in *White Industries Australia Limited* v. *The Republic of India* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal found that the claimant properly conceded that it was not relying on articles 4 or 5 as the entity in question was "patently … not an organ of the state within the meaning of Article 4, nor [did] it exercise elements of Governmental authority within the meaning of Article 5."[447] [87]

[See A/68/72, footnote 55 and para. 67]]

European Court of Human Rights

Kotov v. *Russia*

In its judgment in *Kotov* v. *Russia*, the European Court of Human Rights referred to the commentary to article 5 as part of its elaboration of the law relevant to the attribution of international responsibility to States.[448] [70] The Court quoted excerpts of the commentary relevant to the determination of which entities, including "parastatal entities", were to be regarded as "governmental" for the purposes of attribution under international law.[449] [71]

[A/68/72, para. 54]

International arbitral tribunal (under UNCITRAL Rules)

Claimants v. *Slovak Republic*

The arbitral tribunal in *Claimants* v. *Slovak Republic* noted that "there are three possible bases for attribution of wrongful acts to a State. They are found in Articles 4, 5 and 8 of the Articles on State Responsibility of the International Law Commission … ".[450] [72] Upon consideration of articles 5 and 8, the tribunal determined that, on the basis of the evidence presented, the acts of certain non-State entities and individuals could not be said to have been "carried out in the exercise of governmental authority, nor on the instructions, or under the direction or control of the State".[451] [73]

[A/68/72, para. 55]

[446] [[44] *Ibid*., para. 580.]

[447] [[87] See footnote [303] 87 above, para. 8.1.2.]

[448] [70] See footnote [16] 14 above, paras. 31–32 (quoting paras. (3) and (6) of the commentary to article 5).

[449] [71] *Ibid*.

[450] [72] See footnote [305] 46 above, paras. 150–151.

[451] [73] *Ibid*., paras. 156–159; the tribunal added that, "if it were established that a State organ had acted under the influence of [a non-state entity], such acts would be attributable to the State."; see also *ibid*., para. 163.

Permanent Court of Arbitration (under UNCITRAL Rules)

Ulysseas, Inc. v. *The Republic of Ecuador*

The arbitral tribunal in the *Ulysseas, Inc.* v. *The Republic of Ecuador* case determined that the conduct of certain entities, despite not constituting organs of the Ecuadorian State, "may nonetheless fall within the purview of Article 5 of the ILC Articles and [the relevant] BIT to the extent governmental authority has been delegated to it with the consequence that some of their acts can be attributed to the State, provided that they are 'acting in that capacity in the particular *instance*'."[452] 74

[A/68/72, para. 56]

International arbitral tribunal (under the ICSID Convention)

Bosh International, Inc. & B and P Ltd. Foreign Investments Enterprise v. *Ukraine*

In its award, the arbitral tribunal in *Bosh International, Inc. & B and P Ltd. Foreign Investments Enterprise* v. *Ukraine* relied upon article 5 in its analysis of whether a university's conduct was attributable to Ukraine.

The tribunal considered (1) whether the university was "empowered by the law of Ukraine to exercise elements of governmental authority", and (2) whether "the conduct of the University relates to the exercise of that governmental authority".[453] 75

With regard to the second aspect of its analysis, the tribunal relied upon the commentary to article 5 in indicating that "the question that falls for determination is whether the University's conduct in entering into and terminating the [relevant contract] can be understood or characterised as a form of 'governmental activity', or as a form of 'commercial activity'".[454] 76

The tribunal also referred to article 5 as part of its analysis of a claim brought under the relevant bilateral investment treaty umbrella clause. The tribunal concluded that the term "Party", as used in the umbrella clause, referred "to any situation where the Party is acting *qua* State", namely "where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility) … ".[455] 77

[A/68/72, paras. 57–60]

[*Teinver S.A., et al.* v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., et al.* v. *The Argentine Republic*, in its 2012 decision on jurisdiction, referred to articles 4, 5 and 8 as part of its consideration of whether the acts of certain labour unions were attributable to the Argentine Republic. As a result of the "fact-intensive nature of [the claimants'] allegations", the tribunal decided to postpone adjudication of the attribution issue until the merits phase.[456] 99 Nonetheless, the tribunal

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[452] 74 See footnote [308] 49 above, para. 135 (quoting article 5).

[453] 75 See footnote [310] 75 above, para. 164 (citing James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002), p. 100).

[454] 76 *Ibid.*, para. 176.

[455] 77 *Ibid.*, para. 246. The tribunal stated, in dictum, that it "could not agree that the [university in question] is a 'State organ' within the meaning of Article 4 of the ILC Articles".

[456] [99 See footnote [315] 99 above, para. 274.]

accepted the assertion of both parties "that article 8, and not articles 4 and 5, would be relevant to the analysis of the unions' conduct … ".[457] 100

[See A/68/72, footnote 55 and para. 73]]

Permanent Court of Arbitration (under UNCITRAL Rules)

Luigiterzo Bosca v. *Lithuania*

The arbitral tribunal in *Luigiterzo Bosca* v. *Lithuania* concluded that "[t]he SPF [State Property Fund] is an entity empowered to exercise governmental authority, as described in Article 5" of the State responsibility articles. The question for the arbitral tribunal was thus "whether the SPF was acting in a sovereign capacity".[458] 70

[A/71/80, para. 56]

European Court of Human Rights

Jones and Others v. *the United Kingdom*

The European Court of Human Rights in *Jones and Others* v. *the United Kingdom* referred to article 5 as relevant international law,[459] 71 and noted that the acts of "persons empowered by the law of the State to exercise elements of the governmental authority and acting in that capacity, as defined in Article 5 of the Draft Articles" could be attributed to the State.[460] 72

[A/71/80, para. 57]

Samsonov v. *Russia*

In *Samsonov* v. *Russia*, the European Court of Human Rights referred to article 5 of the State responsibility articles as relevant international law.[461] 73

[A/71/80, para. 58]

Permanent Court of Arbitration (under UNCITRAL Rules)

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. *Government of Canada*

In *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.* v. *Government of Canada*, the arbitral tribunal indicated with regard to articles 4 and 5 that "the ILC Articles quoted here are considered as statements of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which are applicable by analogy to the responsibility of States towards private parties".[462] 59

[457] [100 *Ibid*., para. 275.]

[458] 70 See footnote [169] 26 above, para. 127 (misnumbered).

[459] 71 See footnote [323] 49 above, paras. 107–109.

[460] 72 *Ibid*., para. 207.

[461] 73 See footnote [20] 8 above, paras. 30–32 for further references to the State responsibility articles.

[462] [59 See footnote [333] 59 above, para. 308]

The arbitral tribunal, relying on article 5, agreed with the investor's contention that even if the Joint Review Panel was not "an integral part of the government apparatus of Canada … it is empowered to exercise elements of Canada's governmental authority".[463] 74

[A/71/80, paras. 49 and 59]

International arbitral tribunal (under the ICSID Convention)

Dan Cake S.A. v. *Hungary*

The arbitral tribunal in *Dan Cake S.A.* v. *Hungary* considered that "it is not relevant to the question whether the *liquidator* is, pursuant to Article 5 of the ILC Draft Articles on State Responsibility, 'a person or entity … which is empowered by the law of [the] State to exercise elements of the governmental authority'".[464] 75

[A/71/80, para. 60]

Inter-American Court of Human Rights

Gonzales Lluy et al. v. *Ecuador*

In *Gonzales Lluy et al.* v. *Ecuador*, the Inter-American Court of Human Rights cited the case of *Ximenes Lopes* v. *Brazil*, noting that in that case the Court had

> indicated that the assumptions of State responsibility for violation of rights established in the Convention may include the conduct described in the Resolution of the International Law Commission, 'of a person or entity that, although not a State body, is authorized by the laws of the State to exercise powers entailing the authority of the State. Such conduct, by either a natural or legal person, must be deemed to be an act of the State, provided that the latter was acting in this capacity'.[465] 76

[A/71/80, para. 61]

International arbitral tribunal (under the ICSID Convention)

Adel A Hamadi Al Tamimi v. *Sultanate of Oman*

In *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman*, the arbitral tribunal noted that article 5 "provides a useful guide as to the dividing line between sovereign and commercial acts".[466] 77

[A/71/80, para. 62]

Tulip Real Estate and Development Netherlands B.V. v. *Republic of Turkey*

The arbitral tribunal in *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey* stated that as regards attribution of the conduct of Emlak to Turkey under

[463] 74 *Ibid*.

[464] 75 ICSID, Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015, para. 158 (quoting article 5).

[465] 76 IACHR, Judgment, 1 September 2015, note 205 (quoting *Case of Ximenes Lopes* v. *Brazil, Merits, Reparations and Costs*, Judgment, 4 July, 2006, para. 86).

[466] 77 See footnote [340] 66 above, para. 324.

article 5 "it must be established both that (1) Emlak is empowered by the law of Turkey to exercise elements of governmental authority; and (2) The conduct by Emlak that the Claimant complains of relates to the exercise of that governmental authority".[467] 78

[A/71/80, para. 63]

Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda v. *Bolivarian Republic of Venezuela*

In *Tenaris S.A. and Talta—Trading e Marketing Sociedade Unipessoal Lda* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal considered the question

> whether CVG FMO [Ferrominera del Orinoco] was empowered by Venezuela to exercise elements of governmental authority, and was so acting in the case of the Supply Contract, and, specifically, the discriminatory supply of pellets, such that its actions might be attributed to Venezuela pursuant to Article 5 of the ILC Articles.[468] 79

[A/71/80, para. 64]

[The arbitral tribunal in *Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA* v. *Bolivarian Republic of Venezuela* was "mindful of Note 3 of the commentary to Article 5" of the State responsibility articles when rejecting the applicant's submission that "[CVG FMO]'s actions might be attributed to Venezuela pursuant to Article 5 of the ILC Articles".[469] 65

[A/74/83, p. 14]]

[*Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain*

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* referred to articles 4, 5 and 8 of the State responsibility articles when stating that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[470] 52

[A/74/83, p. 12]]

Permanent Court of Arbitration (under UNCITRAL Rules)

[*CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*, the arbitral tribunal concluded that "when entering into the Agreement, Antrix was not acting as an organ of the Respondent, whether under the provisions of Articles 4 and 5 of the ILC Articles".[471] 38

[A/74/83, p. 11]]

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[467] 78 See footnotes [210] 40 and [128] 16 above, para. 292.

[468] 79 See footnote [342] 68 above, para. 414.

[469] [65 ICSID, Case No. ARB/11/26, Award, 29 January 2016, paras. 414–415.]

[470] [52 ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 168.]

[471] [38 PCA, Case No. 2013–09, Award on Jurisdiction and Merits, 25 July 2016, para. 281.]

Mesa Power Group v. *Government of Canada*

In *Mesa Power Group* v. *Government of Canada*, the arbitral tribunal relied on article 5 of the State responsibility articles to find that "the OPA [Ontario Power Authority] was acting in the exercise of delegated governmental authority. Thus, the OPA's acts in ranking and evaluating the FIT Applications are attributable to Canada".[472] 66

[A/74/83, p. 15]

[In *Mesa Power Group* v. *Government of Canada*, the arbitral tribunal referred to article 55 of the State responsibility articles when finding that "Article 1503(2) [of NAFTA] constitutes a *lex specialis* that excludes the application of Article 5 of the ILC Articles".[473] 249

[A/74/83, p. 42]]

Ad hoc committee (under the ICSID Convention)

Antoine Abou Lahoud et Leila Bounafeh-Abou Lahoud v. *République Démocratique du Congo*

In *Antoine Abou Lahoud et Leila Bounafeh-Abou Lahoud* v. *République Démocratique du Congo*, the committee established to annul the award found that the arbitral tribunal did not exceed its powers because, as its mandate required, it had verified the criteria for attribution of conduct under article 5 of the State responsibility articles.[474] 67

[A/74/83, p. 15]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mr. Kristian Almås and Mr. Geir Almås v. *The Republic of Poland*

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås* v. *The Republic of Poland* found that "the termination of the Lease Agreement was not attributable to Poland under ILC Article 5"[475] 68 after deciding that the Polish Agricultural Property Agency's termination of the Lease Agreement took place in a "purported exercise of contractual powers".

[A/74/83, p. 15]

Flemingo DutyFree Shop Private Limited v. *The Republic of Poland*

In *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland*, the arbitral tribunal noted that

> [t]he Ministry of Transport, by statutory provisions, delegated to PPL the task of modernising and operating Polish airports, controlled PPL, and held it accountable for the exercise of its powers. It is thus an entity exercising governmental authority, as envisaged by Article 5 of the ILC Articles.[476] 69

[A/74/83, p. 15]

[472] 66 PCA, Case No. 2012–17, Award, 24 March 2016, para. 371.

[473] [249 PCA, Case No. 2012–17, Award, 24 March 2016, paras. 359, 362 and 365.]

[474] 67 ICSID, Case No. ARB/10/4, Decision on Annulment, 29 March 2016, para. 185.

[475] 68 PCA, Case No. 2015–13, Award, 27 June 2016, para. 251.

[476] 69 PCA, Award, IIC 883 (2016), 12 August 2016, para. 439.

International arbitral tribunal (under the ICSID Convention)

Garanti Koza LLP v. *Turkmenistan*

The arbitral tribunal in *Garanti Koza LLP* v. *Turkmenistan*, citing article 5 of the State responsibility articles,

> confirm[ed] that the acts of TAY [State Concern 'Turkmenavtoyollary'] in furtherance of the Contract were attributable to Turkmenistan. Road and bridge construction is in any event a core function of government. Any entity empowered by a State to exercise elements of governmental authority is for that purpose acting as an organ of State.[477] [70]

[A/74/83, p. 15]

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

In *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal noted that "although PDVSA is a State-owned company with distinct legal personality, its conduct is attributable to [the] Respondent pursuant to Article 5 of the ILC Draft Articles" because "[b]oth in its alleged function as a '*caretaker*' and its capacity as supervisor and promoter of the nationalization of the plant, PDVSA was vested with governmental authority".[478] [71]

[A/74/83, p. 15]

Permanent Court of Arbitration (under UNCITRAL Rules)

WNC Factoring Limited v. *The Czech Republic*

In *WNC Factoring Limited* v. *The Czech Republic*, the arbitral tribunal stated that "[b]ased on the material available to the Tribunal, there are serious issues which arise in attributing the conduct of CEB [Czech Export Bank] and GAP [Export Guarantee and Insurance Corporation] to the Respondent under Article 5 of the ILC Articles".[479] [72]

[A/74/83, p. 16]

International arbitral tribunal (under the ICSID Convention)

Beijing Urban Construction Group Co. Ltd. v. *Yemen*

In *Beijing Urban Construction Group Co. Ltd.* v. *Yemen*, the arbitral tribunal stated that the so-called Broches factors used to determine the jurisdiction of ICSID under article 25 of the ICSID Convention were "the mirror image of the attribution rules in Articles 5 and 8 of the ILC's *Articles on State Responsibility*".[480] [73]

[A/74/83, p. 16]

[477] [70] ICSID, Case No. ARB/11/20, Award, 19 December 2016, para. 335.

[478] [71] ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, paras. 457–458.

[479] [72] PCA, Case No. 2014–34, Award, 22 February 2017, para. 376.

[480] [73] ICSID, Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, para. 34.

UAB E Energija (Lithuania) v. *Republic of Latvia*

The arbitral tribunal in *UAB E Energija (Lithuania)* v. *Republic of Latvia* stated:

Like Article 4, Article 5 of the ILC Articles merely codifies a well-established rule of international law. […] There are thus three aspects to the analysis: (i) the Regulator must have exercised elements of governmental authority; (ii) it must have been empowered by the Respondent's law to do so; and (iii) it was acting in that capacity in regulating tariffs and granting or revoking licences.[481] 74

The tribunal found that "even if Rēzeknes Siltumtīkli and Rēzeknes Enerģija had been empowered to exercise any element of governmental authority, they were not exercising such authority 'in the particular instance', as Article 5 requires".[482] 75

[A/74/83, p. 16]

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia* cited article 5 of the State responsibility articles and noted that "[t]he Croatian Fund is an entity empowered by Croatian law to exercise elements of governmental authority, as exemplified above, and there is no suggestion that the Fund acted other than in its professional capacity. The Croatian Fund may thus be considered an entity within the ambit of Article 5."[483] 76 The tribunal concluded that "the Claimants have not made out any wrongful conduct in violation of the BIT on the part of the Croatian Fund that is to be attributed to the Respondent. The principles of attribution, as codified in the ILC Articles, do not otherwise operate in respect of the Croatian Fund".[484] 77

[A/74/83, p. 16]

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the arbitral tribunal relied on article 5 of the State responsibility to find that:

[t]he Tribunal does not consider that the Claimant's case is separately advanced by Article 5 of the ILC Articles in regard to EGPC [Egyptian General Petroleum Corporation] and EGAS [Egyptian Natural Gas Holding Company]. The Claimant has not established that EGPC or EGAS are 'empowered' by Egyptian law to exercise governmental authority … The Tribunal has not been shown any provision of Egyptian law 'specifically authorising' EGPC to conclude the SPA [Natural Gas Sale and Purchase Agreement] in the exercise of the Respondent's public authority.[485] 78

[A/74/83, p. 16]

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[481] 74 ICSID, Case No. ARB/12/33, Award, 22 December 2017, paras. 806–807.

[482] 75 *Ibid*., para. 816.

[483] 76 ICSID, Case No. ARB/12/39, Award, 26 July 2018, paras. 810–811.

[484] 77 *Ibid*., para. 816.

[485] 78 ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 9.114.

Inter-American Court of Human Rights

Women Victims of Sexual Torture in Atenco v. *Mexico*

The Inter-American Court of Human Rights in *Women Victims of Sexual Torture in Atenco* v. *Mexico* recalled that under the State responsibility articles, internationally wrongful acts are attributable to the State not only when they are committed by organs of that State (under Article 4), but also when the conduct of persons or entities exercising elements of governmental authority is concerned.[486] 79

[A/74/83, p. 17]

International arbitral tribunal (under the ICSID Convention)

[*Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt*

The arbitral tribunal in *Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt* quoted articles 4, 5, 8 and 11 of the State responsibility articles and

> formed the view that the acts or omissions of EGPC [Egyptian General Petroleum Corporation] or EGAS [Egyptian Natural Gas Holding Company] relevant to the conclusion and termination of the GSPA [Gas Sale Purchase Agreement] are attributable to the Respondent under the relevant provisions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law.[487] 96

The tribunal further explained, referring to article 8 of the State responsibility articles, that EGPC and EGAS

> were '*in fact acting on the instructions of, or under the direction or control of*' the Respondent in relation to the particular conduct. In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus '*acknowledge[d] and adopt[ed] the conduct in question as its own*' within the terms of Article 11.[488] 97

[A/74/83, p. 20]]

[*Karkey Karadeniz Elektrik Uretim A.S.* v. *Islamic Republic of Pakistan*

The arbitral tribunal in *Karkey Karadeniz Elektrik Uretim A.S.* v. *Islamic Republic of Pakistan* concluded, citing the text of articles 5 and 8 of the State responsibility articles, that "Lakhra's acts related to the conclusion and execution of the Contract were directed, instructed or controlled by Pakistan, and are accordingly attributable to Pakistan".[489] 101

[A/74/83, p. 20]]

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[486] 79 IACHR, Preliminary Objection, Merits, Reparations and Costs. Series C No. 371 (Spanish), Judgment, 28 November 2018, para. 205 and footnote 303.

[487] [96 ICSID, Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 135.]

[488] [97 *Ibid*., para. 146.]

[489] [101 ICSID, Case No. ARB/13/1, Award, 22 August 2017, paras. 566–569 and 582.]

[International arbitral tribunal (under UNCITRAL Rules)

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[490] 42 The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[491] 43

[A/77/74, p. 11]]

International arbitral tribunal (under the ICSID Convention)

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

In *Ortiz Construcciones y Proyectos S.A.* v. *People's Democratic Republic of Algeria*, the arbitral tribunal cited the text of article 5 and the commentary thereto,[492] 54 and noted that "jurisprudence consistently indicates that article 5 … imposes two conditions that must both be fulfilled, namely: (i) under national law, the entity in question is authorized to exercise elements of governmental authority, and (ii) the act in question involves the exercise of governmental authority."[493] 55 The tribunal noted that "acts *jure gestionis* of public or private entities cannot be attributed to the State in principle under article 5, since the article concerns precisely the determination of whether the entity in question is exercising the functions, or elements, of governmental authority".[494] 56

Furthermore, the tribunal noted that, despite the absence in the State responsibility articles of a definition of the term "elements of governmental authority", it took the view that "this involves establishing in each case, in the light of the circumstances and evidence of the effective exercise of elements of sovereign authority, what the situation is",[495] 57 and that the commentary "provides certain criteria that make it possible to identify the scope of governmental authority, such as (i) the content of the powers, (ii) the way they are conferred on an entity, (iii) the purposes for which they are to be exercised and (iv) the extent to which the entity is accountable to government for their exercise".[496] 58

[A/77/74, p. 12]

[The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State

[490] [42 Final Award, 26 March 2021, para. 72.]

[491] [43 *Ibid*., paras. 72 and 134–135.]

[492] 54 See footnote [381] 32 above, paras. 193 and 195–197.

[493] 55 *Ibid*., para. 194; see also paras. 196–197.

[494] 56 *Ibid*., para. 200.

[495] 57 *Ibid*., para. 201.

[496] 58 *Ibid*., para. 202.

responsibility "only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, *i.e.* only to those cases of attribution covered by articles 4, 5 and 6." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[497] [70]

[A/77/74, p. 14]]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Strabag SE v. *Libya*

In *Strabag SE* v. *Libya*, the arbitral tribunal analysed whether Libya had entered into a contract with the investor through the conduct of local authorities.[498] [59] The tribunal considered that to interpret "Libya" as only the Government of Libya would fail to take into account that, as noted in the commentary to article 5, "States may operate through 'parastatal entities, which exercise elements of governmental authority in place of State organs …]'. The Tribunal therefore believes that [the text of the treaty] does not mean only the Government of Libya, but may also include other Libyan bodies".[499] [60]

[A/77/74, p. 13]

Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to article 5, noting that "[t]he concept of 'governmental authority' is not defined in the ILC Articles. What, however, is required is that the law of the State authorizes an entity to exercise some aspects of that State's power, that is, public authority".[500] [61]

[A/77/74, p. 13]

International arbitral tribunal (under the ICSID Convention)

Interocean Oil Development Company and Interocean Oil Exploration Company v. *Federal Republic of Nigeria*

In *Interocean Oil Development Company and Interocean Oil Exploration Company* v. *Federal Republic of Nigeria*, the arbitral tribunal recalled that "[i]n principle, State-controlled entities are considered as separate from the State, unless they exercise elements of governmental authority within the meaning of ILC Article 5".[501] [62]

[A/77/74, p. 13]

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[497] [[70] *Ibid*., para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).]

[498] [59] ICSID (Additional Facility), Case No. ARB(AF)/15/1, Award, 29 June 2020, para. 168.

[499] [60] *Ibid*., para. 170.

[500] [61] See footnote [126] 14 above, para. 198.

[501] [62] ICSID, Case No. ARB/13/20, Award, 6 October 2020, para. 297.

Article 6. Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Commentary

(1) Article 6 deals with the limited and precise situation in which an organ of a State is effectively put at the disposal of another State so that the organ may temporarily act for its benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

(2) The words "placed at the disposal of" in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ "placed at the disposal of" the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise.[502] [130]

(3) Examples of situations that could come within this limited notion of a State organ "placed at the disposal" of another State might include a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State. On the other hand, mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by article 6. For example, armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter.[503] [131]

(4) Thus, what is crucial for the purposes of article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving State.

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[502] [130] Thus, the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania: *Xhavara and Others* v. *Italy and Albania*, application No. 39473/98, *Eur. Court H.R.,* decision of 11 January 2001. Conversely, the conduct of Turkey taken in the context of the Turkey-European Communities customs union was still attributable to Turkey: see WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (WT/DS34/R), 31 May 1999, paras. 9.33–9.44.

[503] [131] See also article 47 and commentary.

The notion of an organ "placed at the disposal" of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status: for example, cultural missions, diplomatic or consular missions, foreign relief or aid organizations. Also excluded from the ambit of article 6 are situations in which functions of the "beneficiary" State are performed without its consent, as when a State placed in a position of dependence, territorial occupation or the like is compelled to allow the acts of its own organs to be set aside and replaced to a greater or lesser extent by those of the other State.[504] 132

(5) There are two further criteria that must be met for article 6 to apply. First, the organ in question must possess the status of an organ of the sending State; and secondly its conduct must involve the exercise of elements of the governmental authority of the receiving State. The first of these conditions excludes from the ambit of article 6 the conduct of private entities or individuals which have never had the status of an organ of the sending State. For example, experts or advisers placed at the disposal of a State under technical assistance programmes do not usually have the status of organs of the sending State. The second condition is that the organ placed at the disposal of a State by another State must be "acting in the exercise of elements of the governmental authority" of the receiving State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, article 6 covers only a specific and limited notion of "transferred responsibility". Yet, in State practice the situation is not unknown.

(6) In the *Chevreau* case, a British consul in Persia, temporarily placed in charge of the French consulate, lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that "the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power."[505] 133 It is implicit in the Arbitrator's finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for the Consul's acts. If a third State had brought a claim, the proper respondent in accordance with article 6 would have been the State on whose behalf the conduct in question was carried out.

(7) Similar issues were considered by the European Commission of Human Rights in two cases relating to the exercise by Swiss police in Liechtenstein of "delegated" powers.[506] 134 At the relevant time Liechtenstein was not a party to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), so that if the conduct was attributable only to Liechtenstein no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter's consent and in their mutual interest. The officers in question were governed

[504] 132 For the responsibility of a State for directing, controlling or coercing the internationally wrongful act of another, see articles 17 and 18 and commentaries.

[505] 133 UNRIAA, vol. II (Sales No. 1949.V.1), p. 1113, at p. 1141 (1931).

[506] 134 *X and Y* v. *Switzerland,* application Nos. 7289/75 and 7349/76, decision of 14 July 1977; Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 9, p. 57; and *Yearbook of the European Convention on Human Rights, 1977*, vol. 20 (1978), p. 372, at pp. 402–406.

exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not "placed at the disposal" of the receiving State.[507] 135

(8) A further, long-standing example, of a situation to which article 6 applies is the Judicial Committee of the Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth. Decisions of the Privy Council on appeal from an independent Commonwealth State will be attributable to that State and not to the United Kingdom. The Privy Council's role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.[508] 136 There are many examples of judges seconded by one State to another for a time: in their capacity as judges of the receiving State, their decisions are not attributable to the sending State, even if it continues to pay their salaries.

(9) Similar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State's governmental authority. This is even more exceptional than the inter-State cases to which article 6 is limited. It also raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these articles. Article 57 accordingly excludes from the ambit of the articles all questions of the responsibility of international organizations or of a State for the acts of an international organization. By the same token, article 6 does not concern those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty.[509] 137 In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

[International arbitral tribunal (under the ICSID Convention)

Swisslion DOO Skopje v. *The Former Yugoslav Republic of Macedonia*

In its award, the arbitral tribunal in *Swisslion DOO Skopje* v. *The Former Yugoslav Republic of Macedonia* referred to articles 1 and 6 of the State responsibility articles in support of the assertion that, "under customary international law, every wrongful act of a State entails the international responsibility of that State. This covers the conduct of any State organ, including the judiciary".[510] 17

[See A/68/72, footnote 78 and para. 19]]

[507] 135 See also *Drozd and Janousek* v. *France and Spain, Eur. Court H.R., Series A, No. 240* (1992), paras. 96 and 110. See also *Controller and Auditor-General* v. *Davison* (New Zealand, Court of Appeal), ILR, vol. 104 (1996), p. 526, at pp. 536–537 (Cooke, P.) and pp. 574–576 (Richardson, J.). An appeal to the Privy Council on other grounds was dismissed, *Brannigan* v. *Davison*, *ibid.*, vol. 108, p. 622.

[508] 136 For example, Agreement relating to Appeals to the High Court of Australia from the Supreme Court of Nauru (Nauru, 6 September 1976) (United Nations, *Treaty Series,* vol. 1216, No. 19617, p. 151).

[509] 137 See, *e.g.*, article 89 of the Rome Statute of the International Criminal Court.

[510] [17 See footnote [57] 17 above, para. 261, footnote 323.]

European Court of Human Rights

Catan and Others v. *Moldova and Russia*

In its 2012 judgment in the case of *Catan and Others* v. *Moldova and Russia*, the European Court of Human Rights referred to articles 6 and 8 of the State responsibility articles as relevant international law.[511] 79

[A/68/72, para. 61]

International arbitral tribunal (under the ICSID Convention)

Electrabel S.A. v. *The Republic of Hungary*

The arbitral tribunal in *Electrabel S.A.* v. *The Republic of Hungary* referred to article 6 in considering the legal effect of a decision of the European Commission. Relying upon article 6 and the commentary thereto, the tribunal determined that "[w]hilst the European Union is not a State under international law, in the Tribunal's view, it may yet by analogy be so regarded as a Contracting Party to the [relevant treaty], for the purpose of applying Article 6 of the ILC Articles in the present case".[512] 80

[A/68/72, para. 62]

European Court of Human Rights

Jaloud v. *The Netherlands*

The European Court of Human Rights in *Jaloud* v. *The Netherlands* cited articles 2, 6 and 8 of the State responsibility articles, as well as the respective commentaries, as relevant international law.[513] 80 In establishing jurisdiction in respect of the Netherlands, the Court could not find that

> the Netherlands' troops were placed 'at the disposal' of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were 'under the exclusive direction or control' of any other State (compare, *mutatis mutandis*, Article 6 of the International Law Commission's Articles on State Responsibility).[514] 81

[A/71/80, para. 65]

International arbitral tribunal (under the ICSID Convention)

Electrabel S.A. v. *Republic of Hungary*

In *Electrabel S.A.* v. *Republic of Hungary*, the arbitral tribunal stated that "[w]hilst the European Union is not a State under international law, in the Tribunal's view, it may yet

[511] 79 ECHR, Grand Chamber, Application Nos. 43370/04, 8252/05 and 18454/06, Judgment, 19 October 2012, para. 74.

[512] 80 See footnote [314] 53 above, para. 6.74.

[513] 80 ECHR, Grand Chamber, Application No. 47708/08, Judgment, 20 November 2014, para. 98.

[514] 81 *Ibid.*, para. 151.

by analogy be so regarded as a Contracting Party to the ECT, for the purpose of applying Article 6 of the ILC Articles in the present case".[515] 82

[A/71/80, para. 66]

European Court of Human Rights

Big Brother Watch and others v. *the United Kingdom*

In *Big Brother Watch and others* v. *the United Kingdom*, the European Court of Human Rights noted that the State responsibility articles

would only be relevant if the foreign intelligence agencies were placed at the disposal of the respondent State and were acting in exercise of elements of the governmental authority of the respondent State (Article 6); if the respondent State aided or assisted the foreign intelligence agencies in intercepting the communications where that amounted to an internationally wrongful act for the State responsible for the agencies, the United Kingdom was aware of the circumstances of the internationally wrongful act, and the act would have been internationally wrongful if committed by the United Kingdom (Article 16); or if the respondent State exercised direction or control over the foreign Government (Article 17).[516] 80

[A/74/83, p. 17]

Big Brother Watch and others v. *United Kingdom*

In *Big Brother Watch and others* v. *United Kingdom*, the Grand Chamber of the European Court of Human Rights stated that article 6 would be relevant in a case of interception of communications by foreign intelligence services "if the foreign intelligence services were placed at the disposal of the receiving State and were acting in exercise of elements of the governmental authority of that State".[517] 63

[A/77/74, p. 13]

[International arbitral tribunal (under the ICSID Convention)

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State responsibility "only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, *i.e.* only to those cases of attribution covered by

[515] 82 See footnote [22] 10 above, para. 6.74.

[516] 80 ECHR, First Section, Applications Nos. 58170/13, 62322/14 and 24960/15, Judgment, 13 September 2018, para. 420.

[517] 63 ECHR, Grand Chamber, Applications No. 58170/13, No. 62322/14 and No. 24960/15, Judgment, 25 May 2021, para. 495.

articles 4, 5 and 6." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[518] 70

[A/77/74, p. 14]]

[518] [70 See footnote [381] above, para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).]

Article 7. Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Commentary

(1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.

(2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question.[519] [138] Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.

(3) The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals,[520] [139] State practice came to support the proposition, articulated by the British Government in response to an Italian request, that "all Governments should always be held responsible for all acts committed by their agents by virtue of their official capacity".[521] [140] As the Spanish Government pointed out: "If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received."[522] [141] At this time the United States supported "a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but of their apparent authority".[523] [142] It is probable that the different formulations had essentially the same effect, since acts falling outside the scope of both real and apparent authority would

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[519] [138] See, *e.g.*, the "Star and Herald" controversy, Moore, *Digest*, vol. VI, p. 775.

[520] [139] In a number of early cases, international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority: see, *e.g.*, the following cases: "Only Son", Moore, History and Digest, vol. IV, pp. 3404–3405; "William Lee", *ibid.*, p. 3405; and Donougho's, *ibid.*, vol. III, p. 3012. Where the question was expressly examined tribunals did not consistently apply any single principle: see, *e.g.*, the Lewis's case, *ibid.*, p. 3019; the Gadino case, UNRIAA, vol. XV (Sales No. 66.V.3), p. 414 (1901); the Lacaze case, Lapradelle-Politis, vol. II, p. 290, at pp. 297–298; and the "William Yeaton" case, Moore, History and Digest, vol. III, p. 2944, at p. 2946.

[521] [140] For the opinions of the British and Spanish Governments given in 1898 at the request of Italy in respect of a dispute with Peru, see *Archivio del Ministero degli Affari esteri italiano*, serie politica P, No. 43.

[522] [141] Note verbale by Duke Almodóvar del Río, 4 July 1898, *ibid.*

[523] [142] "American Bible Society" incident, statement of United States Secretary of State, 17 August 1885, Moore, *Digest*, vol. VI, p. 743; "Shine and Milligen", G. H. Hackworth, *Digest of International Law* (Washington, D. C., United States Government Printing Office, 1943), vol. V, p. 575; and "Miller", *ibid.*, pp. 570–571.

not be performed "by virtue of … official capacity". In any event, by the time of the 1930 Hague Conference, a majority of States responding to the Preparatory Committee's request for information were clearly in favour of the broadest formulation of the rule, providing for attribution to the State in the case of "[a]cts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority".[524] 143 The Basis of Discussion prepared by the Committee reflected this view. The Third Committee of the Conference adopted an article on first reading in the following terms:

International responsibility is … incurred by a State if damage is sustained by a foreigner as a result of unauthorised acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.[525] 144

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.[526] 145 It is confirmed, for example, in article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which provides that: "A Party to the conflict … shall be responsible for all acts committed by persons forming part of its armed forces": this clearly covers acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and "correspond[s] to the general principles of law on international responsibility".[527] 146

(5) A definitive formulation of the modern rule is found in the *Caire* case. The case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him. The Commission held:

that the two officers, even if they are deemed to have acted outside their competence … and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.[528] 147

(6) International human rights courts and tribunals have applied the same rule. For example, the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case said:

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[524] 143 League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (footnote [147] 88 above), point V, No. 2 (*b*), p. 74, and *Supplement to Vol. III* … (footnote [221] 104 above), pp. 3 and 17.

[525] 144 League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … , document C.351(*c*)M.145(*c*).1930.V (footnote [147] 88 above), p. 237. For a more detailed account of the evolution of the modern rule, see *Yearbook … 1975*, vol. II, pp. 61–70.

[526] 145 For example, the 1961 revised draft by the Special Rapporteur, Mr. García Amador, provided that "an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity" (*Yearbook … 1961*, vol. II, p. 53).

[527] 146 ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), pp. 1053–1054.

[528] 147 *Caire* (footnote [242] 125 above). For other statements of the rule, see *Maal*, UNRIAA, vol. X (Sales No. 60.V.4), pp. 732–733 (1903); *La Masica, ibid.*, vol. XI (Sales No. 61.V.4), p. 560 (1916); *Youmans*, (footnote [234] 117 above); *Mallén*, *ibid.*; *Stephens*, UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 267–268 (1927); and *Way* (footnote [231] 114 above), pp. 400–401. The decision of the United States Court of Claims in *Royal Holland Lloyd* v. *United States,* 73 Ct. Cl. 722 (1931) (*Annual Digest of Public International Law Cases* (London, Butterworth, 1938), vol. 6, p. 442) is also often cited.

This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.[529] 148

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been "carried out by persons cloaked with governmental authority".[530] 149

(8) The problem of drawing the line between unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression "if the organ, person or entity acts in that capacity" in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.[531] 150 In short, the question is whether they were acting with apparent authority.

(9) As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, *i.e.* only to those cases of attribution covered by articles 4, 5 and 6. Problems of unauthorized conduct by other persons, groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.

(10) As a rule of attribution, article 7 is not concerned with the question whether the conduct amounted to a breach of an international obligation. The fact that instructions given to an organ or entity were ignored, or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.[532] 151 Equally, article 7 is not concerned with the admissibility of claims arising from

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[529] 148 *Velásquez Rodríguez* (footnote [84] 63 above); see also ILR, vol. 95, p. 232, at p. 296.

[530] 149 *Petrolane, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 27, p. 64, at p. 92 (1991). See also paragraph (13) of the commentary to article 4.

[531] 150 One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The articles are not concerned with questions that would then arise as to the validity of the transaction (cf. the 1969 Vienna Convention, art. 50). So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

[532] 151 See *ELSI* (footnote [144] 85 above), especially at pp. 52, 62 and 74.

internationally wrongful acts committed by organs or agents acting *ultra vires* or contrary to their instructions. Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim.[533] 152

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Iran-United States Claims Tribunal

Yeager v. *Islamic Republic of Iran*

In its 1987 award in the *Yeager* v. *Islamic Republic of Iran* case, the Tribunal, in determining whether an agent of Iran Air (which was controlled by the Iranian Government) had acted in his official capacity when he had requested an additional amount of money in order to get the claimant's daughter onto a flight for which she had a confirmed ticket, referred to the "widely accepted" principle codified in draft article 10 provisionally adopted by the International Law Commission,[534] 82 and to the commentary to that provision:

> It is widely accepted that the conduct of an organ of a State may be attributable to the State, even if in a particular case the organ exceeded its competence under internal law or contravened instructions concerning its activity. It must have acted in its official capacity as an organ, however. *See* International Law Commission draft article 10. Acts which an organ commits in a purely private capacity, even if it has used the means placed at its disposal by the State for the exercise of its function, are not attributable to the State. *See* commentary on the International Law Commission draft article 10, *Yearbook of the International Law Commission, 1975*, volume II, p. 61.[535] 83

The tribunal found that, in the said instance, the agent had acted in a private capacity and not in his official capacity as an organ of Iran Air.

[A/62/62, para. 53]

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[533] 152 See further article 44, subparagraph (*b*), and commentary.

[534] 82 This provision was amended and incorporated in article 7 finally adopted by the International Law Commission in 2001. Draft article 10 provisionally adopted read as follows:

Article 10

Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[535] 83 See footnote [204] 101 above, p. 111, para. 65.

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Amco Asia Corporation and Others v. *Republic of Indonesia*

In its 1984 award on the merits, the arbitral tribunal constituted to hear the *Amco Indonesia Corporation and Others* v. *Indonesia* case considered that draft article 10 provisionally adopted by the International Law Commission (as well as draft articles 3 and 5 provisionally adopted), which it quoted in extenso, constituted "an expression of accepted principles of international law". The relevant passage is quoted [on page 25] above.

[A/62/62, para. 54]

INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Prosecutor v. *Duško Tadić*

In its 1999 judgement in the *Tadić* case, the Appeals Chamber, in the context of its examination of the rules applicable for the attribution to States of acts performed by private individuals,[536] 84 incidentally referred to draft article 10 adopted by the International Law Commission on first reading,[537] 85 which it considered to be a restatement of "the rules of State responsibility":

Under the rules of State responsibility, as restated in article 10 of the draft on State responsibility as provisionally adopted by the International Law Commission, a State is internationally accountable for *ultra vires* acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.[538] 86

The Appeals Chamber also indicated in this regard that:

In the case envisaged by article 10 of the draft on State responsibility (as well as in the situation envisaged in article 7 of the same draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity … [I]nternational law renders any State responsible for acts in breach of international law performed … by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem*) … [539] 87

[A/62/62, para. 55]

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[536] 84 For the relevant passage of the Appeals Chamber's judgement, see p. 65 above.

[537] 85 Draft article 10 adopted on first reading was amended and incorporated in article 7 finally adopted by the International Law Commission in 2001. The text of that provision (see *Yearbook … 1996*, vol. II (Part Two), para. 65) was identical to that of draft article 10 provisionally adopted. (See footnote [534] 82 above.)

[538] 86 ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999, para. 121 (footnotes omitted).

[539] 87 *Ibid*., para. 123.

International arbitral tribunal (under the ICSID Additional Facility Rules)

Metalclad Corporation v. *United Mexican States*

In its 2000 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *Metalclad Corporation* v. *Mexico* case, in considering Mexico's responsibility for the conduct of its State and local governments (*i.e.*, the municipality of Guadalcazar and the State of San Luis Potosí) found that the rules of NAFTA accorded "fully with the established position in customary international law", and in particular with draft article 10 adopted by the International Law Commission on first reading, which, "though currently still under consideration, may nonetheless be regarded as an accurate restatement of the present law".[540] [88]

[A/62/62, para. 56]

ADF Group Inc. v. *United States of America*

In its 2003 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *ADF Group Inc.* v. *United States* case, while noting that "even if the United States measures [at issue in the case] were somehow shown or admitted to be *ultra vires* under the internal law of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodied in article 1105(1)" of NAFTA, stated that "[a]n unauthorized or *ultra vires* act of a governmental entity of course remains, in international law, the act of the State of which the acting entity is part, if that entity acted in its official capacity", thereafter referring in a footnote to article 7 finally adopted by the International Law Commission in 2001.[541] [89]

[A/62/62, para. 57]

Human Rights Committee

Sarma v. *Sri Lanka*

In its 2003 views on communication No. 950/2000 (Sri Lanka), the Human Rights Committee, with regard to the abduction of the son of the author of the communication by an officer of the Sri Lankan Army, noted that "it is irrelevant in the present case that the officer to whom the disappearance is attributed acted *ultra vires* or that superior officers were unaware of the actions taken by that officer".[542] [90] In a footnote, the Committee referred to article 7 of the articles finally adopted by the International Law Commission, as well as to article 2, paragraph 3, of the International Covenant on Civil and Political Rights.[543] [91] It then concluded that, "in the circumstances, the State party is responsible for the disappearance of the author's son".

[A/62/62, para. 58]

[540] [88] NAFTA (ICSID Additional Facility), Award, 30 August 2000, para. 73, reproduced in *ILR*, vol. 119, p. 634.

[541] [89] NAFTA (ICSID Additional Facility), Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 190 (and footnote 184), reproduced in *ICSID Review—Foreign Investment Law Journal*, vol. 18, No. 1, 2003, p. 283.

[542] [90] CCPR/C/78/D/950/2000, 31 July 2003, para. 9.2.

[543] [91] *Ibid.*, para. 9.2, footnote 13.

European Court of Human Rights

Ilaşcu and others v. *Moldova and Russia*

In its 2004 judgement in the *Ilaşcu and others* v. *Moldova and Russia* case, the European Court, sitting as a Grand Chamber, in interpreting the term "jurisdiction" in article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[544] [92] examined the issue of State responsibility and referred, *inter alia*, to article 7 finally adopted by the International Law Commission in 2001 in support of its finding that a State may be held responsible where its agents are acting *ultra vires* or contrary to instructions:

> A State may also be held responsible even where its agents are acting ultra vires or contrary to instructions. Under the [European] Convention [for the Protection of Human Rights and Fundamental Freedoms], a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected (see Ireland v. the United Kingdom, judgement of 18 January 1978, Series A no. 25, p. 64, § 159; see also article 7 of the International Law Commission's draft articles on the responsibility of States for internationally wrongful acts … and the [Caire] case heard by the General Claims Commission, (1929) Reports of International Arbitral Awards 5 (RIAA), p. 516).[545] [93]

[A/62/62, para. 59]

International arbitral tribunal (under the ICSID Convention)

Noble Ventures, Inc. v. *Romania*

In its 2005 award, the arbitral tribunal constituted to hear the *Noble Ventures, Inc.* v. *Romania* case, having found that the acts of a Romanian "institution of public interest" (the State Ownership Fund (SOF), subsequently replaced by the Authority for Privatization and Management of the State Ownership (APAPS)) were attributable to Romania, noted that that conclusion would be the same even if those acts were regarded as *ultra vires*, as established by the "generally recognized rule recorded" in article 7 finally adopted by the International Law Commission in 2001:

> Even if one were to regard some of the acts of SOF or APAPS as being *ultra vires*, the result would be the same. This is because of the generally recognized rule recorded in article 7 of the 2001 International Law Commission draft according to which the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds it authority or contravenes instructions. Since, from the Claimant's perspective, SOF and APAPS always acted as if they were entities entitled by the Respondent to do so, their acts would still have to be attributed to the Respondent, even if an excess of competence had been shown.[546] [94]

[A/62/62, para. 60]

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[544] [92] Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

[545] [93] ECHR, Grand Chamber, Application No. 48787/99, Judgment, 8 July 2004, para. 319.

[546] [94] ICSID, Case No. ARB/01/11, Award, 12 October 2005, para. 81.

Azurix Corp. v. *Argentine Republic*

In its 2006 award, the arbitral tribunal constituted to hear the *Azurix Corp.* v. *Argentina* case observed that the claimant had argued that "Argentina is responsible for the actions of the [Argentine] Province [of Buenos Aires] under the [1991 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America] and customary international law". The claimant had referred in particular to "the responsibility of the State for acts of its organs under customary international law and [had] cite[d], as best evidence, articles 4 and 7 of the draft articles on responsibility of States for internationally wrongful acts of the International Law Commission".[547] [95] The tribunal considered, in this regard, that

> [t]he responsibility of States for acts of its organs and political subdivisions is well accepted under international law. The draft articles, as pointed out by the Claimant, are the best evidence of such acceptance and as such have been often referred to by international arbitral tribunals in investor-State arbitration.[548] [96]

[A/62/62, para. 61]

International arbitral tribunal (under the ICSID Convention)

Ioannis Kardassopoulos and Ron Fuchs v. *The Republic of Georgia*

In its award, the arbitral tribunal in *Ioannis Kardassopoulos and Ron Fuchs* v. *The Republic of Georgia* recalled that, during the jurisdictional phase, it had found that, according to article 7, "even in cases where an entity empowered to exercise governmental authority acts ultra vires of it, the conduct in question is nevertheless attributable to the State".[549] [81] The tribunal had concluded that the Republic of Georgia could not avoid the legal effect of its conduct by arguing that it was void *ab initio* under Georgian law.[550] [82]

[A/68/72, para. 63]

Court of Justice of the European Union

European Commission v. Italian Republic

The opinion of Advocate General Kokott in *European Commission* v. *Italian Republic* referred to article 7 in support of the assertion that, "even if it should be found that the [State] officials committed a criminal offence this would not stop their actions being imputable to the State".[551] [83]

[A/68/72, para. 64]

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[547] [95] ICSID, Case No. ARB/01/12, Award, 14 July 2006, para. 46.

[548] [96] *Ibid*., para. 50.

[549] [81] See footnote [288] 36 above, para. 273 (quoting ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 190).

[550] [82] *Ibid*., para. 273 (quoting Decision on Jurisdiction, para. 191).

[551] [83] CJEU, Case C-334/08, Opinion of Advocate General Kokott, 15 April 2010, paras. 29 and 30, and footnote 11.

European Court of Human Rights

El-Masri v. *The Former Yugoslav Republic of Macedonia*

In its 2012 judgment in the case of *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[552] 84

[A/68/72, para. 65]

[International arbitral tribunal (under the ICSID Convention)

The Rompetrol Group N.V. v. *Romania*

The arbitral tribunal in *The Rompetrol Group N.V.* v. *Romania* referred to articles 4 and 7 when affirming that "there was no dispute that all of the authorities and agencies in question were at all material times organs of the Romanian State, and that their conduct was accordingly attributable to the Romanian State for the purposes of the law of State responsibility".[553] 47

[A/71/80, para. 40]]

European Court of Human Rights

Jones and Others v. *the United Kingdom*

In *Jones and Others* v. *the United Kingdom*, the European Court of Human Rights referred to article 7 as relevant international law.[554] 84

[A/71/80, para. 67]

Husayn (Abu Zubaydah) v. *Poland*

In *Husayn (Abu Zubaydah)* v. *Poland*, the European Court of Human Rights listed articles 7, 14, 15 and 16 as relevant international law.[555] 85

[A/71/80, para. 68]

Nasr et Ghali v. *Italy*

The European Court of Human Rights in *Nasr et Ghali* v. *Italy* referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[556] 82

[A/74/83, p. 17]

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[552] 84 ECHR, Grand Chamber, Application No. 39630/09, Judgment, 13 December 2012, para. 97.

[553] [47 See footnote [17] 5 above, para. 173, footnote 298.]

[554] 84 See footnote [323] 49 above, para. 108.

[555] 85 ECHR, Former Fourth Section, Application No. 7511/13, Judgment, 24 July 2014, para. 201.

[556] 82 ECHR, Fourth Section, Application 44883/09, Judgment, 23 February 2016, para. 185.

World Trade Organization Panel

United States—Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia

In *United States—Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, the panel cited articles 4 and 7 of the State responsibility articles, and the commentary thereto, when stating that "it is well established under international law that an action or conduct of a government official or entity is attributable to the State even where that action or conduct is contrary to national law".[557] 83

[A/74/83, p. 17]

International arbitral tribunal (under the ICSID Convention)

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

In *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia*, the arbitral tribunal, referring to article 7 of the State responsibility articles, noted that

> it is not open to the State to plead the patent irregularities of a bankruptcy proceeding overseen and authorised at critical junctures by its own court or the making of an extraordinary loan approved by a senior government minister, which might or might not have been unlawful under Croatian law, in opposition to the BIT claim. Put another way, if this investment was not made in conformity with the legislation of Croatia, on the evidence before this Tribunal, this is due to the acts of organs of the State.[558] 84

Discussing the question of legitimate expectations to ownership over property by the claimant, the arbitral tribunal held:

> [I]n *Kardassopoulos* the contracting entities were an organ of the State or an entity empowered to exercise elements of the governmental authority, such that their conduct was considered an act of the State under ILC Article 7. The concession was also signed and "ratified" by a ministry of the respondent government. Further, some of the most senior government officials were involved in the negotiation of the agreements. There are no comparable findings on the attribution of conduct to the Respondent in the instant case. For example, the Tribunal finds that the contracting entity was not an entity within the meaning of ILC Article 7, and the Respondent is not a party to the Purchase Agreement or otherwise bound. Further, the actions of the Liquidator are not attributable to the Respondent.[559] 85

[A/74/83, p. 17]

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[557] 83 WTO, Report of the Panel, WT/DS491/R, 6 December 2017, para. 7.179.

[558] 84 ICSID, Case No. ARB/12/39, Award, 26 July 2018, para. 384.

[559] 85 *Ibid*., para. 1009, discussing *Ioannis Kardassopoulos* v. *Georgia*, Decision on Jurisdiction (footnote [549] 81 above).

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Chevron Corporation and Texaco Petroleum Company v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* discussed article 7, and the commentary thereto, when finding that a judge had acted in his official capacity.[560] 86

[A/74/83, p. 18]

INTER-AMERICAN COURT OF HUMAN RIGHTS

Villamizar Durán et al. v. *Colombia*

In *Villamizar Durán et al.* v. *Colombia*, the Inter-American Court of Human Rights observed that the practice and *opinio juris* of States, as well as the jurisprudence of international courts, had confirmed the existence of an exception to the "general rule" in Article 7, namely when the organ or person was not acting in an official capacity, but rather acting in the capacity of a private entity or person. The Court further referred to the indication in the commentary to the provision that "the problem of drawing the line between unauthorized but still 'official' conduct, on the one hand, and 'private' conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it".[561] 87

[A/74/83, p. 18]

Women Victims of Sexual Torture in Atenco v. *Mexico*

In *Women Victims of Sexual Torture in Atenco* v. *Mexico*, the Inter-American Court of Human Rights cited Article 7 when discussing the defendant's argument that its agents had acted *ultra vires*.[562] 88

[A/74/83, p. 18]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA)

The "Enrica Lexie" Incident (Italy v. *India)*

The arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea in *The "Enrica Lexie" Incident (Italy* v. *India)* noted that even if State agents were acting "*ultra vires* or contrary to their instructions or orders …, this would not preclude them from enjoying immunity *ratione materiae* as long as they continued to act in the name of the State and in their 'official capacity'". The tribunal recalled

[560] 86 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, para. 8.48.

[561] 87 IACHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 364 (Spanish), Judgment, 20 November 2018, para. 139.

[562] 88 IACHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 371 (Spanish), Judgment, 28 November 2018, para. 165 and footnote 237.

article 7, according to which "conduct by a State organ acting in its official capacity shall be attributable to the State 'even if it exceeds its authority or contravenes instructions'".[563] [64]

[A/77/74, p. 14]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID ADDITIONAL FACILITY RULES)

Strabag SE v. *Libya*

The arbitral tribunal in *Strabag SE* v. *Libya* analysed an argument presented by the respondent State "to the effect that that if damage was inflicted by Libya's military forces, it resulted from unauthorized conduct by forces acting outside of their orders". The tribunal referred to the commentary to article 7, indicating that

[a]s a matter of international law, the International Law Commission affirms that the responsibility of a State under Article 91 of Geneva Protocol I—that the State 'shall be responsible for all acts [committed] by persons forming part of its armed forces'—'clearly covers acts committed contrary to orders or instructions'.[564] [65]

[A/77/74, p. 14]

[INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State responsibility "only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, *i.e.* only to those cases of attribution covered by articles 4, 5 and 6." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[565] [70]

[A/77/74, p. 14]]

[563] [64] See footnote [384] 34 above, para. 860.

[564] [65] See footnote [498] 59 above, para. 319.

[565] [[70] See footnote [381] above, para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).]

Article 8. Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Commentary

(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control.[566] 153 Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery.

(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence.[567] 154 In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves "governmental activity". Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.

(3) More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

(4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary Activities in and against Nicaragua* case. The question was whether the conduct of the contras was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the contras. This was analysed by ICJ in terms of the notion of "control". On the one hand, it held that the United States was responsible for the "planning, direction and support" given by the United States to Nicaraguan opera-

[566] 153 Separate issues are raised where one State engages in internationally wrongful conduct at the direction or under the control of another State: see article 17 and commentary, and especially paragraph (7) for the meaning of the words "direction" and "control" in various languages.

[567] 154 See, *e.g.*, the *Zafiro* case, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 160 (1925); the *Stephens* case (footnote [528] 147 above), p. 267; and *Lehigh Valley Railroad Company and Others (U.S.A.)* v. *Germany (Sabotage* cases*)*: "*Black Tom*" and "*Kingsland*" incidents, *ibid*., vol. VIII (Sales No. 58.V.2), p. 84 (1930) and p. 458 (1939).

tives.[568] 155 But it rejected the broader claim of Nicaragua that all the conduct of the contras was attributable to the United States by reason of its control over them. It concluded that:

> [D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.
>
> …
>
> All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[569] 156

Thus while the United States was held responsible for its own support for the contras, only in certain individual instances were the acts of the contras themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.

(5) The Appeals Chamber of the International Tribunal for the Former Yugoslavia has also addressed these issues. In the *Tadić* case, the Chamber stressed that:

> The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.[570] 157

The Appeals Chamber held that the requisite degree of control by the Yugoslavian "authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations".[571] 158 In the course of their reasoning, the majority considered it necessary to disapprove the ICJ approach in the *Military and Paramilitary Activities in and against Nicaragua* case. But the legal issues and the factual situation in the *Tadić* case were different from those facing the Court in that case. The tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitar-

[568] 155 *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 51, para. 86.

[569] 156 *Ibid.*, pp. 62 and 64–65, paras. 109 and 115. See also the concurring opinion of Judge Ago, *ibid.*, p. 189, para. 17.

[570] 157 *Prosecutor* v. *Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94–1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1518, at p. 1541, para. 117. For the judgment of the Trial Chamber (Case IT-94–1-T (1997)), see ILR, vol. 112, p. 1.

[571] 158 ILM, vol. 38, No. 6 (November 1999), p. 1546, para. 145.

ian law.[572] 159 In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.[573] 160

(6) Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion.[574] 161 The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.[575] 162 Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property.[576] 163 On the other hand, where there was evidence that the corporation was exercising public powers,[577] 164 or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,[578] 165 the conduct in question has been attributed to the State.[579] 166

(7) It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text

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[572] 159 See the explanation given by Judge Shahabuddeen, *ibid*., pp. 1614–1615.

[573] 160 The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by the Iran-United States Claims Tribunal and the European Court of Human Rights: *Yeager* (footnote [204] 101 above), p. 103. See also *Starrett Housing Corporation* v. *Government of the Islamic Republic of Iran,* Iran-U.S. C.T.R., vol. 4, p. 122, at p. 143 (1983); *Loizidou* v. *Turkey, Merits, Eur. Court H.R., Reports*, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and *ibid*., *Preliminary Objections*, *Eur. Court H.R., Series A, No. 310*, p. 23, para. 62 (1995).

[574] 161 *Barcelona Traction* (footnote [46] 52 above), p. 39, paras. 56–58.

[575] 162 For example, the Workers' Councils considered in *Schering Corporation* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 5, p. 361 (1984); *Otis Elevator Company* v. *The Islamic Republic of Iran*, *ibid*., vol. 14, p. 283 (1987); and *Eastman Kodak Company* v. *The Government of Iran*, *ibid*., vol. 17, p. 153 (1987).

[576] 163 *SEDCO, Inc.* v. *National Iranian Oil Company, ibid*., vol. 15, p. 23 (1987). See also *International Technical Products Corporation* v. *The Government of the Islamic Republic of Iran*, *ibid*., vol. 9, p. 206 (1985); and *Flexi-Van Leasing, Inc.* v. *The Government of the Islamic Republic of Iran*, *ibid*., vol. 12, p. 335, at p. 349 (1986).

[577] 164 *Phillips Petroleum Company Iran* v. *The Islamic Republic of Iran*, *ibid*., vol. 21, p. 79 (1989); and *Petrolane* (footnote [530] 149 above).

[578] 165 *Foremost Tehran, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. *Ibid*,, vol. 10, p. 228 (1986); and *American Bell International Inc.* v. *The Islamic Republic of Iran*, *ibid*., vol. 12, p. 170 (1986).

[579] 166 See *Hertzberg et al.* v. *Finland* (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex XIV, communication No. R.14/61, p. 161, at p. 164, para. 9.1) (1982). See also *X* v. *Ireland*, application No. 4125/69, *Yearbook of the European Convention on Human Rights, 1971*, vol. 14 (1973), p. 199; and *Young, James and Webster* v. *the United Kingdom*, *Eur. Court H.R., Series A, No. 44* (1981).

of article 8, the three terms “instructions”, “direction” and “control” are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.

(8) Where a State has authorized an act, or has exercised direction or control over it, questions can arise as to the State’s responsibility for actions going beyond the scope of the authorization. For example, questions might arise if the agent, while carrying out lawful instructions or directions, engages in some activity which contravenes both the instructions or directions given and the international obligations of the instructing State. Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored. The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with article 8.

(9) Article 8 uses the words “person or group of persons”, reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a *de facto* basis. Thus while a State may authorize conduct by a legal entity such as a corporation, it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Iran-United States Claims Tribunal

Yeager v. *Islamic Republic of Iran*

In its 1987 award in the *Yeager* v. *Islamic Republic of Iran* case, the Tribunal, in considering the question whether the acts of revolutionary guards were attributable to the Islamic Republic of Iran under international law, referred to draft article 8(*a*) provisionally adopted by the International Law Commission[580] 97 as a provision codifying a principle “generally accepted in international law”:

> … attributability of acts to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law merely by invoking its internal law. It is generally accepted that a State is also responsible for acts of persons, if it is established that those persons were in fact acting on behalf of the State. See ILC draft article 8(*a*).[581] 98

[A/62/62, para. 62]

[580] 97 This provision was amended and incorporated in article 8 finally adopted by the International Law Commission in 2001. It provided that: “The conduct of a person or group of persons shall also be considered as an act of the State under international law if: (*a*) It is established that such person or group of persons was in fact acting on behalf of that State; … ”.

[581] 98 See footnote [204] 101 above, p. 103, para. 42.

International Tribunal for the Former Yugoslavia

Prosecutor v. *Ivica Rajić ("Stupni Do")*

In its 1996 review of the indictment pursuant to rule 61 of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia in the *Rajić* case, the Trial Chamber considered the issue of when a group of persons may be regarded as the agent of a State with reference to draft article 8 adopted by the International Law Commission on first reading:[582] 99

24. The issue of when a group of persons may be regarded as the agent of a State has been considered frequently in the context of imposing responsibility on States for the actions of their agents. The International Law Commission considered the issue in its 1980 draft articles on State responsibility. Draft article 8 provides in relevant part that the conduct of a person or a group of persons shall 'be considered as an act of the State under international law' if 'it is established that such person or group of persons was in fact acting on behalf of that State'. 1980 II (Part Two) *Yearbook International Law Commission* at p. 31. The matter was also addressed by the International Court of Justice in the *Nicaragua* case. There, the Court considered whether the *contras*, who were irregular forces fighting against the Government of Nicaragua, were agents of the United States of America in order to decide whether the United States was liable for violations of international humanitarian law allegedly committed by the *contras*. The Court held that the relevant standard was

> whether the relationship was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. (*Nicaragua*, 1986 I.C.J. Rep. ¶ 109.)

It found that the United States had financed, organized, trained, supplied and equipped the *contras* and had assisted them in selecting military and paramilitary targets. These activities were not, however, sufficient to hold the United States liable for any violations of international humanitarian law committed by the *contras*.

25. The Trial Chamber deems it necessary to emphasize that the International Court of Justice in the *Nicaragua* case considered the issue of agency in a very different context from the one before the Trial Chamber in this case. First, the Court's decision in the *Nicaragua* case was a final determination of the United States' responsibility for the acts of the *contras*. In contrast, the instant proceedings are preliminary in nature and may be revised at trial. Second, in the *Nicaragua* case the Court was charged with determining State responsibility for violations of international humanitarian law. It therefore rightly focused on the United States' operational control over the *contras*, holding that

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[582] 99 This provision was amended and incorporated in articles 8 and 9 finally adopted by the International Law Commission in 2001. Draft article 8 adopted on first reading read as follows:

> Article 8
>
> Attribution to the State of the conduct of persons acting in fact on behalf of the State
>
> The conduct of a person or group of persons shall also be considered as an act of the State under international law if:
>
> (*a*) It is established that such person or group of persons was in fact acting on behalf of that State
>
> (*b*) Such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority. (*Yearbook … 1996*, vol. II (Part Two), para. 65.)

the 'general control by the [United States] over a force with a high degree of dependency on [the United States]' was not sufficient to establish liability for violations by that force. (*Nicaragua*, 1986 I.C.J. Rep. ¶ 115.) In contrast, this Chamber is not called upon to determine Croatia's liability for the acts of the Bosnian Croats. Rather, it is required to decide whether the Bosnian Croats can be regarded as agents of Croatia for establishing subject-matter jurisdiction over discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Convention. Specific operational control is therefore not critical to the inquiry. Rather, the Trial Chamber focuses on the general political and military control exercised by Croatia over the Bosnian Croats."[583] [100]

[A/62/62, para. 63]

Prosecutor v. *Duško Tadić*

In its 1997 judgement in the *Tadić* case (which was later reviewed on appeal[584] [101]), the Trial Chamber invoked the reasoning followed by the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) with regard to the attribution to States of acts performed by private individuals. In this context, it reproduced a passage of the separate opinion of Judge Ago in that case, which referred to draft article 8 adopted by the International Law Commission on first reading:

It seems clear to the Trial Chamber that the officers of non-Bosnian Serb extraction were sent as "volunteers" on temporary, if not indefinite, assignment to the VRS [the Bosnian Serb Army]. In that sense, they may well be considered agents of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro). In the *Nicaragua* case, by contrast, no evidence was led to the effect that United States personnel operated with or commanded troops of the contras on Nicaraguan territory. As Judge Ago, formerly the Special Rapporteur to the International Law Commission on State Responsibility, explained in the course of his Separate Opinion in the *Nicaragua* case:

> [T]he negative answer returned by the Court to the Applicant's suggestion that the misdeeds committed by some members of the *contra* forces should be considered as acts imputable to the United States of America is likewise in conformity with the provisions of the International Law Commission's draft [*i.e.*, article 8 read together with article 11]. It would indeed be inconsistent with the principles governing the question to regard members of the *contra* forces as persons or groups acting in the name and on behalf of the United States of America. Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or to carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them. Only in such instances does international law recognize, as a rare exception to the rule, that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptation of that term, may be held to be acts of that State. The Judgment, accordingly, takes a correct view when, referring in particular to the atrocities, acts of violence or terrorism and other inhuman actions that Nicaragua alleges to have been committed by the *contras* against the persons and property of civilian populations, it holds that the perpetrators of these misdeeds may not be considered as having been specifically charged by United States

[583] [100] ICTY, Trial Chamber, *Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence*, Case No. IT-95–12-R61, 13 September 1996, paras. 24–25.

[584] [101] For the relevant part of the judgement of the Appeals Chamber of the International Tribunal for the Former Yugoslavia, see [pp. 142–143] below.

authorities to commit them unless, in certain concrete cases, unchallengeable proof to the contrary has been supplied.[585] 102

[A/62/62, para. 64]

Prosecutor v. *Duško Tadić*

In its 1999 judgement in the *Tadić* case, reviewing the judgement of the Trial Chamber referred to above, the Appeals Chamber explained the reasons why it considered that the reasoning followed by the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) with regard to the attribution to States of acts performed by private individuals "would not seem to be consonant with the logic of the law of State responsibility". In this context, it referred to draft article 8 as adopted by the International Law Commission on first reading, which it considered to reflect the "principles of international law concerning the attribution to States of acts performed by private individuals". Its elaboration on this matter, which was later referred to by the International Law Commission in its commentary to article 8 finally adopted in 2001, read as follows:

117. The principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. These principles are reflected in article 8 of the draft on State responsibility adopted on first reading by the United Nations International Law Commission and, even more clearly, in the text of the same provisions as provisionally adopted in 1998 by the International Law Commission Drafting Committee. Under this article, if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.

…

121. … Under the rules of State responsibility, as restated in article 10 of the draft on State responsibility as provisionally adopted by the International Law Commission, a State is internationally accountable for *ultra vires* acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States

[585] 102 ICTY, Trial Chamber, Opinion and Judgement, Case No. IT-94-1-T, 7 May 1997, para. 601, reproducing paragraph 16 of the Separate Opinion of Judge Ago in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (footnote [30] 36 above).

entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.

122. The same logic should apply to the situation under discussion. As noted above, the situation of an organized group is different from that of a single private individual performing a specific act on behalf of a State. In the case of an organized group, the group normally engages in a series of activities. If it is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, *whether or not each of them was specifically imposed, requested or directed by the State*. To a large extent the wise words used by the United States-Mexico General Claims Commission in the *Youmans* case with regard to State responsibility for acts of State military officials should hold true for acts of organized groups over which a State exercises overall control.

123. What has just been said should not, of course, blur the necessary distinction between the various legal situations described. In the case envisaged by article 10 of the draft on State responsibility (as well as in the situation envisaged in article 7 of the same draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity. In the case under discussion here, that of organized groups, State responsibility is instead the objective corollary of the overall control exercised by the State over the group. Despite these legal differences, the fact nevertheless remains that international law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem*), or (ii) by individuals who make up organized groups subject to the State's control. International law does so regardless of whether or not the State has issued *specific instructions* to those individuals. Clearly, the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility."[586] [103]

[A/62/62, para. 65]

World Trade Organization Appellate Body

United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea

In its 2005 report on *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, the Appellate Body noted that the Republic of Korea, in support of its argument that the panel's interpretation of article 1.1(*a*)(1)(iv) of the Agreement on Subsidies and Countervailing Measures—that a private body may be entrusted to take an action even when the action never occurs—was legally and logically incorrect, had referred to article 8 of the articles finally adopted by the International Law Commission in 2001. According to the Appellate Body,

Korea explains that article 8, which is entitled "Conduct directed or controlled by a State", provides that private conduct shall be attributed to a State only "if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." Korea finds "striking" the similarity of wording in the reference to "carrying out" a conduct and submits that the requirement of conduct taking place in order to establish State responsibility is a matter of "common sense".[587] [104]

[586] [103] ICTY, Appeals Chamber, Judgement, Case No. IT-94–1-A, 15 July 1999 (footnotes omitted).

[587] [104] WTO, Appellate Body Report, WT/DS296/AB/R, 27 June 2005, para. 69 (footnotes omitted).

In interpreting the said provision of the agreement, the Appellate Body subsequently referred, in a footnote, to the commentary by the International Law Commission to article 8:

> … the conduct of private bodies is presumptively not attributable to the State. The commentaries to the International Law Commission draft articles explain that "[s]ince corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority". (Commentaries to the International Law Commission draft articles … , article 8, commentary, para. (6) …).[588] [105]

And later, the Appellate Body added, in another footnote:

> The commentaries to the International Law Commission draft articles similarly state that "it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that conduct controlled should be attributed to it". (Commentaries to the International Law Commission draft articles … , article 8, commentary, para. (5), … (footnote omitted).[589] [106]

[A/62/62, para. 66]

International arbitral tribunal (under UNCITRAL rules)

Encana Corporation v. *Republic of Ecuador*

In its 2006 award, the arbitral tribunal constituted to hear the *EnCana Corp.* v. *Ecuador* case under the Canada-Ecuador investment treaty and the UNCITRAL arbitration rules, quoted, *inter alia*, article 8 finally adopted by the International Law Commission in 2001. The relevant passage is quoted [on page 103] above.

[A/62/62, para. 67]

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, in examining the question whether the massacres committed at Srebrenica were attributable, in whole or in part, to the Respondent, after having found that these acts had not been perpetrated by organs of the latter, went on to examine whether the same acts had been committed under the direction or control of the Respondent. The Court noted, with reference to article 8 finally adopted by the International Law Commission in 2001, that

> 398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility …
>
> 399. This provision must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities*

[588] [105] *Ibid.*, para. 112, footnote 179.

[589] [106] *Ibid.*, para. 116, footnote 188.

in and against Nicaragua (Nicaragua v. *United States of America)* … In that Judgment the Court, … after having rejected the argument that the *contras* were to be equated with organs of the United States because they were 'completely dependent' on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself 'directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State' (*I.C.J. Reports 1986*, p. 64, para. 115); this led to the following significant conclusion:

> 'For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.' (*Ibid*., p. 65.)

400. The test thus formulated differs in two respects from the test [described in paragraphs 390–395 of the judgment] to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of 'complete dependence' on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the 'effective control' of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (see paragraph 399 above). The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

402. The Court notes however that the Applicant has … questioned the validity of applying, in the present case, the criterion adopted in the *Military and Paramilitary Activities* Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the *Tadić* case (IT-94–1-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the *Military and Paramilitary Activities* case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY [Federal Republic of Yugoslavia] under the law of State responsibility, was that of the 'overall control' exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, *ibid*., para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS [the army of the Republika Srpska], without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule

on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the 'overall control' test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the 'overall control' test as equally applicable under the law of State responsibility for the purpose of determining—as the Court is required to do in the present case—when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons—neither State organs nor to be equated with such organs—only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the 'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.

407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility.[590] [6]

The Court concluded thereafter that the relevant acts could not be attributed to the Respondent on this basis.[591] [7]

[A/62/62/Add.1, para. 3]

[590] [6] [ICJ, Judgment, *I.C.J. Reports 2007*, p. 43], paras. 398–407.

[591] [7] The Court did consider it necessary to decide whether articles 5, 6, 9 and 11 finally adopted by the International Law Commission in 2001 expressed present customary international law, it being clear that none of them applied in the case ([*ibid*.], para. 414).

[INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Gustav F W Hamester GmbH & Co KG v. Republic of Ghana

In its award, the arbitral tribunal constituted to hear the *Gustav F W Hamester GmbH & Co KG* v. *Republic of Ghana* case indicated that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[592] 56 Referring to articles 4, 5, and 8, the tribunal stated that such a link could result when "the person performing the act is part of the State's organic structure (Article 4); or is utilising the State's specific governmental powers to perform such act, even if it is a separate entity (Article 5); or is acting under the effective control … of the State, even if it is a private or public party (Article 8)".[593] 57 The tribunal noted that, under article 5, "[i]t is clear that two cumulative conditions have to be present [for attribution]: an entity empowered with governmental authority; and an act performed through the exercise of governmental authority".[594] 58

The tribunal also distinguished the attribution analysis under article 5 from the analysis under article 8, indicating that "attribution or non-attribution under Article 8 [was] independent of the status of [the entity], and dependent only on whether the acts were performed 'on the instructions of, or under the direction or control' of that State".[595] 59

[See A/68/72, footnote 85 and paras. 45–48]]

[WORLD TRADE ORGANIZATION APPELLATE BODY

United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China

In its report in the *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* case, the Appellate Body considered whether the rules of attribution contained in the State responsibility articles are "relevant rules of international law applicable in the relations between the parties".[596] 64 The Appellate Body held that, "[t]o the extent that Articles 4, 5 and 8 of the ILC Articles concern[ed] the same subject matter as [a provision] of the SCM Agreement, they would be 'relevant' in the sense of the Vienna Convention [on the Law of Treaties]".[597] 65 The Appellate Body indicated that both the State responsibility articles and the SCM Agreement "set out rules relating to the question of attribution of conduct to a State", though it noted "certain differences" in their respective approach to attribution.[598] 66

Concerning whether the State responsibility articles are "rules of international law … applicable in the relations between the parties", the Appellate Body noted that "Articles 4, 5 and 8 are not binding *by virtue of* being part of an international treaty. However, inso-

[592] [56 See footnote [105] 20 above, para. 172.]

[593] [57 *Ibid.*]

[594] [58 *Ibid.*, paras. 175–177.]

[595] [59 *Ibid.*, para. 198.]

[596] [64 See footnote [13] 11 above, paras. 307 *et seq.* (quoting the Vienna Convention on the Law of Treaties, art. 31(3)(*c*)).]

[597] [65 *Ibid.*, para. 308.]

[598] [66 *Ibid.*, para. 309.]

far as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties".[599] 67

[See A/68/72, footnote 85 and paras. 50–51]]

[International arbitral tribunal (under the ICSID Convention)

Alpha Projektholding GmbH v. *Ukraine*

The arbitral tribunal in *Alpha Projektholding GmbH* v. *Ukraine* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal concluded that the conduct of a "State organ … is clearly attributable to the State under Article 4(1) of the ILC Articles".[600] 39

[See A/68/72, footnote 85 and para. 34]]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area

In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber referred to the commentary to article 8 in support of the assertion that, "while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law".[601] 86

[A/68/72, para. 66]

International arbitral tribunal (under UNCITRAL Rules)

White Industries Australia Limited v. *The Republic of India*

In its award, the arbitral tribunal in *White Industries Australia Limited* v. *The Republic of India* referred to articles 4, 5 and 8 as part of its analysis of the question of attribution. The tribunal found that the claimant properly conceded that it was not relying on articles 4 or 5 as the entity in question was "patently[] not an organ of the state within the meaning of Article 4, nor [did] it exercise elements of Governmental authority within the meaning of Article 5."[602] 87

The tribunal determined that, under article 8, the salient attribution issue "turn[ed] on whether the facts in the record support a conclusion of whether [the entity] was in

[599] [67 *Ibid*., para. 308; see below the text accompanying footnote [2156] 203 for discussion of the Appellate Body's consideration of whether articles 4, 5 and 8 of the State responsibility articles would "be superseded by … the SCM Agreement as *lex specialis* regarding attribution pursuant to Article 55 of the ILC Articles"; *ibid*., para. 314.]

[600] [39 See footnote [293] 39, para. 401.]

[601] 86 See footnote [12] 10 above, para. 112 (citing para. (1) of the commentary to article 8).

[602] 87 See footnote [303] 87 above, para. 8.1.2.

fact acting on the instructions of or under the direction or control of India".[603] 88 The tribunal further noted that the test under article 8 "is a tough one",[604] 89 "involves a high threshold",[605] 90 and "excludes from consideration matters of organisational structure and 'consultation' on operational or policy matters".[606] 91

In addition, the tribunal took note of the International Court of Justice's "effective control" test, as well as the discussion of the test in the context of state-owned and controlled enterprises in the commentary to article 8.[607] 92 On the basis of that test, the tribunal determined that the claimant had to "show that India had both general control over [the entity] as well as specific control over the particular acts in question".[608] 93

[A/68/72, paras. 67–69]

European Court of Human Rights

Catan and Others v. *Moldova and Russia*

In its 2012 judgment in the case of *Catan and Others* v. *Moldova and Russia*, the European Court of Human Rights referred to articles 6 and 8 of the State responsibility articles as relevant international law.[609] 94

[A/68/72, para. 70]

[International arbitral tribunal (under the ICSID Convention)

Bosh International, Inc. v. *B & P Ltd. Foreign Investments Enterprise*

In its 2012 award, the arbitral tribunal constituted to hear the *Bosh International, Inc.* v. *B & P Ltd. Foreign Investments Enterprise* case referred to article 8 in its analysis of the term "Party" as found in the relevant bilateral investment treaty. The tribunal concluded that, in the BIT provision at issue, the term "Party" refers "to any situation where the Party is acting *qua* State", namely "where the conduct of entities can be attributed to the Parties (under, for instance, Articles 4, 5 or 8 of the ILC Articles on State Responsibility) … ".[610] 75

[See A/68/72, footnote 85 and para. 60]]

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[603] 88 *Ibid*., paras. 8.1.3–8.1.4 and 8.1.7.

[604] 89 *Ibid*., para. 8.1.4.

[605] 90 *Ibid*., para. 8.1.10.

[606] 91 *Ibid*., para. 8.1.8.

[607] 92 *Ibid*., paras. 8.1.11–8.1.15 (quoting ICJ, Military and Paramilitary Activities in and against Nicaragua (*Nicaragua* v. *United States of America*), *Judgment*, *I.C.J. Reports 1986*, pp. 62, 65, paras. 109 and 115; ICJ, 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. 208, para. 400, as well as paras. (4) and (6) of the commentary to article 8).

[608] 93 *Ibid*., para. 8.1.18.

[609] 94 See footnote [511] 79 above.

[610] [75 See footnote [310] 75 above, para. 246.]

[International arbitral tribunal (under UNCITRAL Rules)

Claimants v. *Slovak Republic*

The arbitral tribunal in *Claimants* v. *Slovak Republic*, indicated that "there are three possible bases for attribution of wrongful acts to a State. They are found in Articles 4, 5 and 8 of the Articles on State Responsibility of the International Law Commission … ".[611] 46

[See A/68/72, footnote 85 and para. 38]]

International arbitral tribunal (under the ICSID Convention)

Electrabel S.A. v. *The Republic of Hungary*

In its decision on jurisdiction, applicable law and liability, the arbitral tribunal in *Electrabel S.A.* v. *The Republic of Hungary* relied upon the State responsibility articles as a codification of the customary international law relevant to attribution.[612] 95 Largely on the basis of article 8 and its accompanying commentary, the tribunal determined that "[a]lthough the conduct of private persons or entities is not attributable to the State under international law as a general principle, factual circumstances could establish a special relationship between the person engaging in the conduct and the State".[613] 96

The tribunal indicated that, as "expressed in the clearest possible terms in the ILC Commentary under Article 8", a State acting "through a State-owned or State controlled company over which it exercises some influence is by itself insufficient for the acts of such entities to be attributed to the State".[614] 97 As a result, the tribunal found that it was required to assess whether the "private entity" at issue was acting either under the instruction or direction and control of the Hungarian Government.[615] 98

[A/68/72, paras. 71–72]

Teinver S.A., et al. v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., et al.* v. *The Argentine Republic*, in its 2012 decision on jurisdiction, referred to articles 4, 5 and 8 as part of its consideration of whether the acts of certain labour unions were attributable to the Argentine Republic. As a result of the "fact-intensive nature of [the claimants'] allegations", the tribunal decided to postpone adjudication of the attribution issue until the merits phase.[616] 99 Nonetheless, the tribunal accepted the assertion of both parties "that article 8, and not articles 4 and 5, would be relevant to the analysis of the unions' conduct … ".[617] 100

[A/68/72, para. 73]

[611] [46 See footnote [305] 46 above.]

[612] 95 See footnote [314] 53 above, para. 7.60.

[613] 96 *Ibid*., para. 7.71, and paras. 7.64, 7.66 and 7.68.

[614] 97 *Ibid*., para. 7.95.

[615] 98 *Ibid*., paras. 7.64–7.71.

[616] 99 See footnote [315] 99 above, para. 274.

[617] 100 *Ibid*., para. 275.

[EUROPEAN COURT OF HUMAN RIGHTS

Jaloud v. *The Netherlands*

The European Court of Human Rights in *Jaloud* v. *The Netherlands* cited articles 2, 6 and 8 of the State responsibility articles, as well as the respective commentaries, as relevant international law.[618] 80 In establishing jurisdiction in respect of the Netherlands, the Court could not find that "the Netherlands' troops were placed 'at the disposal' of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were 'under the exclusive direction or control' of any other State (compare, *mutatis mutandis*, Article 6 of the International Law Commission's Articles on State Responsibility").[619] 81

[A/71/80, para. 65]]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Hulley Enterprises Limited (Cyprus) v. *The Russian Federation*

The arbitral tribunal in *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation* recited the text of article 8 and noted that

> [t]he commentary to Article 8 observes that: 'Questions arise with respect to the conduct of companies or enterprises which are State owned and controlled … The fact that the State initially establishes a corporate entity … is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. … Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority … [and] the instructions, direction or control [of the State] must relate to the conduct which is said to have amounted to an internationally wrongful act'.[620] 87

[A/71/80, para. 69]

EUROPEAN COURT OF HUMAN RIGHTS

Samsonov v. *Russia*

In *Samsonov* v. *Russia*, the European Court of Human Rights considered article 8, and the commentary thereto, as relevant international law.[621] 88 In assessing whether the conduct of a company could be attributed to the State, the Court held that "[l]a Cour doit examiner de manière effective le contrôle que l'État a excercé dans les circonstances de l'espèce. De l'avis de la Cour, cette approche est conforme tant à sa jurisprudence antérieure … qu'à l'interprétation donnée par la CDI à l'article 8 des articles sur la responsabilité de l'État".[622] 89

[A/71/80, para. 70]

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[618] [80 ECHR, Grand Chamber, Application No. 47708/08, Judgment, 20 November 2014, para. 98.]

[619] [81 *Ibid*., para. 151.]

[620] 87 See footnote [19] 7 above, para. 1466 (quoting para. (6) of the commentary to article 8).

[621] 88 See footnote [20] 8 above, paras. 30–32 for further references to the State responsibility articles.

[622] 89 *Ibid*., para. 73.

Liseytseva and Maslov v. *Russia*

In *Liseytseva and Maslov* v. *Russia*, the European Court of Human Rights listed article 5 and the text and commentary to article 8, as relevant international law.[623] [90] The Court also observed that the question of the independence of the municipalities was to be determined with regard to the actual factual manner of the control exerted over them by the State in the particular case, noting that "this approach is consistent with the ILC's interpretation of the aforementioned Article 8 of the Articles on State Responsibility".[624] [91]

[A/71/80, para. 71]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Lao Holdings N.V. v. *Lao People's Democratic Republic*

In *Lao Holdings N.V.* v. *Lao People's Democratic Republic*, the arbitral tribunal referred to the commentary to article 8 in support of the proposition that "a minority shareholding in a corporation is not sufficient in international law (as well as domestic law), of itself, to attribute the acts of a corporation to its shareholders. The result is no different where the minority shareholder is a Government".[625] [92] It also partly relied on article 8 in finding that "corporate acts may be attributed to the Government if the Government directs and controls the corporation's activities".[626] [93]

[A/71/80, para. 72]

International arbitral tribunal (under the ICSID Convention)

Bernhard von Pezold and others v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal held that the simple encouragement of private persons by the Government, without evidence of a direct order or control, "would not meet the test set out in Article 8".[627] [94]

[A/71/80, para. 73]

Adel A Hamadi Al Tamimi v. *Sultanate of Oman*

In *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman*, the arbitral tribunal observed that the State responsibility articles "set out a number of grounds on which attribution may be based. The ILC Articles suggest that responsibility may be imputed to a State where the

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[623] [90] See footnote [21] 9 above, para. 128.

[624] [91] *Ibid*., para. 205 (see also para. 130, in which the Court refers to ECHR, Grand Chamber, *Kotov* v. *Russia*, Application No. 54522/00, Judgment, 3 April 2012, paras. 30–32 for a summary of other relevant provisions of the State responsibility articles).

[625] [92] ICSID (Additional Facility), Case No. ARB(AF)/12/6, Decision on the Merits, 10 June 2015, para. 81.

[626] [93] *Ibid*., para. 82.

[627] [94] See footnote [114] 24 above, para. 448.

conduct of a person or entity is closely directed or controlled by the State, although the parameters of imputability on this basis remain the subject of debate".[628] 95

[A/71/80, para. 74]

Electrabel S.A. v. *Republic of Hungary*

The arbitral tribunal in *Electrabel S.A.* v. *Republic of Hungary* relied on the commentary to article 8 to observe that "the fact that a State acts through a State-owned or State-controlled company over which it exercises some influence is by itself insufficient for the acts of such entities to be attributed to the State".[629] 96 The tribunal stated that an "invitation to negotiate cannot be assimilated to an instruction" in the sense of article 8, which would have allowed for the attribution of conduct of the company in question to Hungary.[630] 97 Referring to article 8, the tribunal also found that Hungary did not use "its ownership interest in or control of a corporation specifically in order to achieve a particular result".[631] 98

[A/71/80, para. 75]

Tulip Real Estate and Development Netherlands B.V. v. *Republic of Turkey*

The arbitral tribunal in *Tulip Real Estate and Development Netherlands B.V.* v. *Republic of Turkey* stated that "[p]lainly, the words 'instructions', 'direction' and 'control' in Art. 8 are to be read disjunctively. Therefore, the arbitral tribunal need only be satisfied that one of those elements is present in order for there to be attribution under Art. 8".[632] 99 The tribunal accepted the respondent's submission that the relevant test was that of "effective control".[633] 100 It confirmed "that it is insufficient for the purposes of attribution under Art 8 to establish merely that Emlak was majority-owned by TOKI, *i.e.*, a part of the State".[634] 101 The tribunal further noted that for attribution of conduct under article 8, there must be "proof that the State used its control as a vehicle directed towards achieving a particular result in its sovereign interests".[635] 102 The *ad hoc* committee subsequently constituted to decide on the annulment of the award confirmed this interpretation with reference to the commentary to article 8.[636] 103

[A/71/80, para. 76]

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[628] 95 See footnote [340] 66 above, footnote 673 (quoting para. (6) of the commentary to article 8) (footnote omitted).

[629] 96 See footnote [22] 10 above, para. 7.95 (see also paras. 7.63–7.71, quoting article 8 and the commentary in detail).

[630] 97 *Ibid*. para. 7.111.

[631] 98 *Ibid*., para. 7.137 (quoting para. (6) of the commentary to article 8).

[632] 99 See footnotes [210] 40 and [128] 16 above, para. 303.

[633] 100 *Ibid*., para. 304.

[634] 101 *Ibid*., para. 306 (quoting para. (6) of the commentary to article 8).

[635] 102 *Ibid*., para. 326.

[636] 103 See footnote [115] 25 above, paras. 187–189.

[*Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain*

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* referred to articles 4, 5 and 8 of the State responsibility articles when stating that "[i]n order for an act to be attributed to a State, it must have a close link to the State".[637] [52]]

[A/74/83, p. 12]]

[*Beijing Urban Construction Group Co. Ltd.* v. *Yemen*

In *Beijing Urban Construction Group Co. Ltd.* v. *Yemen*, the arbitral tribunal stated that the so-called Broches factors used to determine the jurisdiction of ICSID under article 25 of the ICSID Convention were "the mirror image of the attribution rules in Articles 5 and 8 of the ILC's *Articles on State Responsibility*".[638] [73]

[A/74/83, p. 16]]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mesa Power Group v. *Government of Canada*

In *Mesa Power Group* v. *Government of Canada*, "[h]aving concluded that the OPA [Ontario Power Authority], Hydro One and IESO [Independent Electricity System Operator] are state enterprises and that Article 1503(2) of the NAFTA governs attribution, the Tribunal [could] dispense with reviewing whether their acts are attributable to Canada pursuant to Article 8 of the ILC Articles".[639] [90]

[A/74/83, p. 19]

International arbitral tribunal (under the ICSID Additional Facility Rules)

MNSS B.V. and Recupero Credito Acciaio N.V. v. *Montenegro*

The arbitral tribunal in *MNSS B.V. and Recupero Credito Acciaio N.V.* v. *Montenegro*, observed that mere acts of supervision do not place a private bank "under the Central Bank's control for the purposes of Article 8 of the ILC Articles … It follows, therefore, that the Respondent is not responsible for Prva Banka's actions in this respect".[640] [91]

[A/74/83, p. 19]

Permanent Court of Arbitration (under UNCITRAL Rules)

Mr. Kristian Almås and Mr. Geir Almås v. *The Republic of Poland*

The arbitral tribunal in *Mr. Kristian Almås and Mr. Geir Almås* v. *The Republic of Poland* found "no evidence that ANR [Polish Agricultural Property Agency] acted under

[637] [[52] ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 168.]

[638] [[73] ICSID, Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017, para. 34.]

[639] [90] PCA, Case No. 2012–17, Award, 24 March 2016, para. 365.

[640] [91] ICSID (Additional Facility), Case No. ARB(AF)/12/8, Award, 4 May 2016, para. 299.

Poland's instructions, direction or control when terminating the Lease, and correspondingly no basis for attribution under Article 8".[641] 92

[A/74/83, p. 19]

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. *The Republic of India*

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*, the arbitral tribunal found that "Antrix's notice of annulment is attributable to the Respondent under Article 8 of the ILC Articles".[642] 93

[A/74/83, p. 19]

International arbitral tribunal (under the ICSID Convention)

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

In *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal stated that "it is a well-established principle under international law that, in general, the conduct of private persons or entities is not attributable to the State. This general principle is clearly reflected, *inter alia*, in Article 8 of the ILC Draft Articles".[643] 94 The tribunal considered that "even though members of the SINPROTRAC union may have actually taken President Chávez '*at his word*,' […] they did not act '*on the instructions of, or under the direction or control of*' President Chávez within the meaning of Article 8 of the ILC Draft Articles".[644] 95

[A/74/83, p. 19]

Ampal-American Israel Corporation and others v. *Arab Republic of Egypt*

The arbitral tribunal in *Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt* quoted articles 4, 5, 8 and 11 of the State responsibility articles and

> formed the view that the acts or omissions of EGPC [Egyptian General Petroleum Corporation] or EGAS [Egyptian Natural Gas Holding Company] relevant to the conclusion and termination of the GSPA [Gas Sale Purchase Agreement] are attributable to the Respondent under the relevant provisions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law.[645] 96

The tribunal further explained, referring to article 8 of the State responsibility articles, that EGPC and EGAS

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[641] 92 PCA, Case No. 2015–13, Award, 27 June 2016, para. 272.

[642] 93 PCA, Case No. 2013–09, Award on Jurisdiction and Merits, 25 July 2016, para. 290.

[643] 94 ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para.448.

[644] 95 *Ibid*., para.453.

[645] 96 ICSID, Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 135.

were '*in fact acting on the instructions of, or under the direction or control of*' the Respondent in relation to the particular conduct. In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus '*acknowledge[d] and adopt[ed] the conduct in question as its own*' within the terms of Article 11.[646] [97]

[A/74/83, p. 20]

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. *The Argentine Republic*

In *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic*, the arbitral tribunal, observing that the parties had agreed that article 8 of the State responsibility articles was applicable to the facts of the case,[647] [98] disagreed "that the conduct of the unions of which the Claimant complain can be attributed to Respondent".[648] [99] The tribunal further reiterated that the appropriate test to be applied was "effective control" and not "overall control".[649] [100]

[A/74/83, p. 20]

Karkey Karadeniz Elektrik Uretim A.S. v. *Islamic Republic of Pakistan*

The arbitral tribunal in *Karkey Karadeniz Elektrik Uretim A.S.* v. *Islamic Republic of Pakistan* concluded, citing the text of articles 5 and 8 of the State responsibility articles, that "Lakhra's acts related to the conclusion and execution of the Contract were directed, instructed or controlled by Pakistan, and are accordingly attributable to Pakistan".[650] [101]

[A/74/83, p. 20]

Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. *Bolivarian Republic of Venezuela*

In *Koch Minerals Sàrl and Koch Nitrogen International Sàrl* v. *Bolivarian Republic of Venezuela* the arbitral tribunal determined that

> FertiNitro [a series of joint venture companies] remained fully and effectively controlled by the Respondent, whereby FertiNitro was precluded by the Respondent from making any further *ad hoc* sales to KNI [the claimant] from 28 February 2012, just as it had been precluded from performing the Offtake Agreement from 11 October 2010 onwards. Throughout, FertiNitro (with Pequiven) thus acted under the Respondent's 'direction or control' within the meaning of Article 8 of the ILC Articles on State Responsibility.[651] [102]

[A/74/83, p. 20]

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[646] [97] *Ibid*., para. 146.

[647] [98] See footnote [355] 45 above, para. 721.

[648] [99] *Ibid*., para. 724.

[649] [100] *Ibid*., paras. 722 and 724.

[650] [101] ICSID, Case No. ARB/13/1, Award, 22 August 2017, paras. 566–569 and 582.

[651] [102] ICSID, Case No. ARB/11/19, Award, 30 October 2017, para. 7.46.

UAB E Energija (Lithuania) v. *Republic of Latvia*

In *UAB E Energija (Lithuania)* v. *Republic of Latvia*, the arbitral tribunal cited article 8 and the commentary thereto when affirming that "the Respondent instructed, directed or controlled Rēzeknes Siltumtīkli's or Rēzeknes Enerģija's bringing of the litigation which resulted in [the claimant's] bank accounts being frozen".[652] [103]

[A/74/83, p. 20]

Georg Gavrilović and Gavrilović d.o.o. v. *Republic of Croatia*

The arbitral tribunal in *Georg Gavrilović and Gavrilović d.o.o.* v. *Republic of Croatia*, quoted article 8 and noted that "[a]n 'effective control' test has emerged in international jurisprudence, which requires both a general control of the State over the person or entity and a specific control of the State over the act of attribution which is at stake".[653] [104] The tribunal explained that "due to the change in the control of Holding d.o.o. when the Emergency Board was appointed on 12 July 1991, it is necessary to consider whether the Respondent exercised 'effective control' before and/or after this date"[654] [105] and held that "Holding d.o.o. does not fall within Article 8 of the ILC Articles".[655] [106]

[A/74/83, p. 21]

Marfin Investment Group Holding S.A., Alexandros Bakatselos and Others v. *Republic of Cyprus*

The tribunal in *Marfin Investment Group Holding S.A., Alexandros Bakatselos and Others* v. *Republic of Cyprus* discussed the relevant case law on article 8 of the State responsibility articles and "note[d] that arbitral jurisprudence has consistently upheld the standard set by the ICJ. The Tribunal sees no reason to depart from this *jurisprudence constante*."[656] [107] The tribunal observed that:

> … Claimants have not demonstrated with evidence that these specific acts that they challenge were directed or controlled by Respondent. The evidence put forward by Claimants attempts to show Respondent's overall control over Laiki, but does not contain instructions or directions emanating from the Cypriot Government that Laiki and/or its Board of Directors adopt a specific conduct. For this reason alone, Claimants' case on attribution under ILC Article 8 must fail.[657] [108]

The tribunal further stated that even if it "were to adopt a less stringent test for attribution under ILC Article 8—a test which this Tribunal does not endorse—this would not assist Claimants' case".[658] [109] In particular, "[t]o the Tribunal, it is not sufficient for the Board of Directors to elect an executive who enjoyed the trust of the regulator in order to

[652] [103] ICSID, Case No. ARB/12/33, Award, 22 December 2017, paras. 825 and 830.

[653] [104] ICSID, Case No. ARB/12/39, Award, 26 July 2018, para. 828.

[654] [105] *Ibid*., para. 829.

[655] [106] *Ibid*., para. 831.

[656] [107] ICSID, Case No. ARB/13/27, Award, 26 July 2018, para. 675 (original emphasis).

[657] [108] *Ibid*., para. 679.

[658] [109] *Ibid*., para. 680.

establish attribution under ILC Article 8".[659] 110 Furthermore, "any coordination in strategies between Laiki and Cyprus as regards the financial crisis likewise does not support Claimants' contention that Respondent had complete control over the Bank".[660] 111 Finally,

the Tribunal recall[ed] that the mere ownership of shares in Laiki by the Cypriot Government, along with the powers that this ownership entails, does not establish attribution under ILC Article 8. Claimants remain bound by the obligation to demonstrate that the challenged conduct was carried out under the instructions, direction or control of Cyprus.[661] 112

[A/74/83, p. 21]

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal stated that

[u]nder Article 8 of the ILC Articles on State Responsibility, the conduct of a person (not being an organ of the State) shall be considered an act of a State under international law if the person is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. Its application, as the ILC Commentary states, depends upon 'a specific factual relationship' between the person engaging in the conduct and the State … Moreover, there is a distinction to be drawn between the conduct of the State itself and the conduct of a person attributable to the State, as was held by the ICJ in *Nicaragua* v. *USA*.[662] 113

The tribunal did not consider that the acts of the Egyptian General Petroleum Corporation and the Egyptian Natural Gas Holding Company were attributable to the respondent "within the meaning of Article 8 of the ILC Articles".[663] 114

[A/74/83, p. 22]

Ortiz Construcciones y Proyectos S.A. v. *People's Democratic Republic of Algeria*

In *Ortiz Construcciones y Proyectos S.A.* v. *People's Democratic Republic of Algeria*, the arbitral tribunal cited article 8,[664] 66 recalling that the commentary thereto clarified that "the three terms 'instructions', 'direction' and 'control' are disjunctive" and that "it is sufficient to establish any one of them".[665] 67 The tribunal analysed the degree of State control required over a company to apply article 8, and considered "that a mere recommendation or encouragement is not sufficient to satisfy the criterion of instruction."[666] 68 Instead, "there are two elements to determining effective control: first, determining whether the entity in question is under the general control of the State, and, second, determining whether the State has exercised specific control during the act whose attribution to the State is being sought".[667] 69

[659] 110 *Ibid*., para. 685.

[660] 111 *Ibid*., para. 687.

[661] 112 *Ibid*., para. 691.

[662] 113 ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 9.116.

[663] 114 *Ibid*., paras. 9.117–9.118.

[664] 66 See footnote [381] 32 above, para. 238.

[665] 67 *Ibid*., para. 239.

[666] 68 *Ibid*., para. 242.

[667] 69 *Ibid*., para. 247.

The tribunal distinguished the application of article 8 from that of other relevant provisions, noting that:

Conduct of entities under the effective control of the State that is unauthorized or contrary to instructions is not in principle attributable to the State. Indeed, article 7 of the articles on State responsibility "only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, *i.e.* only to those cases of attribution covered by articles 4, 5 and 6." The only exception to this rule is situations where specific instructions have been ignored while the State was exercising effective control over the conduct in question.[668] [70]

[A/77/74, p. 14]

World Trade Organization Panel

Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights

The panel established in *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights* cited article 8, indicating that

[t]he fact that acts or omissions of private parties 'may involve some element of private choice' does not negate the possibility of those acts or omissions being attributable to a [WTO] Member insofar as they reflect decisions that are not independent of one or more measures taken by a government (or other organ of the Member).[669] [71]

[A/77/74, p. 15]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Strabag SE v. *Libya*

In analysing whether a contract entered into by local authorities could be considered contracts of the State, the arbitral tribunal in *Strabag SE* v. *Libya* considered, among other factors, the nature of the entities involved and of the contracts, and "the circumstances surrounding the conclusion and implementation of the contracts". It took the view that the entities had "acted at the direction of Libyan State organs" and, therefore, "[a]s confirmed by Article 8 of the ILC Draft Articles, their conduct has to be considered as an act of the Libyan State".[670] [72]

[A/77/74, p. 15]

International arbitral tribunal (under the ICSID Convention)

Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. *Turkmenistan*

The arbitral tribunal in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti.* v. *Turkmenistan* referred to article 8, noting that the commentary "shows that the mere ownership of shares in a State-owned company is not sufficient in order to establish attri-

[668] [70] *Ibid*., para. 248, citing James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'État: Introduction, texte et commentaires* (Paris, Pedone, 2003).

[669] [71] See footnote [385] 35 above, para. 7.51.

[670] [72] See footnote [498] 59 above, para. 176.

bution under ILC Article 8”.[671] 73 In that case, no evidence had been adduced “that would demonstrate that Respondent was exercising both a general control over these entities at all relevant times and that it specifically controlled these same entities in connection with specific acts challenged in these proceedings”.[672] 74 Instead, the tribunal was unconvinced that the acts and omissions of the entities, which were “not State organs”, were “attributable to the State pursuant to Article 8 of the ILC Articles”, as it had not been shown that the entities had, “at all relevant times, acted ‘on the instructions of, or under the direction or control of, that State in carrying out the conduct’”.[673] 75

[A/77/74, p. 15]

Inter-American Court of Human Rights

Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. *Brazil*

In *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families* v. *Brazil*, the Inter-American Court of Human Rights addressed the attribution of State responsibility for the violation of the rights to life and to personal integrity resulting from especially hazardous activities, including the production of fireworks. It cited article 8, noting that “it is possible to attribute responsibility to the State in the case of … conduct that is under its direction or control”.[674] 76 In this case, the Court found, that “[r]egarding this activity, owing to the specific risks that it involved for the life and integrity of the individual, the State had the obligation to regulate, supervise and oversee its exercise, to prevent the violation of the rights of those who were working in this sector”.[675] 77

[A/77/74, p. 15]

European Court of Human Rights

Carter v. *Russia*

In *Carter* v. *Russia*, the European Court of Human Rights referred to article 8, noting that “a factor indicative of State responsibility” for a particular operation would be that the conduct of the individuals involved in that operation “was directed or controlled by any State entity or official”.[676] 78

[A/77/74, p. 16]

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[671] 73 See footnote [128] 16 above, para. 775.

[672] 74 *Ibid*., para. 776.

[673] 75 *Ibid*., para. 777.

[674] 76 IACHR, Series C, No. 407, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 July 2020, para. 121 (footnote 202).

[675] 77 *Ibid*., para. 121.

[676] 78 ECHR, Third Section, Application No. 20914/07, Judgment, 28 February 2022, para. 166.

Article 9. Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Commentary

(1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase "in circumstances such as to call for". Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, *e.g.* after foreign occupation.

(2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces:[677] [167] in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State responsibility. Thus the position of the Revolutionary Guards or "Komitehs" immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as covered by the principle expressed in article 9. *Yeager* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The tribunal held the conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards:

> at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.[678] [168]

(3) Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.

(4) As regards the first condition, the person or group acting must be performing governmental functions, though they are doing so on their own initiative. In this respect, the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State. It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* Government. The cases envisaged by article 9 presuppose the existence of a Government in office and of State machinery whose place

[677] [167] This principle is recognized as legitimate by article 2 of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land); and by article 4, paragraph A (6), of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

[678] [168] *Yeager* (footnote [204] 101 above), p. 104, para. 43.

is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* Government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a Government is covered by article 4 rather than article 9.[679] 169

(5) In respect of the second condition, the phrase "in the absence or default of" is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality. The phrase "absence or default" seeks to capture both situations.

(6) The third condition for attribution under article 9 requires that the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons. The term "call for" conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority. There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.[680] 170

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Iran-United States Claims Tribunal

Yeager v. *Islamic Republic of Iran*

In its 1987 award in the *Yeager* v. *Islamic Republic of Iran* case, the Tribunal, in considering the question whether the acts of revolutionary guards were attributable to the Islamic Republic of Iran under international law, referred to draft article 8(*b*) provisionally adopted by the International Law Commission:[681] 107

> … attributability of acts to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law merely by invoking its internal law … . An act is attributable even if a person or group of persons was in fact merely exercising elements of governmental authority in the absence of the official authorities and in cir-

[679] 169 See, *e.g.*, the award of 18 October 1923 by Arbitrator Taft in the *Tinoco* case (footnote [146] 87 above), pp. 381–382. On the responsibility of the State for the conduct of *de facto* governments, see also J. A. Frowein, *Das de facto-Regime im Völkerrecht* (Cologne, Heymanns, 1968), pp. 70–71. Conduct of a government in exile might be covered by article 9, depending on the circumstances.

[680] 170 See, *e.g.*, the *Sambiaggio* case, UNRIAA, vol. X (Sales No. 60.V.4), p. 499, at p. 512 (1904); see also article 10 and commentary.

[681] 107 This provision was amended and incorporated in article 9 finally adopted by the International Law Commission in 2001. Article 8(*b*) provisionally adopted read as follows: "The conduct of a person or group of persons shall also be considered as an act of the State under international law if: … (*b*) Such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority." (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

cumstances which justified the exercise of those elements of authority. *See* International Law Commission draft article 8(*b*).[682] [108]

[A/62/62, para. 68]

International arbitral tribunal (under UNCITRAL Rules)

Sergei Paushok et al. v. *The Government of Mongolia*

The arbitral tribunal in *Sergei Paushok et al.* v. *The Government of Mongolia* referred to articles 4, 5 and 9 as constituting "international law rules of attribution" applicable to the dispute "which are generally considered as representing current customary international law".[683] [101]

[A/68/72, para. 74]

African Court of Human Rights and Peoples' Rights

African Commission on Human and Peoples' Rights v. *Libya*

In *African Commission on Human and Peoples' Rights* v. *Libya*, the African Court of Human Rights and Peoples' Rights determined, while expressing "aware[ness] of the volatile political and security situation in Libya" cited article 9 of the State responsibility articles and found that it "is competent *ratione personae* to hear the instant case".[684] [115]

[A/74/83, p. 22]

[682] [108] See footnote [204] 101 above, p. 103, para. 42.

[683] [101] See footnote [299] 41 above, para. 576.

[684] [115] ACHPR, Application No. 002/2013, Judgment on Merits, 3 June 2016, paras. 50 and 52.

Article 10. Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Commentary

(1) Article 10 deals with the special case of attribution to a State of conduct of an insurrectional or other movement which subsequently becomes the new Government of the State or succeeds in establishing a new State.

(2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals. It can be placed on the same footing as that of persons or groups who participate in a riot or mass demonstration and it is likewise not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9.

(3) Ample support for this general principle is found in arbitral jurisprudence. International arbitral bodies, including mixed claims commissions[685] [171] and arbitral tribunals[686] [172] have uniformly affirmed what Commissioner Nielsen in the *Solis* case described as a "well-established principle of international law", that no Government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.[687] [173] Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to the State. This can be seen, for example, from the preparatory work for the 1930 Hague Conference. Replies of Governments to point IX of the request for information addressed to them by the Preparatory Committee indicated substantial agreement that: (*a*) the conduct of organs of an insurrectional movement could not be attributed as such to the State or entail its international responsibility; and (*b*) only conduct engaged in by

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[685] [171] See the decisions of the various mixed commissions: *Zuloaga and Miramon Governments*, Moore, *History and Digest*, vol. III, p. 2873; *McKenny* case, *ibid.*, p. 2881; *Confederate States*, *ibid.*, p. 2886; *Confederate Debt*, *ibid.*, p. 2900; and *Maximilian Government*, *ibid.*, p. 2902, at pp. 2928–2929.

[686] [172] See, *e.g.*, *British Claims in the Spanish Zone of Morocco* (footnote [38] 44 above), p. 642; and the *Iloilo Claims*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 158, at pp. 159–160 (1925).

[687] [173] UNRIAA, vol. IV (Sales No. 1951.V.1), p. 358, at p. 361 (1928) (referring to *Home Frontier and Foreign Missionary Society*, *ibid.*, vol. VI (Sales No. 1955.V.3), p. 42 (1920)); cf. the *Sambiaggio* case (footnote [680] 170 above), p. 524.

organs of the State in connection with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility, and then only if such conduct constituted a breach of an international obligation of that State.[688] 174

(4) The general principle that the conduct of an insurrectional or other movement is not attributable to the State is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State. This will be the case where the State successfully puts down the revolt. In contrast, where the movement achieves its aims and either installs itself as the new Government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual Government. Thus the term "conduct" only concerns the conduct of the movement as such and not the individual acts of members of the movement, acting in their own capacity.

(5) Where the insurrectional movement, as a new Government, replaces the previous Government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. In such a case, the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. Moreover, it is the only subject of international law to which responsibility can be attributed. The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established Government.

(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity between the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the Government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule.

(7) Paragraph 1 of article 10 covers the scenario in which the insurrectional movement, having triumphed, has substituted its structures for those of the previous Government of the State in question. The phrase "which becomes the new Government" is used to describe this consequence. However, the rule in paragraph 1 should not be pressed too far in the case of governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement. The State should

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[688] 174 League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote [147] 88 above), p. 108; and *Supplement to Volume III …* (footnote [221] 104 above), pp. 3 and 20.

not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government. Thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming.

(8) Paragraph 2 of article 10 addresses the second scenario, where the structures of the insurrectional or other revolutionary movement become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the predecessor State. The expression "or in a territory under its administration" is included in order to take account of the differing legal status of different dependent territories.

(9) A comprehensive definition of the types of groups encompassed by the term "insurrectional movement" as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement's actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) may be taken as a guide. Article 1, paragraph 1, refers to "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol", and it contrasts such groups with "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (art. 1, para. 2). This definition of "dissident armed forces" reflects, in the context of the Protocols, the essential idea of an "insurrectional movement".

(10) As compared with paragraph 1, the scope of the attribution rule articulated by paragraph 2 is broadened to include "insurrectional or other" movements. This terminology reflects the existence of a greater variety of movements whose actions may result in the formation of a new State. The words do not, however, extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State. Nor does it cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. This is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be.

(11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international "legitimacy" or of any illegality in respect of their establishment as a Government, despite the potential importance of such distinctions in other contexts.[689] [175] From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new Government or a new State

[689] [175] See H. Atlam, "National liberation movements and international responsibility", *United Nations Codification of State Responsibility*, B. Simma and M. Spinedi, eds. (New York, Oceana, 1987), p. 35.

from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.[690] 176 Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.

(12) Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10. The international arbitral decisions, *e.g.* those of the mixed commissions established in respect of Venezuela (1903) and Mexico (1920–1930), support the attribution of conduct by insurgents where the movement is successful in achieving its revolutionary aims. For example, in the *Bolívar Railway Company* claim, the principle is stated in the following terms:

The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result.[691] 177

The French-Venezuelan Mixed Claims Commission in its decision concerning the *French Company of Venezuelan Railroads* case emphasized that the State cannot be held responsible for the acts of revolutionaries "unless the revolution was successful", since such acts then involve the responsibility of the State "under the well-recognized rules of public law".[692] 178 In the *Pinson* case, the French-Mexican Claims Commission ruled that:

if the injuries originated, for example, in requisitions or forced contributions demanded … by revolutionaries before their final success, or if they were caused … by offences committed by successful revolutionary forces, the responsibility of the State … cannot be denied.[693] 179

(13) The possibility of holding the State responsible for the conduct of a successful insurrectional movement was brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Hague Conference. On the basis of replies received from a number of Governments, the Preparatory Committee drew up the following Basis of Discussion: "A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops." [694] 180 Although the proposition was never discussed, it may be considered to reflect the rule of attribution now contained in paragraph 2.

(14) More recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in article 10. In one case the Supreme Court of Namibia went even

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[690] 176 As ICJ said, "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States", *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 54, para. 118.

[691] 177 UNRIAA, vol. IX (Sales No. 59.V.5), p. 445, at p. 453 (1903). See also *Puerto Cabello and Valencia Railway Company*, *ibid*., p. 510, at p. 513 (1903).

[692] 178 *Ibid*., vol. X (Sales No. 60.V.4), p. 285, at p. 354 (1902). See also the *Dix* case, *ibid*., vol. IX (Sales No. 59.V.5), p. 119 (1902).

[693] 179 *Ibid*., vol. V (Sales No. 1952.V.3), p. 327, at p. 353 (1928).

[694] 180 League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (footnote [147] 88 above), pp. 108 and 116; and Basis of discussion No. 22 (*c*), *ibid*., p. 118; reproduced in *Yearbook … 1956*, vol. II, p. 223, at p. 224, document A/CN.4/96.

further in accepting responsibility for "anything done" by the predecessor administration of South Africa.[695] 181

(15) Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but improperly failed to do so. This possibility is preserved by paragraph 3 of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of other provisions in chapter II. The term "however related to that of the movement concerned" is intended to have a broad meaning. Thus, the failure by a State to take available steps to protect the premises of diplomatic missions, threatened from attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3.

(16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present articles, which are concerned only with the responsibility of States.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Iran-United States Claims Tribunal

Short v. *Islamic Republic of Iran*

In its 1987 award in the *Short* v. *Islamic Republic of Iran* case, the Tribunal, in examining whether the facts invoked by the claimant as having caused his departure from the Iranian territory were attributable to the Islamic Republic of Iran, referred to draft articles 14 and 15 provisionally adopted by the International Law Commission,[696] 109 which it considered a confirmation of principles still valid contained in the previous case law on attribution:

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[695] 181 Guided in particular by a constitutional provision, the Supreme Court of Namibia held that "the new government inherits responsibility for the acts committed by the previous organs of the State", *Minister of Defence, Namibia* v. *Mwandinghi, South African Law Reports*, 1992 (2), p. 355, at p. 360; and ILR, vol. 91, p. 341, at p. 361. See, on the other hand, *44123 Ontario Ltd.* v. *Crispus Kiyonga and Others*, 11 *Kampala Law Reports* 14, pp. 20–21 (1992); and ILR, vol. 103, p. 259, at p. 266 (High Court, Uganda).

[696] 109 Those provisions were amended and incorporated in article 10 finally adopted by the ILC in 2001. The text of draft articles 14 and 15 provisionally adopted on first reading was as follows:

Article 14

Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

The Tribunal notes … that it is not infrequent that foreigners have had to leave a country *en masse* by reason of dramatic events that occur within the country. It was often the case during this century, even since 1945. A number of international awards have been issued in cases when foreigners have suffered damages as a consequence of such events … . Although these awards are rather dated, the principles that they have followed in the matter of State international responsibility are still valid and have recently been confirmed by the United Nations International Law Commission in its draft articles on the law of State responsibility. *See* draft articles on state responsibility, adopted by the International Law Commission on first reading, notably articles 11, 14 and 15. *1975 Yearbook International Law Commission*, vol. 2, at 59, United Nations doc. A/CN.4/SER.A/1975/Add.1 (1975).[697] 110

The Tribunal further noted, with reference to the commentary to the above mentioned draft article 15, that:

Where a revolution leads to the establishment of a new government the State is held responsible for the acts of the overthrown government insofar as the latter maintained control of the situation. The successor government is also held responsible for the acts imputable to the revolutionary movement which established it, even if those acts occurred prior to its establishment, as a consequence of the continuity existing between the new organization of the State and the organization of the revolutionary movement. *See* draft articles on State responsibility, *supra*, commentary on article 15, paras. (3) and (4), *1975 Yearbook International Law Commission,* vol. 2 at 100.[698] 111

[A/62/62, para. 69]

Rankin v. *Islamic Republic of Iran*

In its 1987 award in the *Rankin* v. *Islamic Republic of Iran* case, the Tribunal, in determining the applicable law with regard to the claim, considered that draft article 15 provisionally adopted by the International Law Commission reflected "an accepted principle of international law". It observed that

… several problems remain even though it is an accepted principle of international law that acts of an insurrectional or revolutionary movement which becomes the new government of a State are attributable to the State. *See* article 15, draft articles on State responsibility … First, when property

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

Article 15

Attribution to the State of the act of an insurrectional movement
which becomes the new government of a State or
which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[697] 110 IUSCT, Award No. 312–11135–3, 14 July 1987, Iran-United States Claims Tribunal Reports, vol. 16 (1987-III), p. 83, para. 28. Draft article 11, to which the passage also refers, was deleted by the International Law Commission on second reading (footnote [206] 26 above).

[698] 111 *Ibid*., p. 84, para. 33.

losses are suffered by an alien during a revolution, there may be a question whether the damage resulted from violence which was directed at the alien or his property *per se* or was merely incidental or collateral damage resulting from the presence of the alien's property or property interests during the period of revolutionary unrest. Second, even with respect to some property losses that are not the result of incidental or collateral damage—for example, losses resulting from acts directed by revolutionaries against the alien because of his nationality—a further question of attribution remains, that is, whether those acts are acts of the revolutionary movement itself, rather than acts of unorganized mobs or of individuals that are not attributable to the movement.[699] [112]

In the same award, the Tribunal further referred to draft article 15 in determining that a number of statements made by the leaders of the Revolution, which it found to be inconsistent with the requirements of the Treaty of Amity between Iran and the United States and customary international law to accord protection and security to foreigners and their property, were "clearly … attributable to the Revolutionary Movement and thereby to the Iranian State".[700] [113]

[A/62/62, para. 70]

International Court of Justice

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

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* the International Court of Justice

consider[ed] that, even if Article 10(2) of the ILC Articles on State Responsibility could be regarded as declaratory of customary international law at the relevant time, that Article is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State. Nor does it affect the principle stated in Article 13 of the said Articles.[701] [104]

[A/71/80, para. 77]

[699] [112] IUSCT, Award No. 326–10913–2, 3 November 1987, Iran-United States Claims Tribunal Reports, vol. 17 (1987-IV), pp. 143–144, para. 25.

[700] [113] *Ibid*., p. 147, para. 30.

[701] [104] See footnote [181] 38 above, para. 104.

Article 11. Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Commentary

(1) All the bases for attribution covered in chapter II, with the exception of the conduct of insurrectional or other movements under article 10, assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act. Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.

(2) In many cases, the conduct which is acknowledged and adopted by a State will be that of private persons or entities. The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law. This conclusion holds irrespective of the circumstances in which the private person acts and of the interests affected by the person's conduct.

(3) Thus like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction … and eventually continued by her, even after the acquisition of territorial sovereignty over the island".[702] [182] In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.[703] [183] However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.

(4) Outside the context of State succession, the *United States Diplomatic and Consular Staff in Tehran* case provides a further example of subsequent adoption by a State of particular conduct. There ICJ drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court:

[702] [182] *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIAA, vol. XII (Sales No. 63.V.3), p. 155, at p. 198 (1956).

[703] [183] The matter is reserved by article 39 of the Vienna Convention on Succession of States in respect of Treaties (hereinafter "the 1978 Vienna Convention").

> The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.[704] [184]

In that case it made no difference whether the effect of the "approval" of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.[705] [185] In other cases no such prior responsibility will exist. Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the tribunal did in the *Lighthouses* arbitration.[706] [186] This is consistent with the position established by article 10 for insurrectional movements and avoids gaps in the extent of responsibility for what is, in effect, the same continuing act.

(5) As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann's capture, a charge neither admitted nor denied by Israeli Foreign Minister Golda Meir, during the discussion in the Security Council of the complaint. She referred to Eichmann's captors as a "volunteer group".[707] [187] Security Council resolution 138 (1960) of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann's captors were "in fact acting on the instructions of, or under the direction or control of" Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State.

(6) The phrase "acknowledges and adopts the conduct in question as its own" is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.[708] [188] ICJ in the *United States Diplomatic and Consular Staff in Tehran* case used phrases such as "approval", "endorsement", "the seal of official governmental approval" and "the decision to perpetuate [the situation]".[709] [189] These were sufficient in

[704] [184] *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 35, para. 74.

[705] [185] *Ibid.*, pp. 31–33, paras. 63–68.

[706] [186] *Lighthouses* arbitration (footnote [702] 182 above), pp. 197–198.

[707] [187] *Official Records of the Security Council, Fifteenth Year*, 866th meeting, 22 June 1960, para. 18.

[708] [188] The separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.

[709] [189] See footnote [80] 59 above.

the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies States often take positions which amount to "approval" or "endorsement" of conduct in some general sense but do not involve any assumption of responsibility. The language of "adoption", on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct. Indeed, provided the State's intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases where a State has accepted responsibility for conduct of which it did not approve, which it had sought to prevent and which it deeply regretted. However such acceptance may be phrased in the particular case, the term "acknowledges and adopts" in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.

(7) The principle established by article 11 governs the question of attribution only. Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law. By the same token, a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity. Such an assumption of responsibility would have to go further and amount to an agreement to indemnify for the wrongful act of another.

(8) The phrase "if and to the extent that" is intended to convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State. Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words, a State may elect to acknowledge and adopt only some of the conduct in question. Thirdly, the act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.

(9) The conditions of acknowledgement and adoption are cumulative, as indicated by the word "and". The order of the two conditions indicates the normal sequence of events in cases in which article 11 is relied on. Acknowledgement and adoption of conduct by a State might be express (as for example in the *United States Diplomatic and Consular Staff in Tehran* case), or it might be inferred from the conduct of the State in question.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International Criminal Tribunal for the former Yugoslavia

Prosecutor v. *Dragan Nikolić ("Sušica Camp")*

In its 2002 decision on the defence motion challenging the exercise of jurisdiction by the Tribunal in the *Nikolić ("Sušica Camp")* case, Trial Chamber II needed to consider the situation in which "some unknown individuals [had] arrested the Accused in the territory of the FRY [Federal Republic of Yugoslavia] and [had] brought him across the border with Bosnia

and Herzegovina and into the custody of SFOR".[710] [114] In this respect, the Trial Chamber used the principles laid down in the articles finally adopted by the International Law Commission in 2001, and in particular article 11 and the commentary thereto, "as *general* legal guidance … insofar as they may be helpful for determining the issue at hand":[711] [115]

> 60. In determining the question as to whether the illegal conduct of the individuals can somehow be attributed to SFOR, the Trial Chamber refers to the principles laid down in the draft articles of the International Law Commission on the issue of 'responsibilities of States for internationally wrongful acts'. These draft articles were adopted by the International Law Commission at its fifty-third session in 2001. The Trial Chamber is however aware of the fact that any use of this source should be made with caution. The draft articles were prepared by the International Law Commission and are still subject to debate amongst States. They do not have the status of treaty law and are not binding on States. Furthermore, as can be deduced from its title, the draft articles are primarily directed at the responsibilities of States and not at those of international organizations or entities. As draft article 57 emphasizes,
>
> > [t]hese articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.
>
> 61. In the present context, the focus should first be on the possible attribution of the acts of the unknown individuals to SFOR. As indicated in article I of Annex 1-A to the Dayton Agreement, IFOR (SFOR) is a multinational military force. It 'may be composed of ground, air and maritime units from NATO and non-NATO nations' and 'will operate under the authority and subject to the direction and political control of the North Atlantic Council.' For the purposes of deciding upon the motions pending in the present case, the Chamber does not deem it necessary to determine the exact legal status of SFOR under international law. Purely as *general* legal guidance, it will use the principles laid down in the draft articles [on State responsibility] insofar as they may be helpful for determining the issue at hand.
>
> 62. Article 11 of the draft articles [on State responsibility] relates to 'Conduct acknowledged and adopted by a State as its own' and states the following:
>
> > Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.
>
> 63. The report of the International Law Commission on the work of its fifty-third session sheds light on the meaning of the article:
>
> > Article 11 (…) provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own. (…), article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes 'nevertheless' that conduct is to be considered as an act of State 'if and to the extent that the State acknowledges and adopts the conduct in question as its own'.
>
> Furthermore, in this report a distinction is drawn between concepts such as 'acknowledgement' and 'adoption' from concepts such as 'support' or 'endorsement'. The International Law Commission argues that

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[710] [114] ICTY, Trial Chamber II, *Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal*, 9 October 2002, Case No. IT-94–2-PT, para. 57.

[711] [115] *Ibid*., para. 61.

[a]s a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies States often take positions which amount to 'approval' or 'endorsement' of conduct in some general sense but do not involve any assumption of responsibility. The language of 'adoption', on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct."[712] 116

The Trial Chamber observed that both parties in the case had used the same and similar criteria of "acknowledgement", "adoption", "recognition", "approval" and "ratification", as used by the ILC.[713] 117 After having examined the facts of the case, it concluded that SFOR and the Prosecution had become the "mere beneficiary" of the fortuitous rendition of the accused to Bosnia, which did not amount to an "adoption" or "acknowledgement" of the illegal conduct "as their own".[714] 118

[A/62/62, para. 71]

[International arbitral tribunal (under the ICSID Convention)

Ioannis Kardassopoulos and Ron Fuchs v. *The Republic of Georgia*

The arbitral tribunal constituted to hear the *Ioannis Kardassopoulos and Ron Fuchs* v. *The Republic of Georgia* case determined that, although the tribunal invoked article 7 during the jurisdictional phase, articles 4, 5 and 11 were equally applicable to the dispute.[715] 36 The tribunal concluded that "there can be no real question in these arbitrations as to the attribution of any acts or omissions on the part of [the relevant entities] to the Respondent".[716] 37

[See A/68/72, footnote 102 and para. 32]]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area

In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber indicated that certain rules on the liability of sponsoring States in the United Nations Convention on the Law of the Sea

are in line with the rules of customary international law on this issue. Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility).[717] 103

[A/68/72, para. 75]

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[712] 116 *Ibid*., paras. 60–63 (footnotes omitted).

[713] 117 *Ibid*., para. 64.

[714] 118 *Ibid*., paras. 66–67.

[715] [36 See footnote [288] 36, para. 274 (quoting articles 4, 5 and 11).]

[716] [37 *Ibid*., paras. 274 and 280.]

[717] 103 See footnote [12] 10 above, para. 182.

Permanent Court of Arbitration (under UNCITRAL Rules)

Luigiterzo Bosca v. *Lithuania*

In *Luigiterzo Bosca* v. *Lithuania*, the arbitral tribunal, paraphrasing article 11, stated that "[i]n other words, where the State endorses the act, as here, the State is subject to international responsibility under international law".[718] 105

[A/71/80, para. 78]

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. *Government of Canada*

In *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.* v. *Government of Canada*, the tribunal found that "[o]n the facts of the present case, however, Article 11 would establish the international responsibility of Canada even if the JRP [Joint Review Panel] were not one of its organs".[719] 106 The arbitral tribunal specified that "[t]here is no indication in the evidence of a level of independent fact-finding, legal analysis or other deliberation by the Government of Canada that would be inconsistent with the view that Canada was acknowledging and adopting the essential reasoning and conclusions of the JRP".[720] 107

[A/71/80, para. 79]

International arbitral tribunal (under the ICSID Convention)

Bernhard von Pezold and others v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal did not find that article 11 of the State responsibility articles was applicable in the case.[721] 108

[A/71/80, para. 80]

[*Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt*

The arbitral tribunal in *Ampal-American Israel Corporation and others* v. *Arab Republic of Egypt* quoted articles 4, 5, 8 and 11 of the State responsibility articles and

> formed the view that the acts or omissions of EGPC [Egyptian General Petroleum Corporation] or EGAS [Egyptian Natural Gas Holding Company] relevant to the conclusion and termination of the GSPA [Gas Sale Purchase Agreement] are attributable to the Respondent under the relevant provisions of the ILC Draft Articles on State Responsibility, which form part of the applicable customary international law.[722] 96

[718] 105 See footnote [169] 26 above, footnote 114.

[719] 106 See footnote [333] 59 above, paras. 321–322.

[720] 107 *Ibid*., para. 323.

[721] 108 See footnote [114] 24 above, para. 449.

[722] [96 ICSID, Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, para. 135.]

The tribunal further explained, referring to article 8 of the State responsibility articles, that EGPC and EGAS

were '*in fact acting on the instructions of, or under the direction or control of*' the Respondent in relation to the particular conduct. In any event, the Tribunal finds that the Respondent subsequently ratified the termination of the GSPA and thus '*acknowledge[d] and adopt[ed] the conduct in question as its own*' within the terms of Article 11.[723] 97

[A/74/83, p. 20]]

Saint-Gobain Performance Plastics Europe v. *Bolivarian Republic of Venezuela*

In *Saint-Gobain Performance Plastics Europe* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal found that:

by means of its conduct after the plant takeover of 15 May 2010 carried out by the members of the SINPROTRAC union, PDVSA [Gas S.A.] acknowledged and adopted the union's actions as its own. On the basis of the applicable principles of customary international law on State responsibility as reflected in Article 11 of the ILC Draft Articles, the plant takeover on 15 May 2010 therefore has to be considered as an act of Respondent. In any event, PDVSA took effective control over the plant and started the expropriation process shortly after 15 May 2010, as confirmed by its internal memoranda and reports of early June 2010.[724] 117

Relying on the commentary to article 11, the arbitral tribunal also explained: "In contrast to cases of mere State support, endorsement or general acknowledgment of a factual situation created by private individuals, attribution under this rule requires that the State clearly and unequivocally '*identifies the conduct in question and makes it its own*'".[725] 118

[A/74/83, p. 22]

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal quoted article 11 of the State responsibility articles and the commentary thereto, based on the claimant's arguments, but did "not consider that Article 11 of the ILC Articles in regard to EGPC [Egyptian General Petroleum Corporation] and EGAS [Egyptian Natural Gas Holding Company] separately advances the Claimant's case".[726] 119

[A/74/83, p. 23]

[723] [97 *Ibid*., para. 146.]

[724] 117 ICSID, Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para. 456.

[725] 118 *Ibid*., para. 461 (original emphasis).

[726] 119 ICSID, Case No. ARB/14/4, Award, 31 August 2018, paras. 9.120–9.121.

[International arbitral tribunal (under UNCITRAL Rules)

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*

The arbitral tribunal in *Zhongshan Fucheng Industrial Investment Co. Ltd.* v. *Federal Republic of Nigeria* took the view that "all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles".[727] 42 The tribunal also cited articles 1, 5, 9, 34, 36 and 38.[728] 43

[A/77/74, p. 11]]

World Trade Organization Panel

Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights

The panel established in *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights* cited the text of article 11, which

> provides that '[c]onduct which is not attributable to a State … shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own'. By its terms, the principle only applies to conduct that is not otherwise attributable to a State.[729] 79

[A/77/74. p. 16]

European Court of Human Rights

Makuchyan and Minasyan v. *Azerbaijan and Hungary*

In *Makuchyan and Minasyan* v. *Azerbaijan and Hungary*, the European Court of Human Rights referred to article 11 in considering whether the conduct of an individual who was not a State agent could be attributable to Azerbaijan. The Court took the view that the current standard under international law, which stemmed from article 11 and the commentary thereto, set

> a very high threshold for State responsibility for an act otherwise non-attributable to a State at the time of its commission. That threshold is not limited to the mere 'approval' and 'endorsement' of the act in question … Article 11 of the Draft Articles explicitly and categorically requires the 'acknowledgment' and 'adoption' of that act.[730] 80

The Court determined that, for State responsibility for the impugned acts to have been established, international law would have required "that the Azerbaijani authorities 'acknowledge' and 'adopt' them as acts perpetrated by the State of Azerbaijan—thus directly and categorically assuming responsibility for the killing of G.M. and the preparations for the murder of the first applicant.[731] 81

[A/77/74. p. 16]

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[727] [42 Final Award, 26 March 2021, para. 72.]

[728] [43 *Ibid*., paras. 72 and 134–135.]

[729] 79 See footnote [385] 35 above, para. 7.161.

[730] 80 ECHR, Fourth Section, Application No. 17247/13, Judgment, 12 October 2020, para. 112.

[731] 81 *Ibid*., para. 113.

Chapter III

BREACH OF AN INTERNATIONAL OBLIGATION

Commentary

(1) There is a breach of an international obligation when conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it, or, to use the language of article 2, subparagraph (*b*), when such conduct constitutes "a breach of an international obligation of the State". This chapter develops the notion of a breach of an international obligation, to the extent that this is possible in general terms.

(2) It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States.[732] [190] In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, *etc.* There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration. Nonetheless, a number of basic principles can be stated.

(3) The essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. Such conduct gives rise to the new legal relations which are grouped under the common denomination of international responsibility. Chapter III, therefore, begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (art. 12). The basic concept having been defined, the other provisions of the chapter are devoted to specifying how this concept applies to various situations. In particular, the chapter deals with the question of the intertemporal law as it applies to State responsibility, *i.e.* the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach (art. 13), with the equally important question of continuing breaches (art. 14), and with the special problem of determining whether and when there has been a breach of an obligation which is directed not at single but at composite acts, *i.e.* where the essence of the breach lies in a series of acts defined in aggregate as wrongful (art. 15).

(4) For the reason given in paragraph (2) above, it is neither possible nor desirable to deal in the framework of this Part with all the issues that can arise in determining whether there has been a breach of an international obligation. Questions of evidence and proof of such a breach fall entirely outside the scope of the articles. Other questions concern rather the classification or typology of international obligations. These have only been included in the text where they can be seen to have distinct consequences within the framework of the secondary rules of State responsibility.[733] [191]

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[732] [190] See paragraphs (2) to (4) of the general commentary.

[733] [191] See, *e.g.*, the classification of obligations of conduct and results, paragraphs (11) to (12) of the commentary to article 12.

Article 12. Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Commentary

(1) As stated in article 2, a breach by a State of an international obligation incumbent upon it gives rise to its international responsibility. It is first necessary to specify what is meant by a breach of an international obligation. This is the purpose of article 12, which defines in the most general terms what constitutes a breach of an international obligation by a State. In order to conclude that there is a breach of an international obligation in any specific case, it will be necessary to take account of the other provisions of chapter III which specify further conditions relating to the existence of a breach of an international obligation, as well as the provisions of chapter V dealing with circumstances which may preclude the wrongfulness of an act of a State. But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.

(2) In introducing the notion of a breach of an international obligation, it is necessary again to emphasize the autonomy of international law in accordance with the principle stated in article 3. In the terms of article 12, the breach of an international obligation consists in the disconformity between the conduct required of the State by that obligation and the conduct actually adopted by the State—*i.e.* between the requirements of international law and the facts of the matter. This can be expressed in different ways. For example, ICJ has used such expressions as "incompatibility with the obligations" of a State,[734] [192] acts "contrary to" or "inconsistent with" a given rule,[735] [193] and "failure to comply with its treaty obligations".[736][194] In the *ELSI* case, a Chamber of the Court asked the "question whether the requisition was in conformity with the requirements … of the FCN Treaty".[737] [195] The expression "not in conformity with what is required of it by that obligation" is the most appropriate to indicate what constitutes the essence of a breach of an international obligation by a State. It allows for the possibility that a breach may exist even if the act of the State is only partly contrary to an international obligation incumbent upon it. In some cases precisely defined conduct is expected from the State concerned; in others the obligation only sets a minimum standard above which the State is free to act. Conduct proscribed by an international obligation may involve an act or an omission or a combination of acts and omissions; it may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition. In every case, it is by comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation that one can determine whether

[734] [192] *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 29, para. 56.

[735] [193] *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 64, para. 115, and p. 98, para. 186, respectively.

[736] [194] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 46, para. 57.

[737] [195] *ELSI* (footnote [144] 85 above), p. 50, para. 70.

or not there is a breach of that obligation. The phrase "is not in conformity with" is flexible enough to cover the many different ways in which an obligation can be expressed, as well as the various forms which a breach may take.

(3) Article 12 states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation "regardless of its origin". As this phrase indicates, the articles are of general application. They apply to all international obligations of States, whatever their origin may be. International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. States may assume international obligations by a unilateral act.[738] 196 An international obligation may arise from provisions stipulated in a treaty (a decision of an organ of an international organization competent in the matter, a judgment given between two States by ICJ or another tribunal, *etc*.). It is unnecessary to spell out these possibilities in article 12, since the responsibility of a State is engaged by the breach of an international obligation whatever the particular origin of the obligation concerned. The formula "regardless of its origin" refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law. The word "source" is sometimes used in this context, as in the preamble to the Charter of the United Nations which stresses the need to respect "the obligations arising from treaties and other sources of international law". The word "origin", which has the same meaning, is not attended by the doubts and doctrinal debates the term "source" has provoked.

(4) According to article 12, the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State, nor does it, as such, affect the regime of State responsibility thereby arising. Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act.[739] 197 Moreover, these various grounds of obligation interact with each other, as practice clearly shows. Treaties, especially multilateral treaties, can contribute to the formation of general international law; customary law may assist in the interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on. Thus, international courts and tribunals have treated responsibility as arising for a State by reason of any "violation of a duty imposed by an international juridical standard".[740] 198 In the *"Rainbow Warrior"* arbitration, the tribunal said that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility

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[738] 196 Thus, France undertook by a unilateral act not to engage in further atmospheric nuclear testing: *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand v. France), ibid*., p. 457. The extent of the obligation thereby undertaken was clarified in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand* v. *France) Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 288.

[739] 197 ICJ has recognized "[t]he existence of identical rules in international treaty law and customary law" on a number of occasions, *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 95, para. 177; see also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38–39, para. 63.

[740] 198 *Dickson Car Wheel Company* (footnote [36] 42 above); cf. the *Goldenberg* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 901, at pp. 908–909 (1928); *International Fisheries Company* (footnote [37] 43 above), p. 701 ("some principle of international law"); and *Armstrong Cork Company* (footnote [39] 45 above), p. 163 ("any rule whatsoever of international law").

and consequently, to the duty of reparation".[741] 199 In the *Gabčíkovo-Nagymaros Project* case, ICJ referred to the relevant draft article provisionally adopted by the Commission in 1976 in support of the proposition that it is "well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect".[742] 200

(5) Thus, there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, *i.e.* for responsibility arising *ex contractu* or *ex delicto*. In the *"Rainbow Warrior"* arbitration, the tribunal affirmed that "in the field of international law there is no distinction between contractual and tortious responsibility".[743] 201 As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the "civil" and "criminal" responsibility as is the case in internal legal systems.

(6) State responsibility can arise from breaches of bilateral obligations or of obligations owed to some States or to the international community as a whole. It can involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law. Questions of the gravity of the breach and the peremptory character of the obligation breached can affect the consequences which arise for the responsible State and, in certain cases, for other States also. Certain distinctions between the consequences of certain breaches are accordingly drawn in Parts Two and Three of these articles.[744] 202 But the regime of State responsibility for breach of an international obligation under Part One is comprehensive in scope, general in character and flexible in its application: Part One is thus able to cover the spectrum of possible situations without any need for further distinctions between categories of obligation concerned or the category of the breach.

(7) Even fundamental principles of the international legal order are not based on any special source of law or specific law-making procedure, in contrast with rules of constitutional character in internal legal systems. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts. But this is an issue belonging to the content of State responsibility.[745] 203 So far at least as Part One of the articles is concerned, there is a unitary regime of State responsibility which is general in character.

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[741] 199 *"Rainbow Warrior"* (footnote [40] 46 above), p. 251, para. 75. See also *Barcelona Traction* (footnote [46] 52 above), p. 46, para. 86 ("breach of an international obligation arising out of a treaty or a general rule of law").

[742] 200 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 38, para. 47. The qualification "likely to be involved" may have been inserted because of possible circumstances precluding wrongfulness in that case.

[743] 201 *"Rainbow Warrior"* (footnote [40] 46 above), p. 251, para. 75.

[744] 202 See Part Three, chapter II and commentary; see also article 48 and commentary.

[745] 203 See articles 40 and 41 and commentaries.

(8) Rather similar considerations apply with respect to obligations arising under the Charter of the United Nations. Since the Charter is a treaty, the obligations it contains are, from the point of view of their origin, treaty obligations. The special importance of the Charter, as reflected in its Article 103,[746] 204 derives from its express provisions as well as from the virtually universal membership of States in the United Nations.

(9) The general scope of the articles extends not only to the conventional or other origin of the obligation breached but also to its subject matter. International awards and decisions specifying the conditions for the existence of an internationally wrongful act speak of the breach of an international obligation without placing any restriction on the subject matter of the obligation breached.[747] 205 Courts and tribunals have consistently affirmed the principle that there is no *a priori* limit to the subject matters on which States may assume international obligations. Thus PCIJ stated in its first judgment, in the *S.S. "Wimbledon"* case, that "the right of entering into international engagements is an attribute of State sovereignty".[748] 206 That proposition has often been endorsed.[749] 207

(10) In a similar perspective, it has sometimes been argued that an obligation dealing with a certain subject matter could only have been breached by conduct of the same description. That proposition formed the basis of an objection to the jurisdiction of ICJ in the *Oil Platforms* case. It was argued that a treaty of friendship, commerce and navigation could not in principle have been breached by conduct involving the use of armed force. The Court responded in the following terms:

> The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955.[750] 208

Thus the breach by a State of an international obligation constitutes an internationally wrongful act, whatever the subject matter or content of the obligation breached, and whatever description may be given to the non-conforming conduct.

(11) Article 12 also states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation, "regardless of its …

[746] 204 According to which "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

[747] 205 See, *e.g.*, *Case concerning the Factory at Chorzów, Jurisdiction* (footnote [28] 34 above); *Case concerning the Factory at Chorzów, Merits* (*ibid.*); and *Reparation for Injuries* (footnote [32] 38 above). In these decisions it is stated that "any breach of an international engagement" entails international responsibility. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (footnote [33] 39 above), p. 228.

[748] 206 *S.S. "Wimbledon"* (footnote [28] 34 above), p. 25.

[749] 207 See, *e.g.*, *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4, at pp. 20–21; *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6, at p. 33; and *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 131, para. 259.

[750] 208 *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at pp. 811–812, para. 21.

character". In practice, various classifications of international obligations have been adopted. For example, a distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive,[751] 209 and it does not seem to bear specific or direct consequences as far as the present articles are concerned. In the *Colozza* case, for example, the European Court of Human Rights was concerned with the trial in absentia of a person who, without actual notice of his trial, was sentenced to six years' imprisonment and was not allowed subsequently to contest his conviction. He claimed that he had not had a fair hearing, contrary to article 6, paragraph 1, of the European Convention on Human Rights. The Court noted that:

> The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of article 6 § 1 in this field. The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved … For this to be so, the resources available under domestic law must be shown to be effective and a person "charged with a criminal offence" … must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*.[752] 210

The Court thus considered that article 6, paragraph 1, imposed an obligation of result.[753] 211 But, in order to decide whether there had been a breach of the Convention in the circumstances of the case, it did not simply compare the result required (the opportunity for a trial in the accused's presence) with the result practically achieved (the lack of that opportunity in the particular case). Rather, it examined what more Italy could have done to make the applicant's right "effective".[754] 212 The distinction between obligations of conduct and result was not determinative of the actual decision that there had been a breach of article 6, paragraph 1.[755] 213

(12) The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation *prima facie* conflicts with what is required by the international obligation, or whether the legislation has to be implemented

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[751] 209 Cf. *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 77, para. 135, where the Court referred to the parties having accepted "obligations of conduct, obligations of performance, and obligations of result".

[752] 210 *Colozza* v. *Italy, Eur. Court H.R., Series A, No. 89* (1985), pp. 15–16, para. 30, citing *De Cubber* v. *Belgium*, *ibid.*, *No. 86* (1984), p. 20, para. 35.

[753] 211 Cf. *Plattform "Ärzte für das Leben"* v. *Austria*, in which the Court gave the following interpretation of article 11:

> "While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used … In this area the obligation they enter into under article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved" (*Eur. Court H.R., Series A, No. 139*, p. 12, para. 34 (1988)).

In the *Colozza* case (footnote [752] 210 above), the Court used similar language but concluded that the obligation was an obligation of result. Cf. C. Tomuschat, "What is a 'breach' of the European Convention on Human Rights?", *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, Lawson and de Blois, eds. (Dordrecht, Martinus Nijhoff, 1994), vol. 3, p. 315, at p. 328.

[754] 212 *Colozza* case (footnote [752] 210 above), para. 28.

[755] 213 See also *The Islamic Republic of Iran* v. *The United States of America,* cases A15 (IV) and A24, Iran-U.S. C.T.R., vol. 32, p. 115 (1996).

in the given case before the breach can be said to have occurred. Again, no general rule can be laid down that is applicable to all cases.[756] 214 Certain obligations may be breached by the mere passage of incompatible legislation.[757] 215 Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the legislature itself being an organ of the State for the purposes of the attribution of responsibility.[758] 216 In other circumstances, the enactment of legislation may not in and of itself amount to a breach,[759] 217 especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.[760] 218

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Ad hoc committee (under the ICSID Convention)

Compañia de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie générale des eaux) v. *Argentine Republic*

In its 2002 decision on annulment in the *CAA and Vivendi Universal* v. *Argentina* case, the ICSID *ad hoc* committee referred to the text and commentaries to articles 2, 4 and 12 finally adopted by the International Law Commission. The relevant passages are quoted [on pages 26 and 67] above.

[A/62/62, para. 72]

[756] 214 Cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (footnote [142] 83 above), p. 30, para. 42.

[757] 215 A uniform law treaty will generally be construed as requiring immediate implementation, *i.e.* as embodying an obligation to make the provisions of the uniform law a part of the law of each State party: see, *e.g.*, B. Conforti, "Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme", *Rivista di diritto internazionale privato e processuale*, vol. 24 (1988), p. 233.

[758] 216 See article 4 and commentary. For illustrations, see, e. g., the findings of the European Court of Human Rights in *Norris* v. *Ireland*, *Eur. Court H.R., Series A, No. 142*, para. 31 (1988), citing *Klass and Others* v. *Germany*, *ibid.*, *No. 28*, para. 33, (1978); *Marckx* v. *Belgium*, *ibid.*, *No. 31*, para. 27 (1979); *Johnston and Others* v. *Ireland*, *ibid.*, *No. 112*, para. 42 (1986); *Dudgeon* v. *the United Kingdom*, *ibid.*, *No. 45*, para. 41 (1981); and *Modinos* v. *Cyprus*, *ibid.*, *No. 259*, para. 24 (1993). See also *International responsibility for the promulgation and enforcement of laws in violation of the Convention (arts. 1 and 2 American Convention on Human Rights)*, Advisory Opinion OC–14/94, Inter-American Court of Human Rights, Series A, No. 14 (1994). The Inter-American Court also considered it possible to determine whether draft legislation was compatible with the provisions of human rights treaties: *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC–3/83, Series A, No. 3 (1983).

[759] 217 As ICJ held in *LaGrand*, *Judgment* (footnote [236] 119 above), p. 497, paras. 90–91.

[760] 218 See, *e.g.*, WTO, Report of the Panel[, United States–Sections 301–310 of the Trade Act of 1974 (WT/DS152/R), 22 December 1999] (footnote [94] 73 above), paras. 7.34–7.57.

International arbitral tribunal (under the ICSID Convention)

ConocoPhillips Petrozuata B.V., and others v. *Bolivarian Republic of Venezuela*

In *ConocoPhillips Petrozuata B.V., and others* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal cited the commentary to article 12 when considering that "a breach of obligation does not occur until the law in issue is actually applied in breach of that obligation and that cannot happen before the law in question is in force".[761] 109

[A/71/80, para. 81]

Special Tribunal for Lebanon

The Prosecutor v. *Salim Jamil Ayyash et al.*

In *The Prosecutor* v. *Salim Jamil Ayyash et al.*, the Special Tribunal for Lebanon referred to article 12 and the pertinent commentary in explaining that "the standard for determining a State's non-compliance may be objective" but "[i]nterpretation, obviously, depends upon the circumstances".[762] 110

[A/71/80, para. 82]

Caribbean Court of Justice

Maurice Tomlinson v. *The State of Belize and The State of Trinidad and Tobago*

The Caribbean Court of Justice in *Maurice Tomlinson* v. *The State of Belize and The State of Trinidad and Tobago* accepted that "[a]rticle 12 [of the State responsibility articles] repeats the rule of customary international law that there is a breach of an international obligation by a State when an act of the State is not in conformity with what is required of it by that obligation".[763] 120

[A/74/83, p. 23]

African Commission on Human and Peoples' Rights

Hossam Ezzat & Rania Enayet v. *The Arab Republic of Egypt*

In *Hossam Ezzat & Rania Enayet* v. *The Arab Republic of Egypt*, the African Commission on Human and Peoples' Rights, citing article 12, observed that "[a] [S]tate breaches an international obligation when its conduct or conduct attributable to it in the form of action or omission is not in conformity or is inconsistent with what is expected of it by the obligation in question".[764] 121

[A/74/83, p. 23]

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[761] 109 See footnote [18] 6 above, para. 289, footnote 308.

[762] 110 STL, STL-11–01, Decision on Updated Request for a Finding of Non-Compliance, 27 March 2015, paras. 43–45.

[763] 120 CCJ, [2016] CCJ 1 (OJ), 10 June 2016, para. 22.

[764] 121 African Commission on Human and Peoples' Rights, Communication No. 355/07, Decision, 28 April 2018, para. 124.

Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[765] [82]

[A/77/74, p. 17]

[765] [82] See footnote [126] 14 above, para. 155.

Article 13. International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Commentary

(1) Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when the State is bound by the obligation. This is but the application in the field of State responsibility of the general principle of intertemporal law, as stated by Judge Huber in another context in the *Island of Palmas* case:

[A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.[766] [219]

Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation ("does not constitute … unless …") is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.

(2) International tribunals have applied the principle stated in article 13 in many cases. An instructive example is provided by the decision of Umpire Bates of the United States-Great Britain Mixed Commission concerning the conduct of British authorities who had seized United States vessels engaged in the slave trade and freed slaves belonging to United States nationals. The incidents referred to the Commission had taken place at different times and the umpire had to determine whether, at the time each incident took place, slavery was "contrary to the law of nations". Earlier incidents, dating back to a time when the slave trade was considered lawful, amounted to a breach on the part of the British authorities of the international obligation to respect and protect the property of foreign nationals.[767] [220] The later incidents occurred when the slave trade had been "prohibited by all civilized nations" and did not involve the responsibility of Great Britain.[768] [221]

(3) Similar principles were applied by Arbitrator Asser in deciding whether the seizure and confiscation by Russian authorities of United States vessels engaged in seal hunting outside Russia's territorial waters should be considered internationally wrongful. In his award in the *"James Hamilton Lewis"* case, he observed that the question had to be settled "according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the

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[766] [219] *Island of Palmas* (Netherlands/United States of America), UNRIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845 (1928). Generally on intertemporal law, see resolution I adopted in 1975 by the Institute of International Law at its Wiesbaden session, *Annuaire de l'Institut de droit international*, vol. 56 (1975), pp. 536–540; for the debate, *ibid.*, pp. 339–374; for M. Sørensen's reports, *ibid.*, vol. 55 (1973), pp. 1–116. See further W. Karl, "The time factor in the law of State responsibility", Simma and Spinedi, eds., *op. cit.* (footnote [689] 175 above), p. 95.

[767] [220] See the *"Enterprize"* case, Lapradelle-Politis (footnote [520] 139 above), vol. I, p. 703 (1855); and Moore, *History and Digest*, vol. IV, p. 4349, at p. 4373. See also the *"Hermosa"* and *"Créole"* cases, Lapradelle-Politis, *op. cit.*, p. 704 (1855); and Moore, *History and Digest*, vol. IV, pp. 4374–4375.

[768] [221] See the *"Lawrence"* case, Lapradelle-Politis, *op. cit.*, p. 741; and Moore, *History and Digest*, vol. III, p. 2824. See also the *"Volusia"*case, Lapradelle-Politis, *op. cit.*, p. 741.

vessel".[769] [222] Since, under the principles in force at the time, Russia had no right to seize the United States vessel, the seizure and confiscation of the vessel were unlawful acts for which Russia was required to pay compensation.[770] [223] The same principle has consistently been applied by the European Commission and the European Court of Human Rights to deny claims relating to periods during which the European Convention on Human Rights was not in force for the State concerned.[771] [224]

(4) State practice also supports the principle. A requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place is a common stipulation in arbitration agreements, [772] [225] and undoubtedly is made by way of explicit confirmation of a generally recognized principle. International law writers who have dealt with the question recognize that the wrongfulness of an act must be established on the basis of the obligations in force at the time when the act was performed.[773] [226]

(5) State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence, as contemplated by article 64 of the 1969 Vienna Convention, this does not entail any retrospective assumption of responsibility. Article 71, paragraph 2 (*b*), provides that such a new peremptory norm "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm".

(6) Accordingly, it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application. It is, however, without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for

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[769] [222] *Affaire des navires Cape Horn Pigeon, James Hamilton Lewis, C. H. White et Kate and Anna*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 66, at p. 69 (1902).

[770] [223] See also the *"C. H. White"* case, *ibid*., p. 74. In these cases the arbitrator was required by the arbitration agreement itself to apply the law in force at the time the acts were performed. Nevertheless, the intention of the parties was clearly to confirm the application of the general principle in the context of the arbitration agreement, not to establish an exception. See further the *S.S. "Lisman"* case, *ibid*., vol. III (Sales No. 1949.V.2), p. 1767, at p. 1771 (1937).

[771] [224] See, *e.g.*, *X* v. *Germany*, application No. 1151/61, Council of Europe, European Commission of Human Rights, *Recueil des décisions*, No. 7 (March 1962), p. 119 (1961) and many later decisions.

[772] [225] See, *e.g.*, Declarations exchanged between the Government of the United States of America and the Imperial Government of Russia, for the submission to arbitration of certain disputes concerning the international responsibility of Russia for the seizure of American ships, UNRIAA, vol. IX (Sales No. 59.V.5), p. 57 (1900).

[773] [226] See, *e.g.*, P. Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public: problèmes de droit intertemporel ou de droit transitoire* (Paris, Librairie générale de droit et de jurisprudence, 1970), pp. 119, 135 and 292; D. Bindschedler-Robert, "De la rétroactivité en droit international public", *Recueil d'études de droit international en hommage à Paul Guggenheim* (University of Geneva Law Faculty/Graduate Institute of International Studies, 1968), p. 184; M. Sørensen, "Le problème intertemporel dans l'application de la Convention européenne des droits de l'homme", *Mélanges offerts à Polys Modinos* (Paris, Pedone, 1968), p. 304; T. O. Elias, "The doctrine of intertemporal law", AJIL, vol. 74, No. 2 (April 1980), p. 285; and R. Higgins, "Time and the law: international perspectives on an old problem", *International and Comparative Law Quarterly,* vol. 46 (July 1997), p. 501.

that State. In fact, cases of the retrospective assumption of responsibility are rare. The *lex specialis* principle (art. 55) is sufficient to deal with any such cases where it may be agreed or decided that responsibility will be assumed retrospectively for conduct which was not a breach of an international obligation at the time it was committed.[774] 227

(7) In international law, the principle stated in article 13 is not only a necessary but also a sufficient basis for responsibility. In other words, once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law. Thus, as ICJ said in the *Northern Cameroons* case:

> [I]f during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust.[775] 228

Similarly, in the *"Rainbow Warrior"* arbitration, the arbitral tribunal held that, although the relevant treaty obligation had terminated with the passage of time, France's responsibility for its earlier breach remained.[776] 229

(8) Both aspects of the principle are implicit in the ICJ decision in the *Certain Phosphate Lands in Nauru* case. Australia argued there that a State responsibility claim relating to the period of its joint administration of the Trust Territory for Nauru (1947–1968) could not be brought decades later, even if the claim had not been formally waived. The Court rejected the argument, applying a liberal standard of laches or unreasonable delay.[777] 230 But it went on to say that:

> [I]t will be for the Court, in due time, to ensure that Nauru's delay in seising [*sic*] it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.[778] 231

Evidently, the Court intended to apply the law in force at the time the claim arose. Indeed that position was necessarily taken by Nauru itself, since its claim was based on a breach of the Trusteeship Agreement, which terminated at the date of its accession to independence in 1968. Its claim was that the responsibility of Australia, once engaged under the law in force at a given time, continued to exist even if the primary obligation had subsequently terminated.[779] 232

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[774] 227 As to the retroactive effect of the acknowledgement and adoption of conduct by a State, see article 11 and commentary, especially paragraph (4). Such acknowledgement and adoption would not, without more, give retroactive effect to the obligations of the adopting State.

[775] 228 *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15, at p. 35.

[776] 229 *"Rainbow Warrior"* (footnote [40] 46 above), pp. 265–266.

[777] 230 *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at pp. 253–255, paras. 31–36. See article 45, subparagraph (*b*), and commentary.

[778] 213 *Certain Phosphate Lands in Nauru*, *ibid*., p. 255, para. 36.

[779] 232 The case was settled before the Court had the opportunity to consider the merits: *Certain Phosphate Lands in Nauru, Order of 13 September 1993, I.C.J. Reports 1993*, p. 322; for the settlement agreement, see Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru (Nauru, 10 August 1993) (United Nations, *Treaty Series*, vol. 1770, No. 30807, p. 379).

(9) The basic principle stated in article 13 is thus well established. One possible qualification concerns the progressive interpretation of obligations, by a majority of the Court in the *Namibia* case.[780] 233 But the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permissible in certain cases,[781] 234 but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct. Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation.[782] 235

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Additional Facility Rules)

Mondev International Ltd. v. *United States of America*

In its 2002 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *Mondev* v. *United States* case observed that the basic principle "that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach" was "stated both in [article 28 of] the Vienna Convention on the Law of Treaties and in the International Law Commission's articles on State responsibility, and has been repeatedly affirmed by international tribunals".[783] 119 It referred in a footnote to article 13 finally adopted by the International Law Commission in 2001.

[A/62/62, para. 73]

European Court of Human Rights

Blečić v. *Croatia*

In its 2006 judgement in the *Blečić* v. *Croatia* case, the European Court, sitting as a Grand Chamber, quoted the text of articles 13 and 14, as finally adopted by the International Law Commission in 2001, in the section devoted to the "relevant international law and practice".[784] 120 The European Court later observed that

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[780] 233 *Namibia* case (footnote [690] 176 above), pp. 31–32, para. 53.

[781] 234 See, *e.g.*, *Tyrer* v. *the United Kingdom, Eur. Court H.R., Series A, No. 26*, pp. 15–16 (1978).

[782] 235 See, *e.g.*, *Zana* v. *Turkey*, *Eur. Court H.R., Reports*, 1997–VII, p. 2533 (1997); and J. Pauwelyn, "The concept of a 'continuing violation' of an international obligation: selected problems", BYBIL*, 1995*, vol. 66, p. 415, at pp. 443–445.

[783] 119 NAFTA (ICSID Additional Facility), *Mondev International Ltd.* v. *United States of America*, Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 68 (footnotes omitted), reproduced in *International Law Reports*, vol. 125, p. 131.

[784] 120 ECHR, Grand Chamber, Application No. 59532/00, Judgment, 8 March 2006, para. 48.

> while it is true that from the ratification date onwards all of the State's acts and omissions must conform to the [1950 European Convention on Human Rights] … the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to that date … Any other approach would undermine both the principle of non-retroactivity in the law of treaties and the fundamental distinction between violation and reparation that underlines the law of State responsibility.[785] [121]

The European Court found thereafter that, on the basis of its jurisdiction *ratione temporis*, it could not take cognizance of the merits of the case, since the facts allegedly constitutive of interference preceded the date into force of the Convention in respect of Croatia.[786] [122]

[A/62/62, para. 74]

Šilih v. *Slovenia*

In the *Šilih* v. *Slovenia* case, the European Court of Human Rights referred to article 13 of the State responsibility articles as constituting "relevant international law and practice" in the context of the consideration of the jurisdiction *ratione temporis* of the court.[787] [14]

[A/65/76, para. 18]

International Court of Justice

Jurisdictional Immunities of the State (Germany v. *Italy)*

In its judgment in *Jurisdictional Immunities of the State (Germany* v. *Italy)*, the International Court of Justice referred to article 13 in support of the assertion that "the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred".[788] [104]

[A/68/72, para. 76]

International arbitral tribunal (under the ICSID Convention)

Railroad Development Corporation v. *Republic of Guatemala*

The arbitral tribunal in *Railroad Development Corporation* v. *Republic of Guatemala* referred to article 13 in support of the assertion that a "[t]reaty cannot be breached before it entered into force … ".[789] [105]

[A/68/72, para. 77]

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[785] [121] *Ibid*., para. 81.

[786] [122] *Ibid*., para. 92 and operative paragraph.

[787] [14] ECHR, Grand Chamber, Application No. 71463/01, Judgment, 9 April 2009, para. 107.

[788] [104] ICJ, Judgment, 3 February 2012, para. 58.

[789] [105] ICSID, Case No. ARB/07/23, second decision on objections to jurisdiction, 29 June 2012, para. 116 (quoting article 13).

African Commission on Human and Peoples' Rights

Al-Asad v. *Djibouti*

In *Al-Asad* v. *Djibouti*, the African Commission on Human and Peoples' Rights referred to article 13 as a "simple and well-articulated" principle.[790] 112

[A/71/80, para. 83]

International arbitral tribunal (under the ICSID Convention)

Renee Rose Levy and Gremcitel S.A. v. *Republic of Peru*

The arbitral tribunal in *Renee Rose Levy and Gremcitel S.A.* v. *Republic of Peru* cited article 13 in support of "the principle of non-retroactivity of treaties".[791] 113

[A/71/80, para. 84]

Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company Limited v. *The Government of Belgium*

In *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company Limited* v. *The Government of Belgium*, the arbitral tribunal cited article 13 as codifying the "general principle (perhaps more accurately described as a presumption) of non-retroactivity of treaties".[792] 114 More specifically, the tribunal relied on article 13 in support of its view that

> the substantive provisions of a BIT may not be relied on in relation to acts and omissions occurring before its entry into force (unless they are continuing or composite acts) even where (as here) the BIT applies to investments made prior to the entry into force of the BIT, or where the dispute arose after the entry into force of the BIT.[793] 115

[A/71/80, para. 85]

Adel A Hamadi Al Tamimi v. *Sultanate of Oman*

In *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman*, the arbitral tribunal noted that "Article 13 of the ILC Articles on State Responsibility confirms that an act of State will not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs".[794] 116

[A/71/80, para. 86]

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[790] 112 ACHPR, Communication 383/10, Decision on Admissibility, 12 May 2014, para. 130.

[791] 113 ICSID, Case No. ARB/11/17, Award, 9 January 2015, para. 147, note 170.

[792] 114 ICSID, Case No. ARB/12/29, Award, 30 April 2015, paras. 168–169.

[793] 115 *Ibid.*, para. 172.

[794] 116 See footnote [340] 66 above, para. 395.

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Mesa Power Group v. *Government of Canada*

In *Mesa Power Group* v. *Government of Canada*, the arbitral tribunal cited article 13 with regard to the non-retroactivity of treaties when concluding that "State conduct cannot be governed by rules that are not applicable when the conduct occurs".[795] [122]

[A/74/83, p. 23]

Renco Group v. *Republic of Peru*

In *Renco Group* v. *Republic of Peru*, the arbitral tribunal noted that articles 13 and 14 reflected

> the general principle that the lawfulness of State conduct must be assessed contemporaneously with that conduct. Since a State is not bound by a conventional obligation it has assumed under a treaty until such treaty enters into force, that treaty obligation cannot be breached until the treaty giving rise to that obligation has come into force.[796] [83]

[A/77/74, p. 17]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Spółdzielnia Pracy Muszynianka v. *Slovak Republic*

In *Spółdzielnia Pracy Muszynianka* v. *Slovak Republic*, the arbitral tribunal quoted paragraph (7) of the commentary to article 13 and noted that, at the time that the facts occurred, the relevant bilateral investment treaty was in force and, "[a]s a result, … the Respondent's responsibility as well as the monetary consequences of a breach are governed by the BIT irrespective of the latter's termination".[797] [84]

[A/77/74, p. 17]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Astrida Benita Carrizosa v. *Republic of Colombia*

The arbitral tribunal in *Astrida Benita Carrizosa* v. *Republic of Colombia* referred to article 13, noting that conduct prior to the entry into force of the investment treaty could not constitute a breach, as "confirmed by the rule of State responsibility, according to which there can be no breach of an international obligation if that obligation did not apply at the time of the commission of the allegedly unlawful conduct".[798] [85]

[A/77/74, p. 17]

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[795] [122] PCA, Case No. 2012–17, Award, 24 March 2016, para. 325 and footnote 69.

[796] [83] PCA, Case No. 2019–46, Decision on Expedited Preliminary Objections, 30 June 2020, paras. 141–142.

[797] [84] PCA, Case No. 2017–08, Award, 7 October 2020, para. 264.

[798] [85] ICSID, Case No. ARB/18/5, Award, 19 April 2021, para. 126.

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

OOO Manolium Processing v. *Republic of Belarus*

The arbitral tribunal in *OOO Manolium Processing* v. *Republic of Belarus* referred to article 13 and the commentary thereto. It noted that article 13 reflected a principle "which is considered 'well established' and supported by State practice", namely that "[t]he prohibition of retroactivity implies that the legality of a Member State's actions under the [Treaty on the Eurasian Economic Union] can only be assessed if the Treaty was in force at the time the act was performed".[799] [86]

[A/77/74, p. 17]

[799] [86] PCA, Case No. 2018–06, Final Award, 22 June 2021, para. 269.

Article 14. Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Commentary

(1) The problem of identifying when a wrongful act begins and how long it continues is one which arises frequently[800] 236 and has consequences in the field of State responsibility, including the important question of cessation of continuing wrongful acts dealt with in article 30. Although the existence and duration of a breach of an international obligation depends for the most part on the existence and content of the obligation and on the facts of the particular breach, certain basic concepts are established. These are introduced in article 14. Without seeking to be comprehensive in its treatment of the problem, article 14 deals with several related questions. In particular, it develops the distinction between breaches not extending in time and continuing wrongful acts (see paragraphs (1) and (2) respectively), and it also deals with the application of that distinction to the important case of obligations of prevention. In each of these cases it takes into account the question of the continuance in force of the obligation breached.

(2) Internationally wrongful acts usually take some time to happen. The critical distinction for the purpose of article 14 is between a breach which is continuing and one which has already been completed. In accordance with paragraph 1, a completed act occurs "at the moment when the act is performed", even though its effects or consequences may continue. The words "at the moment" are intended to provide a more precise description of the time frame when a completed wrongful act is performed, without requiring that the act necessarily be completed in a single instant.

(3) In accordance with paragraph 2, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obliga-

[800] 236 See, *e.g.*, *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35; *Phosphates in Morocco* (footnote [28] 34 above), pp. 23–29; *Electricity Company of Sofia and Bulgaria, Judgment, 1939*, *P.C.I.J., Series A/B, No. 77*, p. 64, at pp. 80–82; and *Right of Passage over Indian Territory* (footnote [749] 207 above), pp. 33–36. The issue has often been raised before the organs of the European Convention on Human Rights. See, e. g., the decision of the European Commission of Human Rights in the *De Becker* v. *Belgium* case, application No. 214/56, *Yearbook of the European Convention on Human Rights, 1958–1959*, p. 214, at pp. 234 and 244; and the Court's judgments in *Ireland* v. *The United Kingdom*, *Eur. Court H.R., Series A, No. 25*, p. 64 (1978); *Papamichalopoulos and Others* v. *Greece*, *ibid.*, *No. 260–B*, para. 40 (1993); and *Agrotexim and Others* v. *Greece*, *ibid.*, *No. 330–A*, p. 22, para. 58 (1995). See also E. Wyler, "Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite", RGDIP, vol. 95, p. 881 (1991).

tion during that period.[801] [237] Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent.

(4) Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. For example, the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for.[802] [238] The question whether a wrongful taking of property is a completed or continuing act likewise depends to some extent on the content of the primary rule said to have been violated. Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act. The position with a *de facto*, "creeping" or disguised occupation, however, may well be different.[803] [239] Exceptionally, a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act.[804] [240]

(5) Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin. In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect, it is covered by paragraph 1 of article 14.

(6) An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.

(7) The notion of continuing wrongful acts is common to many national legal systems and owes its origins in international law to Triepel.[805] [241] It has been repeatedly referred to by ICJ and by other international tribunals. For example, in the *United States Diplomatic and Consu-*

[801] [237] See article 13 and commentary, especially para. (2).

[802] [238] *Blake*, Inter-American Court of Human Rights, Series C, No. 36, para. 67 (1998).

[803] [239] *Papamichalopoulos* (footnote [800] 236 above).

[804] [240] *Loizidou*, *Merits* (footnote [573] 160 above), p. 2216.

[805] [241] H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 289. The concept was subsequently taken up in various general studies on State responsibility as well as in works on the interpretation of the formula "situations or facts prior to a given date" used in some declarations of acceptance of the compulsory jurisdiction of ICJ.

lar Staff in Tehran case, the Court referred to "successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963".[806] 242

(8) The consequences of a continuing wrongful act will depend on the context, as well as on the duration of the obligation breached. For example, the *"Rainbow Warrior"* arbitration involved the failure of France to detain two agents on the French Pacific island of Hao for a period of three years, as required by an agreement between France and New Zealand. The arbitral tribunal referred with approval to the Commission's draft articles (now amalgamated in article 14) and to the distinction between instantaneous and continuing wrongful acts, and said:

> Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach. And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.[807] 243

The tribunal went on to draw further legal consequences from the distinction in terms of the duration of French obligations under the agreement.[808] 244

(9) The notion of continuing wrongful acts has also been applied by the European Court of Human Rights to establish its jurisdiction *ratione temporis* in a series of cases. The issue arises because the Court's jurisdiction may be limited to events occurring after the respondent State became a party to the Convention or the relevant Protocol and accepted the right of individual petition. Thus, in the *Papamichalopoulos* case, a seizure of property not involving formal expropriation occurred some eight years before Greece recognized the Court's competence. The Court held that there was a continuing breach of the right to peaceful enjoyment of property under article 1 of the Protocol to the European Convention on Human Rights, which continued after the Protocol had come into force; it accordingly upheld its jurisdiction over the claim.[809] 245

(10) In the *Loizidou* case,[810] 246 similar reasoning was applied by the Court to the consequences of the Turkish invasion of Cyprus in 1974, as a result of which the applicant was denied access to her property in northern Cyprus. Turkey argued that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus of 1985, the property in question had been expropriated, and this had occurred prior to Turkey's acceptance of the Court's jurisdiction in 1990. The Court held that, in accordance with international law and having regard to the relevant Security Council resolutions, it could not attribute legal effect to the 1985 Constitution so that the expropriation was not completed at that time and the property continued to belong to the applicant. The conduct of the Turkish Republic and of Turkish troops in denying the applicant access to her property continued after Turkey's

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[806] 242 *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 37, para. 80. See also *ibid*., pages 36–37, paras. 78–79.

[807] 243 *"Rainbow Warrior"* (footnote [40] 46 above), p. 264, para. 101.

[808] 244 *Ibid*., pp. 265–266, paras. 105–106. But see the separate opinion of Sir Kenneth Keith, *ibid*., pp. 279–284.

[809] 245 See footnote [800] 236 above.

[810] 246 *Loizidou, Merits* (footnote [573] 160 above), p. 2216.

acceptance of the Court's jurisdiction, and constituted a breach of article 1 of the Protocol to the European Convention on Human Rights after that time.[811] 247

(11) The Human Rights Committee has likewise endorsed the idea of continuing wrongful acts. For example, in *Lovelace*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a registered member of an Indian group, although the loss had occurred at the time of her marriage in 1970 and Canada only accepted the Committee's jurisdiction in 1976. The Committee noted that it was:

> not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol … In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status … at the time of her marriage in 1970 …
>
> The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date.[812] 248

It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, was sufficient to constitute a breach of article 27 of the International Covenant on Civil and Political Rights after that date. Here the notion of a continuing breach was relevant not only to the Committee's jurisdiction but also to the application of article 27 as the most directly relevant provision of the Covenant to the facts in hand.

(12) Thus, conduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including State responsibility. For example, the obligation of cessation contained in article 30 applies to continuing wrongful acts.

(13) A question common to wrongful acts whether completed or continuing is when a breach of international law occurs, as distinct from being merely apprehended or imminent. As noted in the context of article 12, that question can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct,[813] 249 incitement or attempt,[814] 250 in which case the threat, incitement or attempt is itself a

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[811] 247 *Ibid*., pp. 2230–2232, 2237–2238, paras. 41–47 and 63–64. See, however, the dissenting opinion of Judge Bernhardt, p. 2242, para. 2 (with whom Judges Lopes Rocha, Jambrek, Pettiti, Baka and Gölcüklü in substance agreed). See also *Loizidou, Preliminary Objections* (footnote [573] 160 above), pp. 33–34, paras. 102–105; and *Cyprus* v. *Turkey*, application No. 25781/94, judgement of 10 May 2001, *Eur. Court H.R., Reports*, 2001–IV.

[812] 248 *Lovelace* v. *Canada, Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), annex XVIII, communication No. R.6/24, p. 172, paras. 10–11 (1981).

[813] 249 Notably, Article 2, paragraph 4, of the Charter of the United Nations prohibits "the threat or use of force against the territorial integrity or political independence of any state". For the question of what constitutes a threat of force, see *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), pp. 246–247, paras. 47–48; see also R. Sadurska, "Threats of force", AJIL, vol. 82, No. 2 (April 1988), p. 239.

[814] 250 A particularly comprehensive formulation is that of article III of the Convention on the Prevention and Punishment of the Crime of Genocide which prohibits conspiracy, direct and public incitement, attempt and complicity in relation to genocide. See also article 2 of the International Con-

wrongful act. On the other hand, where the internationally wrongful act is the occurrence of some event—*e.g.* the diversion of an international river—mere preparatory conduct is not necessarily wrongful.[815] 251 In the *Gabčíkovo-Nagymaros Project* case, the question was when the diversion scheme ("Variant C") was put into effect. ICJ held that the breach did not occur until the actual diversion of the Danube. It noted:

> that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.
>
> Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act". [816] 252

Thus, the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Preparatory conduct does not itself amount to a breach if it does not "predetermine the final decision to be taken". Whether that is so in any given case will depend on the facts and on the content of the primary obligation. There will be questions of judgement and degree, which it is not possible to determine in advance by the use of any particular formula. The various possibilities are intended to be covered by the use of the term "occurs" in paragraphs 1 and 3 of article 14.

(14) Paragraph *3* of article 14 deals with the temporal dimensions of a particular category of breaches of international obligations, namely the breach of obligations to prevent the occurrence of a given event. Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur. The breach of an obligation of prevention may well be a continuing wrongful act, although, as for other continuing wrongful acts, the effect of article 13 is that the breach only continues if the State is bound by the obligation for the period during which the event continues and remains not in conformity with what is required by the obligation. For example, the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter*

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vention for the Suppression of Terrorist Bombings and article 2 of the International Convention for the Suppression of the Financing of Terrorism.

[815] 251 In some legal systems, the notion of "anticipatory breach" is used to deal with the definitive refusal by a party to perform a contractual obligation, in advance of the time laid down for its performance. Confronted with an anticipatory breach, the party concerned is entitled to terminate the contract and sue for damages. See K. Zweigert and H. Kötz, *Introduction to Comparative Law*, 3rd rev. ed., trans. T. Weir (Oxford, Clarendon Press, 1998), p. 508. Other systems achieve similar results without using this concept, *e.g.* by construing a refusal to perform in advance of the time for performance as a "positive breach of contract", *ibid*., p. 494 (German law). There appears to be no equivalent in international law, but article 60, paragraph 3 (*a*), of the 1969 Vienna Convention defines a material breach as including "a repudiation … not sanctioned by the present Convention". Such a repudiation could occur in advance of the time for performance.

[816] 252 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 54, para. 79, citing the draft commentary to what is now article 30.

arbitration,[817] 253 was breached for as long as the pollution continued to be emitted. Indeed, in such cases the breach may be progressively aggravated by the failure to suppress it. However, not all obligations directed to preventing an act from occurring will be of this kind. If the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act.[818] 254 If the obligation in question has ceased, any continuing conduct by definition ceases to be wrongful at that time.[819] 255 Both qualifications are intended to be covered by the phrase in paragraph 3, "and remains not in conformity with that obligation".

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 determined that France had committed a material breach of its obligations to New Zealand, referred to the distinction made by the International Law Commission between an instantaneous breach and a breach having a continuing character, as it appeared in draft article 24 and draft article 25, paragraph 1,[820] 123 provisionally adopted:

In its codification of the law of State responsibility, the International Law Commission has made another classification of the different types of breaches, taking into account the time factor as an ingredient of the obligation. It is based on the determination of what is described as *tempus commissi delictu*, that is to say, the duration or continuation in time of the breach. Thus the Commis-

[817] 253 *Trail Smelter*, UNRIAA, (vol. III Sales No. 1949.V.2), p. 1905 (1938, 1941).

[818] 254 An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation will not necessarily be of a continuing character, since it may be that once the information is published, the whole point of the obligation is defeated.

[819] 255 See the *"Rainbow Warrior"* case (footnote [40] 46 above), p. 266.

[820] 123 These provisions were amended and incorporated in article 14 finally adopted by the International Law Commission in 2001. Draft article 24 provisionally adopted [in 1980] read as follows:

Article 24

Moment and duration of the breach of an international obligation by an act of the State not extending in time

The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently. (Yearbook … *1980*, vol. II (Part Two), para. 34.)

Paragraph 1 of draft article 25 (Moment and duration of the breach of an international obligation by an act of the State extending in time) provisionally adopted read as follows:

1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

sion distinguishes the breach which does not extend in time, or instantaneous breach, defined in article 24 of the draft, from the breach having a continuing character or extending in time. In the latter case, according to paragraph 1 of article 25, "the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation".

Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents [Major Mafart and Captain Prieur, as provided for under the agreement between the Parties,] has been not only a material but also a continuous breach.

And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.[821] [124]

The arbitral tribunal again referred to draft article 25 provisionally adopted in the context of the determination of the time of commission of the breach by France. It noted that, in the case of breaches extending or continuing in time,

[a]ccording to article 25, "the time of commission of the breach" extends over the entire period during which the unlawful act continues to take place. [It thus followed that] France committed a continuous breach of its obligations, without any interruption or suspension, during the whole period when the two agents remained in Paris in breach of the Agreement.[822] [125]

[A/62/62, para. 75]

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 moment when the unlawful act was performed for the purposes of deciding the scope of the damages due, found that Burundi's violation in that case was of a continuing nature and thereafter referred to paragraph 1 of draft article 25 provisionally adopted by the International Law Commission,[823] [126] which was quoted in the award.[824] [127]

[A/62/62, para. 76]

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[821] [124] *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. 101, reproduced in UNRIAA, vol. XX, pp. 263–264.

[822] [125] *Ibid*., pp. 265–266, para. 105.

[823] [126] This provision was amended and incorporated in article 14, paragraph 2, finally adopted by the International Law Commission in 2001. For the text of this provision, see footnote [820] 123 above.

[824] [127] Arbitral Award of 4 March 1991, para. 66 (English version in: *International Law Reports*, vol. 96, pp. 323–324).

International Court of Justice

Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

In its 1997 judgment in the *Gabčíkovo-Nagymaros Project* case, the Court referred to the commentary to draft article 41, as adopted by the International Law Commission on first reading:[825] 128

> A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act" (see for example the commentary on article 41 of the draft articles on State responsibility, … *Yearbook of the International Law Commission*, *1993*, vol. II (Part Two), p. 57, para. 14).[826] 129

[A/62/62, para. 77]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Mondev International Ltd. v. *United States of America*

In its 2002 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *Mondev* v. *United States* case referred to article 14, paragraph 1, finally adopted by the International Law Commission in 2001 in support of its statement that "there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage".[827] 130

[A/62/62, para. 78]

Técnicas Medioambientales Tecmed S.A. v. *United Mexican States*

In its 2003 award, the arbitral tribunal constituted to hear the *Técnicas Medioambientales Tecmed S.A.* v. *United Mexican States* case referred in a footnote to the commentary to articles 14 and 15 finally adopted by the International Law Commission to support the statement that "[w]hether it be conduct that continues in time, or a complex act whose constituting elements are in a time period with different durations, it is only by observation as a whole or as a unit that it is possible to see to what extent a violation of a treaty or of international law rises or to what extent damage is caused".[828] 131

[A/62/62, para. 79]

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[825] 128 The extract of the commentary to draft article 41 (Cessation of wrongful conduct) by the International Law Commission referred to by the Court in the quoted passage was not retained in the commentary to article 30 (Cessation and non-repetition) as finally adopted in 2001. However, the International Law Commission included a citation of this passage of the Court's judgment in its commentary to article 14 finally adopted in 2001. For this reason, the said passage is hereby reproduced with reference to article 14.

[826] 129 See footnote [31] 37 above, p. 54, para. 79.

[827] 130 NAFTA (ICSID Additional Facility), Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 58 and footnote 9, reproduced in *ILR*, vol. 125, p. 128.

[828] 131 ICSID, Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 62, footnote 26 (unofficial English translation of the Spanish original). The passages of the commentaries to articles 14 and 15 referred to can be found in [*Yearbook of the International Law Commission, 2001*, vol. II (Part Two)], para. 77.

European Court of Human Rights

Ilaşcu and others v. *Moldova and Russia*

In its 2004 judgement in the *Ilaşcu and others* v. *Moldova and Russia* case, the European Court, sitting as a Grand Chamber, after having observed that the principle of "State responsibility for the breach of an international obligation" was a "recognized principle of international law", referred in particular to the commentary to article 14, paragraph 2, and to article 15, paragraph 2, as finally adopted by the International Law Commission in 2001:

320. Another recognized principle of international law is that of State responsibility for the breach of an international obligation, as evidenced by the work of the International Law Commission.

321. A wrongful act may be described as continuing if it extends over the entire period during which the relevant conduct continues and remains at variance with the international obligation (see the commentary on draft article 14 § 2 … of the work of the International Law Commission).

In addition, the Court considers that, in the case of a series of wrongful acts or omissions, the breach extends over the entire period starting with the first of the acts and continuing for as long as the acts or omissions are repeated and remain at variance with the international obligation concerned (see also draft article 15 § 2 of the work of the International Law Commission).[829] [132]

[A/62/62, para. 80]

International arbitral tribunal (under the ICSID Convention)

Impregilo S.p.A. v. *Islamic Republic of Pakistan*

In its 2005 decision on jurisdiction, the arbitral tribunal constituted to hear the *Impregilo* v. *Pakistan* case noted that Impregilo had invoked article 14 finally adopted by the International Law Commission in 2001, "which, in its opinion, reflects customary international law", to allege that Pakistan's acts previous to the date of entry into force of the bilateral investment treaty had to conform to the provisions of that treaty. According to the tribunal, "[w]hether or not this article does in fact reflect customary international law need not be addressed for present purposes": the case before the tribunal was not covered by article 14, since the acts in question had no "continuing character" within the meaning of that provision.[830] [133]

[A/62/62, para. 81]

European Court of Human Rights

Blečić v. *Croatia*

In its 2006 judgement in the *Blečić* v. *Croatia* case, the European Court, sitting as a Grand Chamber, quoted, *inter alia*, the text of article 14 finally adopted by the International Law Commission in 2001. The relevant passage is quoted [on page 192] above.

[A/62/62, para. 82]

[829] [132] ECHR, Grand Chamber, Application No. 48787/99, Judgment, 8 July 2004, paras. 320–321.

[830] [133] ICSID, Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 312.

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, in examining whether the Respondent had complied with its obligations to prevent genocide under article I of the Genocide Convention, referred to the "general rule of the law of State responsibility" stated in article 14, paragraph 3, finally adopted by the International Law Commission in 2001:

a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility: …

This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent."[831] [8]

[A/62/62/Add.1, para. 4]

European Court of Human Rights

Šilih v. *Slovenia*

In the *Šilih* v. *Slovenia* case, the European Court of Human Rights referred to article 14 of the State responsibility articles as constituting "relevant international law and practice" in the context of the consideration of the jurisdiction *ratione temporis* of the court.[832] [15]

[A/65/76, para. 19]

Varnava and Others v. *Turkey*

In the *Varnava and Others* v. *Turkey* case, the European Court of Human Rights, in a case involving alleged disappearance of individuals 15 years prior to the initiation of the case, had to consider the applicability of the six-month time limit for the bringing of a complaint under the Convention of an alleged continuing violation. The Court maintained that "[n]ot all continuing situations are the same; the nature of the situation may be such that the passage of time affects what is at stake … [and] where disappearances are con-

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[831] [8] [ICJ, Judgment, *I.C.J. Reports 2007*, p. 43], para. 431.

[832] [15] [ECHR, Grand Chamber, Application No. 71463/01, Judgment, 9 April 2009], para. 108.

cerned, applicants cannot wait indefinitely before coming to Strasbourg. They must make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay".[833] [16] It proceeded to hold, nonetheless, that the "applicants had acted, in the special circumstances of their cases, with reasonable expedition for the purposes of … the [European Convention on Human Rights]".[834] [17]

[A/65/76, para. 20]

Inter-American Court of Human Rights

Radilla Pacheco v. *United Mexican States*

In the 2009 *Radilla Pacheco* v. *Mexico* case, the Inter-American Court of Human Rights cited article 14, paragraph 2, of the State responsibility articles (which it quoted) when distinguishing between instantaneous acts and those of a continuing or permanent nature.[835] [18]

[A/65/76, para. 21]

Gomes Lund et al. ("Guerrilha do Araguaia") v. *Brazil*

In its judgment in *Gomes Lund et al. ("Guerrilha do Araguaia")* v. *Brazil*, the Inter-American Court of Human Rights referred to article 14 in support of the assertion that "acts of a continuous or permanent nature extend throughout time wherein the event continues, maintaining a lack of conformity with international obligations".[836] [107]

[A/68/72, para. 78]

[International arbitral tribunal (under UNCITRAL Rules)

Sergei Paushok et al. v. *The Government of Mongolia*

The arbitral tribunal in *Sergei Paushok et al.* v. *The Government of Mongolia* referred to the commentary to articles 14 and 15 dealing with continuing and composite acts, and determined that certain negotiations did not constitute continuing or composite acts or omissions.[837] [117]

[See A/68/72, footnote 106 and para. 84]]

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[833] [16] ECHR, Grand Chamber, Application Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment, 18 September 2009, para. 161.

[834] [17] *Ibid*., para. 170.

[835] [18] IACHR, Preliminary Objections, Merits, Reparations, and Costs, Judgment, 23 November 2009, para. 22.

[836] [107] IACHR, Judgment, Series C, No. 219, 24 November 2010, para. 17, footnote 24.

[837] [[117] See footnote [299] 41 above, paras. 496–500.]

World Trade Organization Appellate Body

European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft

In its report in *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, the Appellate Body referred to article 14 in determining that, under the SCM Agreement, it is the causing of "adverse effects to the interests of other Members … that is relevant … and the conclusion as to retroactivity will hinge on whether that situation continues or has been completed, rather than on when the act of granting a subsidy occurred".[838] 108 While agreeing that, on the basis of article 14, "it is important to distinguish between an act and its effects", the tribunal indicated that "the SCM Agreement is concerned, however, with a situation that continues over time, rather than with specific 'acts'".[839] 109

[A/68/72, para. 79]

International arbitral tribunal (under the ICSID Convention)

Pac Rim Cayman LLC v. *The Republic of El Salvador*

The arbitral tribunal constituted to hear the *Pac Rim Cayman LLC* v. *The Republic of El Salvador* case considered the "well-established distinctions under customary international law" recognized in the commentary to articles 14 and 15 between a "one-time act", a "continuous act" and a "composite act".[840] 110 Upon consideration of the commentary to articles 14 and 15, as well as the factual circumstances of the dispute,[841] 111 the tribunal determined that the alleged measure "should be considered as a continuing act under international law … ".[842] 112

[A/68/72, para. 80]

Inter-American Court of Human Rights

Castillo González et al. v. Venezuela

In its 2012 judgment in *Castillo González et al.* v. *Venezuela*, the Inter-American Court of Human Rights cited article 14(3) in holding that "international responsibility of the State may arise from human rights violations committed by individuals or third parties, in the context of the State's obligations to ensure respect for human rights among individuals".[843] 113

[A/68/72, para. 81]

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[838] 108 WTO, Appellate Body Report, WT/DS316/AB/R, 18 May 2011, para. 684.

[839] 109 *Ibid*., para. 685 (internal quotations omitted).

[840] 110 ICSID, Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, 1 June 2012, paras. 2.65–2.74.

[841] 111 *Ibid*., paras. 2.65–2.93.

[842] 112 *Ibid*, para. 2.94.

[843] 113 See footnote [108] 51 above, para. 111, footnote 53 (quoting article 14.3 of the State responsibility articles).

European Court of Human Rights

El-Masri v. The Former Yugoslav Republic of Macedonia

In its 2012 judgment in the case of *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[844] 114

[A/68/72, para. 82]

[*Husayn (Abu Zubaydah)* v. *Poland*

In *Husayn (Abu Zubaydah)* v. *Poland*, the European Court of Human Rights listed articles 7, 14, 15 and 16 as relevant international law.[845] 85

[A/71/80, para. 68]]

Inter-American Court of Human Rights

Case of Osorio Rivera and Family Members v. *Peru*

In *Case of Osorio Rivera and Family Members* v. *Peru*, the Inter-American Court of Human Rights cited article 14 in support of the statement that "[o]wing to their characteristics, once the treaty enters into force, those continuing or permanent acts which persist after that date can generate international obligations for the State party, without this signifying a violation of the principle of the non-retroactivity of treaties".[846] 118 The Court continued by explaining that it

> ha[d] already established that it is competent to examine violations of a continuing or permanent nature that commenced before the defendant State had accepted the Court's contentious jurisdiction, and that persist following this acceptance, because they continue to be committed and, thus, the principle of non-retroactivity is not infringed.[847] 119

[A/71/80, para. 87]

International arbitral tribunal (under the ICSID Convention)

Cervin Investissements S.A. and Rhone Investissements v. *Republic of Costa Rica*

The arbitral tribunal in *Cervin Investissements S.A. and Rhone Investissements* v. *Republic of Costa Rica* referred to article 14 in support of its assertion that "[l]a responsabilidad internacional del Estado debe en efecto apreciarse a la fecha en la cual ha sido cometido el hecho generador de su responsabilidad".[848] 120

[A/71/80, para. 88]

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[844] 114 See footnote [552] 84 above.

[845] [85 ECHR, Former Fourth Section, Application No. 7511/13, Judgment, 24 July 2014, para. 201.]

[846] 118 IACHR, Judgment, 26 November 2013, para. 30.

[847] 119 *Ibid*., para. 32, referring to IACHR, *Case of the Serrano Cruz Sisters* v. *El Salvador, Preliminary objections*, Judgment, 23 November 2004, paras. 65–66, and IACHR, *Case of Radilla Pacheco* v. *Mexico, Preliminary Objections, merits, reparations and costs*, Judgment, 23 November 2009, para. 24.

[848] 120 ICSID, Case No. ARB/13/2, Decision on Jurisdiction 15 December 2014, para. 278.

International arbitral tribunal (under the ICSID Convention)

Adel A Hamadi Al Tamimi v. *Sultanate of Oman*

In *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman*, the arbitral tribunal relied on the commentary to article 14 as supporting the view that "[a]n act does not have a continuing character merely because its effects or consequences extend in time".[849] 121

[A/71/80, para. 89]

[European Court of Human Rights

Nasr et Ghali v. *Italy*

The European Court of Human Rights in *Nasr et Ghali* v. *Italy* referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[850] 82

[A/74/83, p. 17]]

Permanent Court of Arbitration (under UNCITRAL Rules)

Resolute Forest Products Inc. v. *Government of Canada*

In *Resolute Forest Products Inc.* v. *Government of Canada*, the arbitral tribunal explained, after quoting article 14, paragraph 2, of the State responsibility articles on a breach having a continuing character, that "the breach nonetheless occurs when the State act is first perfected and can be definitely characterized as a breach of the relevant obligation".[851] 124

[A/74/83, p. 23]

[*Renco Group* v. *Republic of Peru*

In *Renco Group* v. *Republic of Peru*, the arbitral tribunal noted that articles 13 and 14 reflected

> the general principle that the lawfulness of State conduct must be assessed contemporaneously with that conduct. Since a State is not bound by a conventional obligation it has assumed under a treaty until such treaty enters into force, that treaty obligation cannot be breached until the treaty giving rise to that obligation has come into force.[852] 83

[A/77/74, p. 17]]

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[849] 121 See footnote [340] 66 above, para. 417, footnote 850 (quoting para. (6) of the commentary to article 14).

[850] [82 ECHR, Fourth Section, Application 44883/09, Judgment, 23 February 2016, para. 185.]

[851] 124 PCA, Case No. 2016–13, Decision on Jurisdiction and Admissibility, 30 January 2018, para. 179.

[852] [83 PCA, Case No. 2019–46, Decision on Expedited Preliminary Objections, 30 June 2020, paras. 141–142.]

Committee on Economic, Social and Cultural Rights

S.C. and G.P. v. *Italy*

In *S.C. and G.P.* v. *Italy*, the Committee on Economic, Social and Cultural Rights referred to article 14 in analysing the admissibility of the communication, noting that

> an act that may constitute a violation of the Covenant does not have a continuing character merely because its effects or consequences extend in time. Therefore, when the facts constituting a violation of the Covenant occurred before the entry into force of the Optional Protocol for the State party concerned, the mere fact that their consequences or effects have not been extinguished, after the entry into force, is not sufficient grounds for declaring a communication admissible *ratione temporis*.[853] [88]

[A/77/74, p. 18]

International arbitral tribunal (under the ICSID Convention)

Carlos Ríos and Francisco Ríos v. *Republic of Chile*

In *Carlos Ríos and Francisco Ríos* v. *Republic of Chile*, the arbitral tribunal referred to article 14, according to which "a simple internationally wrongful act is one that does not have a continuing character and, as such, 'occurs at the moment when the act is performed, even if its effects continue'."[854] [89] In contrast, "a continuing wrongful act extends over the period during which the violative act maintains the state of noncompliance with a particular obligation. The breach ceases once the effects of the act cease or the primary obligation no longer exists".[855] [90] The arbitral tribunal emphasized that pursuant to article 14,

> determining whether a wrongful act is simple or continuing depends primarily on the content of the primary obligation, which indicates whether the obligation can be breached continuously (for example, during the illegal detention of a foreign public official) or not (for example, in an isolated instance of the unlawful use of force).[856] [91]

[A/77/74, p. 18]

Infinito Gold Ltd. v. *Republic of Costa Rica*

The arbitral tribunal in *Infinito Gold Ltd.* v. *Republic of Costa Rica* referred to article 14 and the commentary thereto in establishing that it must "determine the point in time in which an act is capable of constituting an international wrong".[857] [92] In particular, the tribunal cited paragraph (13) of the commentary in distinguishing preparatory conduct for an act from the act itself.[858] [93] The tribunal concluded "that a simple act 'occurs' when it has been 'performed' or 'completed'; that the concept of 'completion' relates to the point

[853] [88] CESCR, Communication No. E/C.12/65/D/22/2017, 7 March 2019, para. 6.5, referring to *Merino Sierra and Marino Sierra* v. *Spain*, Communication No. E/C.12/59/D/4/2014, 29 September 2016, para. 6.7, and *Alarcón Flores et al.* v. *Ecuador,* Communication No. E/C.12/62/D/14/2016, 4 October 2017, para. 9.7.

[854] [89] See footnote [386] 36 above, para. 187.

[855] [90] *Ibid*., para. 200.

[856] [91] *Ibid*.

[857] [92] ICSID, Case No. ARB/14/5, Award, 3 June 2021, para. 231; see also paras. 232–234.

[858] [93] *Ibid*., para. 234.

in time at which the act is capable of constituting a breach, which depends on the content of the primary obligation; and that a breach need not be completed in a single act".[859] [94]

[A/77/74, p. 18]

[*Ad hoc* committee (under the ICSID Convention)

Víctor Pey Casado and Foundation President Allende v. *Republic of Chile*

The *ad hoc* committee in the annulment proceeding *Víctor Pey Casado and Foundation President Allende* v. *Republic of Chile* rejected an argument that the nature of the violation as a single act or continuous conduct could affect the analysis pertaining to adequate compensation. Instead, it noted that

> [i]t does not make any difference whether a wrongful act is a single act or 'a course of conduct', as explicitly provided for in Articles 14 and 15 of the Articles on State Responsibility. A course of conduct cannot remove the wrongfulness of one or many acts, and it cannot remove the obligation of the wrongdoer to make full reparation for injury, as provided for in Article 31 of the Articles on State Responsibility.[860] [132]

[A/77/74, p. 25]]

[859] [94] *Ibid*., para. 235.

[860] [[132] ICSID, Case No. ARB/98/2[, Decision on Annulment, 8 January 2020], para. 681.]

Article 15. Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Commentary

(1) Within the basic framework established by the distinction between completed and continuing acts in article 14, article 15 deals with a further refinement, viz. the notion of a composite wrongful act. Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.

(2) Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is "a series of acts or omissions defined in aggregate as wrongful". Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, *etc.* Some of the most serious wrongful acts in international law are defined in terms of their composite character. The importance of these obligations in international law justifies special treatment in article 15.[861] 256

(3) Even though it has special features, the prohibition of genocide, formulated in identical terms in the Convention on the Prevention and Punishment of the Crime of Genocide and in later instruments,[862] 257 may be taken as an illustration of a "composite" obligation. It implies that the responsible entity (including a State) will have adopted a systematic policy or practice. According to article II, subparagraph (*a*), of the Convention, the prime case of genocide is "[k]illing members of the [national, ethnical, racial or religious] group" with the intent to destroy that group as such, in whole or in part. Both limbs of the definition contain systematic elements. Genocide has also to be carried out with the relevant intention, aimed at physically eliminating the group "as such". Genocide is not committed until there has been an accumulation of acts of killing, causing harm, *etc.*, committed with the relevant intent, so as to satisfy the definition in article II. Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide.[863] 258

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[861] 256 See further J. J. A. Salmon, "Le fait étatique complexe: une notion contestable", *Annuaire français de droit international*, vol. 28 (1982), p. 709.

[862] 257 See, *e.g.*, article 4 of the statute of the International Tribunal for the Former Yugoslavia, originally published as an annex to document S/25704 and Add.1, approved by the Security Council in its resolution 827 (1993) of 25 May 1993, and amended on 13 May 1998 by resolution 1166 (1998) and on 30 November 2000 by resolution 1329 (2000); article 2 of the statute of the International Tribunal for Rwanda, approved by the Security Council in its resolution 955 (1994) of 8 November 1994; and article 6 of the Rome Statute of the International Criminal Court.

[863] 258 The intertemporal principle does not apply to the Convention, which according to its article I is declaratory. Thus, the obligation to prosecute relates to genocide whenever committed. See

(4) It is necessary to distinguish composite obligations from simple obligations breached by a "composite" act. Composite acts may be more likely to give rise to continuing breaches, but simple acts can cause continuing breaches as well. The position is different, however, where the obligation itself is defined in terms of the cumulative character of the conduct, *i.e.* where the cumulative conduct constitutes the essence of the wrongful act. Thus, apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically or racially motivated killing.

(5) In *Ireland* v. *United Kingdom*, Ireland complained of a practice of unlawful treatment of detainees in Northern Ireland which was said to amount to torture or inhuman or degrading treatment, and the case was held to be admissible on that basis. This had various procedural and remedial consequences. In particular, the exhaustion of local remedies rule did not have to be complied with in relation to each of the incidents cited as part of the practice. But the Court denied that there was any separate wrongful act of a systematic kind involved. It was simply that Ireland was entitled to complain of a practice made up by a series of breaches of article VII of the Convention on the Prevention and Punishment of the Crime of Genocide, and to call for its cessation. As the Court said:

> A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; *a practice does not of itself constitute a violation separate from such breaches …*
>
> The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in Article 26 of the Convention, applies to State applications … in the same way as it does to "individual' applications" … On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.[864] 259

In the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed.

(6) A further distinction must be drawn between the necessary elements of a wrongful act and what might be required by way of evidence or proof that such an act has occurred. For example, an individual act of racial discrimination by a State is internationally wrongful,[865] 260 even though it may be necessary to adduce evidence of a series of acts by State officials (involving the same person or other persons similarly situated) in order to show that any one of those acts was discriminatory rather than actuated by legitimate grounds. In its essence such discrimination is not a composite act, but it may be necessary for the purposes of proving it to produce evidence of a practice amounting to such an act.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (footnote [48] 54 above), p. 617, para. 34.

[864] 259 *Ireland* v. *The United Kingdom* (footnote [800] 236 above), p. 64, para. 159; see also *ibid*., page 63, para. 157. See further the United States counterclaim in *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 190, which likewise focuses on a general situation rather than specific instances.

[865] 260 See, *e.g.*, article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination; and article 26 of the International Covenant on Civil and Political Rights.

(7) A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, *i.e.* an act defined in aggregate as wrongful.

(8) Paragraph 1 of article 15 defines the time at which a composite act "occurs" as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series. Similar considerations apply as for completed and continuing wrongful acts in determining when a breach of international law exists; the matter is dependent upon the precise facts and the content of the primary obligation. The number of actions or omissions which must occur to constitute a breach of the obligation is also determined by the formulation and purpose of the primary rule. The actions or omissions must be part of a series but the article does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided a sufficient number of acts has occurred to constitute a breach. At the time when the act occurs which is sufficient to constitute the breach it may not be clear that further acts are to follow and that the series is not complete. Further, the fact that the series of actions or omissions was interrupted so that it was never completed will not necessarily prevent those actions or omissions which have occurred being classified as a composite wrongful act if, taken together, they are sufficient to constitute the breach.

(9) While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation. For example, the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful. Nor does it affect the temporal element in the commission of the acts: a series of acts or omissions may occur at the same time or sequentially, at different times.

(10) Paragraph 2 of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined.

(11) The word "remain" in paragraph 2 is inserted to deal with the intertemporal principle set out in article 13. In accordance with that principle, the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (*e.g.* in order to establish a factual basis for the later breaches or to provide evidence of intent).

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Additional Facility Rules)

Técnicas Medioambientales Tecmed S.A. v. *United Mexican States*

In its 2003 award, the arbitral tribunal constituted to hear the *Técnicas Medioambientales Tecmed S.A.* v. *United Mexican States* case referred to a text taken from the commentary to article 15 finally adopted by the International Law Commission. The relevant passage is quoted [on page 203] above.

[A/62/62, para. 83]

European Court of Human Rights

Ilaşcu and others v. *Moldova and Russia*

In its 2004 judgement in the *Ilaşcu and others* v. *Moldova and Russia* case, the European Court, sitting as a Grand Chamber, referred *inter alia* to the commentary to article 15, paragraph 2 finally adopted by the International Law Commission in 2001. The relevant passage is quoted [on page 204] above.

[A/62/62, para. 84]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Gemplus S.A. et al. v. *The United Mexican States and Talsud S.A.* v. *The United Mexican States*

The arbitral tribunal constituted to hear the *Gemplus S.A. et al.* v. *The United Mexican States* and *Talsud S.A.* v. *The United Mexican States* cases relied upon article 15 and its accompanying commentary to determine the relevant date for the assessment of compensation.[866] [116]

[A/68/72, para. 83]

International arbitral tribunal (under UNCITRAL Rules)

Sergei Paushok et al. v. *The Government of Mongolia*

The arbitral tribunal in *Sergei Paushok et al.* v. *The Government of Mongolia* referred to the commentary to articles 14 and 15 dealing with continuing and composite acts, and determined that certain negotiations did not constitute continuing or composite acts or omissions.[867] [117]

[A/68/72, para. 84]

[866] [116] ICSID, Case Nos. ARB (AF)/04/3 & ARB (AF)/04/4, Award, 16 June 2010, paras. 12–44, 12–45.

[867] [117] See footnote [299] 41 above, paras. 496–500.

International arbitral tribunal (under the ICSID Convention)

El Paso Energy International Company v. *The Argentine Republic*

The arbitral tribunal in *El Paso Energy International Company* v. *The Argentine Republic* referred to article 15 in finding that a series of measures taken by the Government of Argentina amounted to a "composite act".[868] 118

[A/68/72, para. 85]

[*Pac Rim Cayman LLC* v. *The Republic of El Salvador*

The arbitral tribunal constituted to hear the *Pac Rim Cayman LLC* v. *The Republic of El Salvador* case considered the "well-established distinctions under customary international law" recognized in the commentary to articles 14 and 15 between a "one-time act", a "continuous act" and a "composite act".[869] 110 Upon consideration of the commentary to articles 14 and 15, as well as the factual circumstances of the dispute,[870] 111 the tribunal determined that the alleged measure "should be considered as a continuing act under international law … ".[871] 112

[See A/68/72, footnote 115 and para. 80]]

European Court of Human Rights

El-Masri v. *The Former Yugoslav Republic of Macedonia*

In its 2012 judgment in the case of *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[872] 119

[A/68/72, para. 86]

[*Husayn (Abu Zubaydah)* v. *Poland*

In *Husayn (Abu Zubaydah)* v. *Poland*, the European Court of Human Rights listed articles 7, 14, 15 and 16 as relevant international law.[873] 85

[A/71/80, para. 68]]

Ad hoc committee (under the ICSID Convention)

El Paso Energy International Company v. *The Argentine Republic*

The *ad hoc* committee in *El Paso Energy International Company* v. *The Argentine Republic*, noted that the arbitral tribunal, basing itself, *inter alia*, on article 15, had exposed

[868] 118 See footnote [56] 16 above, para. 516.

[869] [110 See footnote [840] 110, paras. 2.65–2.74.]

[870] [111 *Ibid*., paras. 2.65–2.93.]

[871] [112 *Ibid*., para. 2.94.]

[872] 119 See footnote [552] 84 above.

[873] [85 ECHR, Former Fourth Section, Application No. 7511/13, Judgment, 24 July 2014, para. 201.]

the substance of the problem that led to its reasoning and decision, namely "that the cumulative effect of a series of measures which might be inoffensive and legal one by one may alter the global situation and the legal framework in a way that the investor could not have legitimately expected".[874] [123]

[A/71/80, para. 90]

[European Court of Human Rights

Nasr et Ghali v. *Italy*

The European Court of Human Rights in *Nasr et Ghali* v. *Italy* referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[875] [82]

[A/74/83, p. 17]]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Crystallex International Corporation v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Crystallex International Corporation* v. *Bolivarian Republic of Venezuela* explained that "State responsibility for creeping expropriation is reflected in the concept of a composite act, defined in Article 15(1) of the ILC's Articles on State Responsibility".[876] [126]

[A/74/83, p. 24]

Rusoro Mining Limited v. *The Bolivarian Republic of Venezuela*

In *Rusoro Mining Limited* v. *The Bolivarian Republic of Venezuela*, the arbitral tribunal stated that "the general thrust of the ILC Articles regarding composite acts is clear, the Articles do not address every single question, and in particular do not solve how time bar affects a string of acts which gives rise to a composite breach of a treaty".[877] [127] The tribunal considered "the better approach for applying the time bar consists in breaking down each alleged composite claim into individual breaches, each referring to a certain governmental measure, and to apply the time bar to each of such breaches separately".[878] [128]

[A/74/83, p. 24]

International arbitral tribunal (under the ICSID Convention)

Blusun A.A., Jean-Pierre Lecorcier and Michael Stein v. *Italian Republic*

The arbitral tribunal in *Blusun A.A., Jean-Pierre Lecorcier and Michael Stein* v. *Italian Republic* stated that "Article 15 only applies to a breach 'through a series of acts or omis-

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[874] [123] ICSID, Case No. ARB/03/15 Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, 22 September 2014, para. 284.

[875] [[82] ECHR, Fourth Section, Application 44883/09, Judgment, 23 February 2016, para. 185.]

[876] [126] ICSID (Additional Facility), Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 669.

[877] [127] ICSID (Additional Facility), Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 227.

[878] [128] *Ibid*., para. 231.

sions defined in aggregate as wrongful'—for example, genocide. The first two sentences of ECT Article 10(1) do not define an aggregate of acts as wrongful in the way that Article 1 of the Genocide Convention does".[879] 129

[A/74/83, p. 24]

Burlington Resources Inc. v. *Republic of Ecuador*

In *Burlington Resources Inc.* v. *Republic of Ecuador*, the arbitral tribunal noted that "[t]he cases relied upon by Burlington are inapposite since they deal with breaches consisting of composite acts, as set out in Article 15 of the ILC Articles … In the present case, the Tribunal excluded the hypothesis of creeping expropriation".[880] 130

[A/74/83, p. 24]

Hydro S.r.l. et al. v. *Republic of Albania*

The arbitral tribunal in *Hydro S.r.l. et al.* v. *Republic of Albania* cited article 15, noting that the principle of non-retroactivity "does not exclude the application of treaty obligations where the series of acts result in an aggregate breach after the claimant acquires its investment".[881] 96 The tribunal noted that "a composite act 'crystallizes' or 'takes place at a time when the last of these acts occurs and violates (in aggregate) the applicable rule'".[882] 97

[A/77/74, p. 19]

International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

Duzgit Integrity Arbitration (Republic of Malta v. *Democratic Republic of Sao Tome and Principe)*

The arbitral tribunal in the *Duzgit Integrity Arbitration (Republic of Malta* v. *Democratic Republic of Sao Tome and Principe)* recalled that, under article 15, paragraph 2, the breach of an international obligation by way of a composite act "extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation". Analysing the facts, the tribunal concluded that a series of actions by Sao Tome and Principe, beginning with certain administrative proceedings and extending until the release of the vessel, were incompatible with the United Nations Convention on the Law of the Sea and therefore internationally wrongful for the entire period concerned.[883] 98

[A/77/74, p. 19]

[879] 129 ICSID, Case No. ARB/14/3, Award, 27 December 2016, para. 361.

[880] 130 ICSID, Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 452.

[881] 96 ICSID, Case No. ARB/15/28, Award, 24 April 2019, paras. 557–558.

[882] 97 *Ibid.*, para. 558, citing *Pac Rim Cayman LLC* v. *Republic of El Salvador*, ICSID, Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.74.

[883] 98 PCA, Case No. 2014–07, Award on Reparation, 18 December 2019, para. 86.

International arbitral tribunal (under the ICSID Convention)

Global Telecom Holding S.A.E. v. *Canada*

In *Global Telecom Holding S.A.E.* v. *Canada*, the arbitral tribunal referred to article 15 and the commentary thereto, noting that, particularly in the case of a composite act, "[i]t is only when the last of the actions or omissions necessary to constitute the wrongful act occurs (which, as the ILC noted, is not necessarily the last act in the series), that the investor can acquire knowledge of the loss caused by that wrongful act".[884] 99

[A/77/74, p. 19]

Carlos Ríos and Francisco Ríos v. *Republic of Chile*

In *Carlos Ríos and Francisco Ríos* v. *Republic of Chile*, the arbitral tribunal referred to article 15 and the commentary thereto, noting that

> a composite wrongful act is one that results from a series of actions or omissions of the State which, when considered in aggregate, are enough to constitute a breach an international obligation, regardless of whether each individual action or omission of the series might also be considered to constitute a wrongful act in respect of a different obligation.[885] 100

The tribunal went on:

> In the case of composite wrongful acts, there is a State action which, considered together with the acts that precede it, crosses the threshold to constitute the breach of an obligation. It is this action that determines the moment at which an affected subject is able to become aware of the breach and the damage resulting from it. The fact that other later actions and omissions may aggravate the composite wrongful act whose threshold has already been crossed is irrelevant for the purposes of identifying a violation and the resulting damage.[886] 101

[A/77/74, p. 19]

Infinito Gold Ltd. v. *Republic of Costa Rica*

The arbitral tribunal in *Infinito Gold Ltd.* v. *Republic of Costa Rica* noted that the commentary to article 15 "makes it clear that, to amount to a composite breach, the various acts must not separately amount to the same breach as the composite act (although they could separately amount to different breaches). It also clarifies that the breach cannot 'occur' with the first of the acts in the series".[887] 102

[A/77/74, p. 20]

[884] 99 ICSID, Case No. ARB/16/16, Award, 27 March 2020, para. 411.

[885] 100 See footnote [386] 36 above, para. 189.

[886] 101 *Ibid*., para. 190.

[887] 102 See footnote [857] 92 above, para. 230.

Permanent Court of Arbitration (under UNCITRAL Rules)

OOO Manolium Processing v. *Republic of Belarus*

The arbitral tribunal in *OOO Manolium Processing* v. *Republic of Belarus* noted that while "Art. 15.1 defines the moment when a composite breach is deemed to occur and Art. 15.2 the date and extension in time of the breach",[888] 103 those provisions "do not solve the issue of how the entry into force of a treaty affects the string of acts, where some acts have occurred before and others after the entry into force of that treaty".[889] 104 The tribunal found that "[t]he appropriate solution is to break down the composite claim into individual claims related to measures prior to the Effective Date and claims related to measures after the Effective Date—the Tribunal only having jurisdiction to adjudicate those claims arising out of measures which occurred after the Effective Date".[890] 105

[A/77/74, p. 20]

[*Ad hoc* committee (under the ICSID Convention)

Víctor Pey Casado and Foundation President Allende v. *Republic of Chile*

The *ad hoc* committee in the annulment proceeding *Víctor Pey Casado and Foundation President Allende* v. *Republic of Chile* rejected an argument that the nature of the violation as a single act or continuous conduct could affect the analysis pertaining to adequate compensation. Instead, it noted that

> [i]t does not make any difference whether a wrongful act is a single act or 'a course of conduct', as explicitly provided for in Articles 14 and 15 of the Articles on State Responsibility. A course of conduct cannot remove the wrongfulness of one or many acts, and it cannot remove the obligation of the wrongdoer to make full reparation for injury, as provided for in Article 31 of the Articles on State Responsibility.[891] 132

[A/77/74, p. 25]]

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[888] 103 See footnote [799] 86 above, para. 277.

[889] 104 *Ibid*., para. 280.

[890] 105 *Ibid*., para. 281.

[891] [132 See footnote [860] 132 above, para. 681.]

Chapter IV

RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

Commentary

(1) In accordance with the basic principles laid down in chapter I, each State is responsible for its own internationally wrongful conduct, *i.e.* for conduct attributable to it under chapter II which is in breach of an international obligation of that State in accordance with chapter III.[892] 261 The principle that State responsibility is specific to the State concerned underlies the present articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities.

(2) However, internationally wrongful conduct often results from the collaboration of several States rather than of one State acting alone.[893] 262 This may involve independent conduct by several States, each playing its own role in carrying out an internationally wrongful act. Or it may be that a number of States act through a common organ to commit a wrongful act.[894] 263 Internationally wrongful conduct can also arise out of situations where a State acts on behalf of another State in carrying out the conduct in question.

(3) Various forms of collaborative conduct can coexist in the same case. For example, three States, Australia, New Zealand and the United Kingdom, together constituted the Administering Authority for the Trust Territory of Nauru. In the *Certain Phosphate Lands in Nauru* case, proceedings were commenced against Australia alone in respect of acts performed on the "joint behalf" of the three States.[895] 264 The acts performed by Australia involved both "joint" conduct of several States and day-to-day administration of a territory by one State acting on behalf of other States as well as on its own behalf. By contrast, if the relevant organ of the acting State is merely "placed at the disposal" of the requesting State, in the sense provided for in article 6, only the requesting State is responsible for the act in question.

(4) In certain circumstances the wrongfulness of a State's conduct may depend on the independent action of another State. A State may engage in conduct in a situation where another State is involved and the conduct of the other State may be relevant or even decisive in assess-

[892] 261 See, in particular, article 2 and commentary.

[893] 262 See M. L. Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (Milan, Giuffrè, 1990); Brownlie, *System of the Law of Nations …* (footnote [195] 92 above), pp. 189–192; J. Quigley, "Complicity in international law: a new direction in the law of State responsibility", BYBIL*, 1986*, vol. 57, p. 77; J. E. Noyes and B. D. Smith, "State responsibility and the principle of joint and several liability", *Yale Journal of International Law,* vol. 13 (1988), p. 225; and B. Graefrath, "Complicity in the law of international responsibility", *Revue belge de droit international*, vol. 29 (1996), p. 370.

[894] 263 In some cases, the act in question may be committed by the organs of an international organization. This raises issues of the international responsibility of international organizations which fall outside the scope of the present articles. See article 57 and commentary.

[895] 264 *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), p. 258, para. 47; see also the separate opinion of Judge Shahabuddeen, *ibid*., p. 284.

ing whether the first State has breached its own international obligations. For example, in the *Soering* case the European Court of Human Rights held that the proposed extradition of a person to a State not party to the European Convention on Human Rights where he was likely to suffer inhuman or degrading treatment or punishment involved a breach of article 3 of the Convention by the extraditing State.[896] 265 Alternatively, a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from such conduct. Thus, the basis of responsibility in the *Corfu Channel* case[897] 266 was Albania's failure to warn the United Kingdom of the presence of mines in Albanian waters which had been laid by a third State. Albania's responsibility in the circumstances was original and not derived from the wrongfulness of the conduct of any other State.

(5) In most cases of collaborative conduct by States, responsibility for the wrongful act will be determined according to the principle of independent responsibility referred to in paragraph (1) above. But there may be cases where conduct of the organ of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, and this may be so even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of Part One defines these exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another.

(6) Three situations are covered in chapter IV. Article 16 deals with cases where one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter. Article 17 deals with cases where one State is responsible for the internationally wrongful act of another State because it has exercised powers of direction and control over the commission of an internationally wrongful act by the latter. Article 18 deals with the extreme case where one State deliberately coerces another into committing an act which is, or but for the coercion would be,[898] 267 an internationally wrongful act on the part of the coerced State. In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting State, and is or, but for the coercion, would be a breach of that State's international obligations. The implication of the second State in that breach arises from the special circumstance of its willing assistance in, its direction and control over or its coercion of the acting State. But there are important differences between the three cases. Under article 16, the State primarily responsible is the acting State and the assisting State has a mere supporting role. Similarly under article 17, the acting State commits the internationally wrongful act, albeit under the direction and control of another State. By contrast, in the case of coercion under article 18, the coercing State is the prime mover in respect of the conduct and the coerced State is merely its instrument.

(7) A feature of this chapter is that it specifies certain conduct as internationally wrongful. This may seem to blur the distinction maintained in the articles between the primary

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[896] 265 *Soering* v. *The United Kingdom*, *Eur. Court H.R., Series A, No. 161*, pp. 33–36, paras. 85–91 (1989). See also *Cruz Varas and Others* v. *Sweden*, *ibid.*, No. 201, p. 28, paras. 69–70 (1991); and *Vilvarajah and Others* v. *The United Kingdom, ibid.*, No. 215, p. 37, paras. 115–116 (1991).

[897] 266 *Corfu Channel, Merits* (footnote [29] 35 above), p. 22.

[898] 267 If a State has been coerced, the wrongfulness of its act may be precluded by *force majeure*: see article 23 and commentary.

or substantive obligations of the State and its secondary obligations of responsibility.[899] 268 It is justified on the basis that responsibility under chapter IV is in a sense derivative.[900]269 In national legal systems, rules dealing, for example, with conspiracy, complicity and inducing breach of contract may be classified as falling within the "general part" of the law of obligations. Moreover, the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in chapter II.

(8) On the other hand, the situations covered in chapter IV have a special character. They are exceptions to the principle of independent responsibility and they only cover certain cases. In formulating these exceptional cases where one State is responsible for the internationally wrongful acts of another, it is necessary to bear in mind certain features of the international system. First, there is the possibility that the same conduct may be internationally wrongful so far as one State is concerned but not for another State having regard to its own international obligations. Rules of derived responsibility cannot be allowed to undermine the principle, stated in article 34 of the 1969 Vienna Convention, that a "treaty does not create either obligations or rights for a third State without its consent"; similar issues arise with respect to unilateral obligations and even, in certain cases, rules of general international law. Hence it is only in the extreme case of coercion that a State may become responsible under this chapter for conduct which would not have been internationally wrongful if performed by that State. Secondly, States engage in a wide variety of activities through a multiplicity of organs and agencies. For example, a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be internationally unlawful. Thus, it is necessary to establish a close connection between the action of the assisting, directing or coercing State on the one hand and that of the State committing the internationally wrongful act on the other. Thus, the articles in this part require that the former State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of the assisting, directing or coercing State. This is done without prejudice to the general question of "wrongful intent" in matters of State responsibility, on which the articles are neutral.[901] 270

(9) Similar considerations dictate the exclusion of certain situations of "derived responsibility" from chapter IV. One of these is incitement. The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State.[902] 271 However, there can be specific treaty

[899] 268 See above, in the introduction to the articles, paras. (1)–(2) and (4) for an explanation of the distinction.

[900] 269 Cf. the term *responsabilité dérivée* used by Arbitrator Huber in *British Claims in the Spanish Zone of Morocco* (footnote [38] 44 above), p. 648.

[901] 270 See above, the commentary to paragraphs (3) and (10) of article 2.

[902] 271 See the statement of the United States-French Commissioners relating to the *French Indemnity of 1831* case in Moore, *History and Digest*, vol. V, p. 4447, at pp. 4473–4476. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 129, para. 255, and the dissenting opinion of Judge Schwebel, p. 389, para. 259.

obligations prohibiting incitement under certain circumstances.[903] [272] Another concerns the issue which is described in some systems of internal law as being an "accessory after the fact". It seems that there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred. Again it is a matter for specific treaty obligations to establish any such obligation of suppression after the event. There are, however, two important qualifications here. First, in some circumstances assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that act by the former State. In such cases responsibility for that act potentially arises pursuant to article 11. Secondly, special obligations of cooperation in putting an end to an unlawful situation arise in the case of serious breaches of obligations under peremptory norms of general international law. By definition, in such cases States will have agreed that no derogation from such obligations is to be permitted and, faced with a serious breach of such an obligation, certain obligations of cooperation arise. These are dealt with in article 41.

[903] [272] See, *e.g.*, article III (*c*) of the Convention on the Prevention and Punishment of the Crime of Genocide; and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

Article 16. Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so 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.

Commentary

(1) Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term "by the latter" in the *chapeau* to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts.[904] [273] Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as Article 2, paragraph 5, of the Charter of the United Nations, again these have a specific rationale which goes well beyond the scope and purpose of article 16.

(3) Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase "knowledge of the circumstances of the internationally wrongful act". A State providing material

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[904] [273] See, *e.g.*, the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex); and article 3 (*f*) of the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State *vis-à-vis* third States. This basic principle is also embodied in articles 34 and 35 of the 1969 Vienna Convention. Correspondingly, a State is free to act for itself in a way which is inconsistent with the obligations of another State *vis-à-vis* third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided *vis-à-vis* the injured State. Thus, it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 the Islamic Republic of Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.[905] [274] The Government of the United Kingdom denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.[906] [275] In 1998, a similar allegation surfaced that the Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq's representative to the United Nations.[907] [276]

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic of Germany in response to an allegation that Germany had participated in an armed attack by allowing United States military aircraft to use airfields in its territory

[905] [274] *The New York Times*, 6 March 1984, p. A1.

[906] [275] *Ibid*., 5 March 1984, p. A3.

[907] [276] *Ibid*., 26 August 1998, p. A8.

in connection with the United States intervention in Lebanon. While denying that the measures taken by the United States and the United Kingdom in the Near East constituted intervention, the Federal Republic of Germany nevertheless seems to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act.[908] [277] Another example arises from the Tripoli bombing incident in April 1986. The Libyan Arab Jamahiriya charged the United Kingdom with responsibility for the event, based on the fact that the United Kingdom had allowed several of its air bases to be used for the launching of United States fighter planes to attack Libyan targets.[909] [278] The Libyan Arab Jamahiriya asserted that the United Kingdom "would be held partly responsible" for having "supported and contributed in a direct way" to the raid.[910][279] The United Kingdom denied responsibility on the basis that the raid by the United States was lawful as an act of self-defence against Libyan terrorist attacks on United States targets.[911] [280] A proposed Security Council resolution concerning the attack was vetoed, but the General Assembly issued a resolution condemning the "military attack" as "a violation of the Charter of the United Nations and of international law", and calling upon all States "to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya".[912] [281]

(9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the Security Council[913] [282] or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.[914] [283] Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.

(10) In accordance with article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State. In some cases this may be a distinction without a difference: where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be

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[908] [277] For the text of the note from the Federal Government, see *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 20 (August 1960), pp. 663–664.

[909] [278] See United States of America, *Department of State Bulletin*, No. 2111 (June 1986), p. 8.

[910] [279] See the statement of Ambassador Hamed Houdeiry, Libyan People's Bureau, Paris, *The Times*, 16 April 1986, p. 6.

[911] [280] Statement of Mrs. Margaret Thatcher, Prime Minister, *House of Commons Debates,* 6th series, vol. 95, col. 737 (15 April 1986), reprinted in BYBIL*, 1986*, vol. 57, pp. 637–638.

[912] [281] General Assembly resolution 41/38 of 20 November 1986, paras. 1 and 3.

[913] [282] See, *e.g.*, Report by President Clinton*,* AJIL, vol. 91, No. 4 (October 1997), p. 709.

[914] [283] Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII (A/37/745), p. 50.

concurrently attributed to the assisting and the acting State.[915] 284 In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct.

(11) Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State. ICJ has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, "it would have to rule, as a prerequisite, on the lawfulness"[916] 285 of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle.[917] 286 That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter. This may present practical difficulties in some cases in establishing the responsibility of the aiding or assisting State, but it does not vitiate the purpose of article 16. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such. Moreover, that principle is not all-embracing, and the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case. In any event, wrongful assistance given to another State has frequently led to diplomatic protests. States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

World Trade Organization panel

Turkey—Restrictions on Imports of Textile and Clothing Products

In its 1999 report on *Turkey—Restrictions on Imports of Textile and Clothing Products*, the panel, in examining the Turkish argument according to which the measures at issue had been taken by a separate entity (*i.e.* the Turkey-European Communities customs union or the European Communities), concluded that the said measures were attributable to Turkey, since they had been adopted by the Turkish Government or had at least been implemented, applied and monitored by Turkey. In this regard, the panel found that, in any event, "in public international law, in the absence of any contrary treaty provision, Turkey could reasonably be held responsible for the measures taken by the Turkey-EC cus-

[915] 284 For the question of concurrent responsibility of several States for the same injury, see article 47 and commentary.

[916] 285 *East Timor* (footnote [48] 54 above), p. 105, para. 35.

[917] 286 *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19, at p. 32; *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), p. 261, para. 55.

toms union",[918] [134] on the basis of the principle reflected in draft article 27 adopted on first reading by the International Law Commission.[919] [135] In the report, the panel reproduced a passage of the commentary of the Commission to that provision.[920] [136]

[A/62/62, para. 85]

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, in examining whether the Respondent was responsible for "complicity in genocide" under article III, paragraph (*e*), of the Genocide Convention, referred to article 16 finally adopted by the International Law Commission in 2001, which it considered as reflecting a customary rule:

In this connection, reference should be made to Article 16 of the ILC's Articles on State Responsibility, reflecting a customary rule …

Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between 'complicity in genocide', within the meaning of Article III, paragraph (*e*), of the Convention, and the 'aid or assistance' of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16—setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. In other words, to ascertain whether the Respondent is responsible for 'complicity in genocide' within the meaning of Article III, paragraph (*e*), which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished 'aid or assistance' in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility."[921] [9]

[A/62/62/Add.1, para. 5]

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[918] [134] WTO, Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, 31 May 1999, para. 9.42.

[919] [135] This provision was amended and incorporated in article 16 finally adopted by the International Law Commission in 2001. The text of draft article 27 was the following:

Article 27

Aid or assistance by a State to another State for the commission of an internationally wrongful act

Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation. (*Yearbook … 1996*, vol. II (Part Two), para. 65.)

[920] [136] WTO, Panel Report, WT/DS34/R, 31 May 1999, para. 9.43, where the panel quoted a passage taken from paragraph (2) of the commentary to draft article 27 provisionally adopted (*Yearbook … 1996*, vol. II (Part Two), p. 99).

[921] [9] [ICJ, Judgment, *I.C.J. Reports 2007*, p. 43], para. 420.

European Court of Human Rights

El-Masri v. The Former Yugoslav Republic of Macedonia

In its 2012 judgment in the case of *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[922] 120

[A/68/72, para. 87]

[*Husayn (Abu Zubaydah)* v. *Poland*

In *Husayn (Abu Zubaydah)* v. *Poland*, the European Court of Human Rights listed articles 7, 14, 15 and 16 as relevant international law.[923] 85

[A/71/80, para. 68]]

Al Nashiri v. *Poland*

In *Al Nashiri* v. *Poland*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 as relevant international law.[924] 125

[A/71/80, para. 91]

[*Big Brother Watch and others* v. *the United Kingdom*

In *Big Brother Watch and others* v. *the United Kingdom*, the European Court of Human Rights noted that the State responsibility articles

would only be relevant if the foreign intelligence agencies were placed at the disposal of the respondent State and were acting in exercise of elements of the governmental authority of the respondent State (Article 6); if the respondent State aided or assisted the foreign intelligence agencies in intercepting the communications where that amounted to an internationally wrongful act for the State responsible for the agencies, the United Kingdom was aware of the circumstances of the internationally wrongful act, and the act would have been internationally wrongful if committed by the United Kingdom (Article 16); or if the respondent State exercised direction or control over the foreign Government (Article 17).[925] 80

[A/74/83, p. 17]]

[*Nasr et Ghali* v. *Italy*

The European Court of Human Rights in *Nasr et Ghali* v. *Italy* referred to articles 7, 14, 15 and 16 of the State responsibility articles as relevant international law.[926] 82

[A/74/83, p. 17]]

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[922] 120 See footnote [552] 84 above.

[923] [85 ECHR, Former Fourth Section, Application No. 7511/13, Judgment, 24 July 2014, para. 201.]

[924] 125 ECHR, Former Fourth Section, Application No. 28761/11, Judgment, 24 July 2014, para. 207.

[925] [80 ECHR, First Section, Applications Nos. 58170/13, 62322/14 and 24960/15, Judgment, 13 September 2018, para. 420.]

[926] [82 ECHR, Fourth Section, Application 44883/09, Judgment, 23 February 2016, para. 185.]

Permanent Court of Arbitration (under UNCITRAL Rules)

Chevron Corporation and Texaco Petroleum Company v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* referred to article 16 under "principal legal and other texts",[927] 132 and noted that "[a]s the International Court of Justice decided in the Bosnia Genocide Case (2007), Article 16 of the State responsibility articles reflects a rule of customary international law".[928] 133

[A/74/83, p. 25]

European Court of Human Rights

Big Brother Watch and others v. *United Kingdom*

In *Big Brother Watch and others* v. *United Kingdom*, the Grand Chamber of the European Court of Human Rights stated that article 16 would be relevant in a case of interception of communications by foreign intelligence services

> if the receiving State aided or assisted the foreign intelligence services in intercepting the communications where that amounted to an internationally wrongful act for the State responsible for the services, the receiving State was aware of the circumstances of the internationally wrongful act, and the act would have been internationally wrongful if committed by the receiving State.[929] 106

[A/77/74, p. 20]

[927] 132 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, para. 3.33.

[928] 133 *Ibid*., para. 9.10.

[929] 106 See footnote [517] 63 above, para. 495.

Article 17. Direction and control exercised over the commission of an internationally wrongful act

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.

Commentary

(1) Article 17 deals with a second case of derived responsibility, the exercise of direction and control by one State over the commission of an internationally wrongful act by another. Under article 16 a State providing aid or assistance with a view to the commission of an internationally wrongful act incurs international responsibility only to the extent of the aid or assistance given. By contrast, a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety.

(2) Some examples of international responsibility flowing from the exercise of direction and control over the commission of a wrongful act by another State are now largely of historical significance. International dependency relationships such as "suzerainty" or "protectorate" warranted treating the dominant State as internationally responsible for conduct formally attributable to the dependent State. For example, in *Rights of Nationals of the United States of America in Morocco*,[930] [287] France commenced proceedings under the Optional Clause in respect of a dispute concerning the rights of United States nationals in Morocco under French protectorate. The United States objected that any eventual judgment might not be considered as binding upon Morocco, which was not a party to the proceedings. France confirmed that it was acting both in its own name and as the protecting power over Morocco, with the result that the Court's judgment would be binding both on France and on Morocco,[931] [288] and the case proceeded on that basis.[932] [289] The Court's judgment concerned questions of the responsibility of France in respect of the conduct of Morocco which were raised both by the application and by the United States counterclaim.

(3) With the developments in international relations since 1945, and in particular the process of decolonization, older dependency relationships have been terminated. Such links do not involve any legal right to direction or control on the part of the representing State. In cases of representation, the represented entity remains responsible for its own international obligations, even though diplomatic communications may be channelled through another State. The representing State in such cases does not, merely because it is the channel through which communications pass, assume any responsibility for their content. This is not in contradiction to the *British Claims in the Spanish Zone of Morocco* arbitration, which affirmed that "the responsibility of the protecting State … proceeds … from the fact that the protecting State alone represents the protected territory in its

[930] [287] *Rights of Nationals of the United States of America in Morocco* (footnote [225] 108 above), p. 176.

[931] [288] *Ibid.*, *I.C.J. Pleadings*, vol. I, p. 235; and vol. II, pp. 431–433; the United States thereupon withdrew its preliminary objection: *ibid.*, p. 434.

[932] [289] See *Rights of Nationals of the United States of America in Morocco* (footnote [225] 108 above), p. 179.

international relations",[933] [290] and that the protecting State is answerable "in place of the protected State".[934] [291] The principal concern in the arbitration was to ensure that, in the case of a protectorate which put an end to direct international relations by the protected State, international responsibility for wrongful acts committed by the protected State was not erased to the detriment of third States injured by the wrongful conduct. The acceptance by the protecting State of the obligation to answer in place of the protected State was viewed as an appropriate means of avoiding that danger.[935] [292] The justification for such an acceptance was not based on the relationship of "representation" as such but on the fact that the protecting State was in virtually total control over the protected State. It was not merely acting as a channel of communication.

(4) Other relationships of dependency, such as dependent territories, fall entirely outside the scope of article 17, which is concerned only with the responsibility of one State for the conduct of another State. In most relationships of dependency between one territory and another, the dependent territory, even if it may possess some international personality, is not a State. Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right, and not by delegation from the federal State, the component unit is not itself a State in international law. So far as State responsibility is concerned, the position of federal States is no different from that of any other State: the normal principles specified in articles 4 to 9 of the draft articles apply, and the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal constitution.[936] [293]

(5) Nonetheless, instances exist or can be envisaged where one State exercises the power to direct and control the activities of another State, whether by treaty or as a result of a military occupation or for some other reason. For example, during the belligerent occupation of Italy by Germany in the Second World War, it was generally acknowledged that the Italian police in Rome operated under the control of the occupying Power. Thus, the protest by the Holy See in respect of wrongful acts committed by Italian police who forcibly entered the Basilica of St. Paul in Rome in February 1944 asserted the responsibility of the German authorities.[937] [294] In such cases the occupying State is responsible for acts of the occupied State which it directs and controls.

(6) Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State. International tribunals have consistently refused to infer responsibility on the part of a dominant State merely because the latter may have the power to interfere in matters of administration internal to a dependent State, if that power is not exercised in the particular case. In the *Brown* case, for example, the arbitral tribunal held that the authority of Great Britain, as suzerain over the South African Republic prior to the Boer War, "fell far short of what

[933] [290] *British Claims in the Spanish Zone of Morocco* (footnote [38] 44 above), p. 649.

[934] [291] *Ibid*., p. 648.

[935] [292] *Ibid*.

[936] [293] See, *e.g.*, *LaGrand, Provisional Measures* (footnote [150] 91 above).

[937] [294] See R. Ago, "L'occupazione bellica di Roma e il Trattato lateranense", *Comunicazioni e Studi* (Milan, Giuffrè, 1945), vol. II, pp. 167–168.

would be required to make her responsible for the wrong inflicted upon Brown."[938] 295 It went on to deny that Great Britain possessed power to interfere in matters of internal administration and continued that there was no evidence "that Great Britain ever did undertake to interfere in this way".[939] 296 Accordingly, the relation of suzerainty "did not operate to render Great Britain liable for the acts complained of". [940] 297 In the *Heirs of the Duc de Guise* case, the Franco-Italian Conciliation Commission held that Italy was responsible for a requisition carried out by Italy in Sicily at a time when it was under Allied occupation. Its decision was not based on the absence of Allied power to requisition the property, or to stop Italy from doing so. Rather, the majority pointed to the absence in fact of any "intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees". [941] 298 The mere fact that a State may have power to exercise direction and control over another State in some field is not a sufficient basis for attributing to it any wrongful acts of the latter State in that field.[942] 299

(7) In the formulation of article 17, the term "controls" refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word "directs" does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind. Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility. The choice of the expression, common in English, "*direction and control*", raised some problems in other languages, owing in particular to the ambiguity of the term "*direction*" which may imply, as is the case in French, complete power, whereas it does not have this implication in English.

(8) Two further conditions attach to responsibility under article 17. First, the dominant State is only responsible if it has knowledge of the circumstances making the conduct of the dependent State wrongful. Secondly, it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling State itself. This condition is significant in the context of bilateral obligations, which are not opposable to the directing State. In cases of multilateral obligations and especially of obligations to the international community, it is of much less significance. The essential principle is that a State should not be able to do through another what it could not do itself.

(9) As to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse under chapter V of Part One. If the conduct in question would involve a breach of its international obligations, it is incumbent upon it to decline to comply with the direction. The defence

[938] 295 *Robert E. Brown (United States)* v. *Great Britain,* UNRIAA, vol. VI (Sales No. 1955.V.3), p. 120, at p. 130 (1923).

[939] 296 *Ibid*., p. 131.

[940] 297 *Ibid*.

[941] 298 *Heirs of the Duc de Guise* (footnote [232] 115 above). See also, in another context, *Drozd and Janousek* v. *France and Spain* (footnote [507] 135 above); see also *Iribarne Pérez* v. *France*, *Eur. Court H.R., Series A*, *No. 325–C*, pp. 62–63, paras. 29–31 (1995).

[942] 299 It may be that the fact of the dependence of one State upon another is relevant in terms of the burden of proof, since the mere existence of a formal State apparatus does not exclude the possibility that control was exercised in fact by an occupying Power. Cf. *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)*, Kammergericht of Berlin, ILR, vol. 44, p. 301, at pp. 340–342 (1965).

of "superior orders" does not exist for States in international law. This is not to say that the wrongfulness of the directed and controlled State's conduct may not be precluded under chapter V, but this will only be so if it can show the existence of a circumstance precluding wrongfulness, *e.g. force majeure*. In such a case it is to the directing State alone that the injured State must look. But as between States, genuine cases of *force majeure* or coercion are exceptional. Conversely, it is no excuse for the directing State to show that the directed State was a willing or even enthusiastic participant in the internationally wrongful conduct, if in truth the conditions laid down in article 17 are met.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

European Court of Human Rights

Big Brother Watch and others v. *the United Kingdom*

In *Big Brother Watch and others* v. *the United Kingdom*, the European Court of Human Rights referred to article 17 of the State responsibility articles.[943] 134

[A/74/83, pp. 17–25]

In *Big Brother Watch and others* v. *United Kingdom*, the Grand Chamber of the European Court of Human Rights stated that article 17 would be relevant in a case of interception of communications by foreign intelligence services "if the receiving State exercised direction or control over the foreign Government".[944] 107

[A/77/74, p. 21]

[943] 134 See the text accompanying footnote [516] 80.

[944] [107 See footnote [517] 63 above, para. 495.]

Article 18. Coercion of another 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.

Commentary

(1) The third case of derived responsibility dealt with by chapter IV is that of coercion of one State by another. Article 18 is concerned with the specific problem of coercion deliberately exercised in order to procure the breach of one State's obligation to a third State. In such cases the responsibility of the coercing State with respect to the third State derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State. Responsibility for the coercion itself is that of the coercing State *vis-à-vis* the coerced State, whereas responsibility under article 18 is the responsibility of the coercing State *vis-à-vis* a victim of the coerced act, in particular a third State which is injured as a result.

(2) Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct: such questions are covered by the preceding articles. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the coerced act merely make it more difficult for the coerced State to comply with the obligation.

(3) Though coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion.[945] [300] As a practical matter, most cases of coercion meeting the requirements of the article will be unlawful, *e.g.* because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, *i.e.* coercive interference, in the affairs of another State. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in article 49, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.[946] [301] However, coercion could possibly take other forms, *e.g.* serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached.

(4) The equation of coercion with *force majeure* means that in most cases where article 18 is applicable, the responsibility of the coerced State will be precluded *vis-à-vis* the injured third State. This is reflected in the phrase "but for the coercion" in subparagraph (*a*) of article 18. Coercion amounting to *force majeure* may be the reason why the wrongfulness of an act is precluded *vis-à-vis* the coerced State. Therefore, the act is not described as an internation-

[945] [300] P. Reuter, *Introduction to the Law of Treaties*, 2nd rev. ed. (London, Kegan Paul International, 1995), paras. 271–274.

[946] [301] See article 49, para. 2, and commentary.

ally wrongful act in the opening clause of the article, as is done in articles 16 and 17, where no comparable circumstance would preclude the wrongfulness of the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded *vis-à-vis* the coercing State. On the contrary, if the coercing State cannot be held responsible for the act in question, the injured State may have no redress at all.

(5) It is a further requirement for responsibility under article 18 that the coercing State must be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct. The reference to "circumstances" in subparagraph (*b*) is understood as reference to the factual situation rather than to the coercing State's judgement of the legality of the act. This point is clarified by the phrase "circumstances of the act". Hence, while ignorance of the law is no excuse, ignorance of the facts is material in determining the responsibility of the coercing State.

(6) A State which sets out to procure by coercion a breach of another State's obligations to a third State will be held responsible to the third State for the consequences, regardless of whether the coercing State is also bound by the obligation in question. Otherwise, the injured State would potentially be deprived of any redress, because the acting State may be able to rely on *force majeure* as a circumstance precluding wrongfulness. Article 18 thus differs from articles 16 and 17 in that it does not allow for an exemption from responsibility for the act of the coerced State in circumstances where the coercing State is not itself bound by the obligation in question.

(7) State practice lends support to the principle that a State bears responsibility for the internationally wrongful conduct of another State which it coerces. In the *Romano-Americana* case, the claim of the United States Government in respect of the destruction of certain oil storage and other facilities owned by a United States company on the orders of the Government of Romania during the First World War was originally addressed to the British Government. At the time the facilities were destroyed, Romania was at war with Germany, which was preparing to invade the country, and the United States claimed that the Romanian authorities had been "compelled" by Great Britain to take the measures in question. In support of its claim, the United States Government argued that the circumstances of the case revealed "a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, compelled a weaker Ally to acquiesce in an operation which it carried out on the territory of that Ally."[947] [302] The British Government denied responsibility, asserting that its influence over the conduct of the Romanian authorities "did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause".[948] [303] The point of disagreement between the Governments of the United States and of Great Britain was not as to the responsibility of a State for the conduct of another State which it has coerced, but rather the existence of "compulsion" in the particular circumstances of the case.[949] [304]

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[947] [302] Note from the United States Embassy in London, dated 16 February 1925, in Hackworth, *op. cit.* (footnote [523] 142 above), p. 702.

[948] [303] Note from the British Foreign Office dated 5 July 1928, *ibid*., p. 704.

[949] [304] For a different example involving the coercion of a breach of contract in circumstances amounting to a denial of justice, see C. L. Bouvé, "Russia's liability in tort for Persia's breach of contract", AJIL, vol. 6, No. 2 (April 1912), p. 389.

Article 19. Effect of this chapter

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.

Commentary

(1) Article 19 serves three purposes. First, it preserves the responsibility of the State which has committed the internationally wrongful act, albeit with the aid or assistance, under the direction and control or subject to the coercion of another State. It recognizes that the attribution of international responsibility to an assisting, directing or coercing State does not preclude the responsibility of the assisted, directed or coerced State.

(2) Secondly, the article makes clear that the provisions of chapter IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful. The phrase "under other provisions of these articles" is a reference, *inter alia*, to article 23 (*Force majeure*), which might affect the question of responsibility. The phrase also draws attention to the fact that other provisions of the draft articles may be relevant to the State committing the act in question, and that chapter IV in no way precludes the issue of its responsibility in that regard.

(3) Thirdly, article 19 preserves the responsibility "of any other State" to whom the internationally wrongful conduct might also be attributable under other provisions of the articles.

(4) Thus, article 19 is intended to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance, or from acts otherwise attributable to any State under chapter II. The article covers both the implicated and the acting State. It makes it clear that chapter IV is concerned only with situations in which the act which lies at the origin of the wrong is an act committed by one State and not by the other. If both States commit the act, then that situation would fall within the realm of co-perpetrators, dealt with in chapter II.

Chapter V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Commentary

(1) Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation. The six circumstances are: consent (art. 20), self-defence (art. 21), countermeasures (art. 22), *force majeure* (art. 23), distress (art. 24) and necessity (art. 25). Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law. Article 27 deals with certain consequences of the invocation of one of these circumstances.

(2) Consistent with the approach of the present articles, the circumstances precluding wrongfulness set out in chapter V are of general application. Unless otherwise provided,[950] 305 they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists. This was emphasized by ICJ in the *Gabčíkovo-Nagymaros Project* case. Hungary sought to argue that the wrongfulness of its conduct in discontinuing work on the Project in breach of its obligations under the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System was precluded by necessity. In dealing with the Hungarian plea, the Court said:

> The state of necessity claimed by Hungary—supposing it to have been established—thus could not permit of the conclusion that … it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.[951] 306

Thus a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in chapter V operate as a shield rather than a sword. As Fitzmaurice noted, where one of the circumstances precluding wrongfulness applies, "the non-performance is not only justified, but 'looks towards' a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present".[952] 307

(3) This distinction emerges clearly from the decisions of international tribunals. In the *"Rainbow Warrior"* arbitration, the tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while

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[950] 305 For example, by a treaty to the contrary, which would constitute a *lex specialis* under article 55.

[951] 306 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 39, para. 48.

[952] 307 *Yearbook … 1959*, vol. II, p. 41, document A/CN.4/120.

it was in force, including the question whether the wrongfulness of the conduct in question was precluded.[953] 308 In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

[E]ven if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but—unless the parties by mutual agreement terminate the treaty—it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.[954] 309

(4) While the same facts may amount, for example, to *force majeure* under article 23 and to a supervening impossibility of performance under article 61 of the 1969 Vienna Convention, the two are distinct. *Force majeure* justifies non-performance of the obligation for so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. *Force majeure* excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory Committee of the 1930 Hague Conference. Among its Bases of discussion,[955]310 it listed two "[c]ircumstances under which States can decline their responsibility", self-defence and reprisals.[956] 311 It considered that the extent of a State's responsibility in the context of diplomatic protection could also be affected by the "provocative attitude" adopted by the injured person (Basis of discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces "in the suppression of an insurrection, riot or other disturbance" (Basis of discussion No. 21). However, these issues were not taken to any conclusion.

(6) The category of circumstances precluding wrongfulness was developed by ILC in its work on international responsibility for injuries to aliens[957] 312 and the performance of treaties.[958] 313 In the event, the subject of excuses for the non-performance of treaties was not included within the scope of the 1969 Vienna Convention.[959] 314 It is a matter for the law on State responsibility.

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[953] 308 *"Rainbow Warrior"* (footnote [40] 46 above), pp. 251–252, para. 75.

[954] 309 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 63, para. 101; see also *ibid.*, page 38, para. 47.

[955] 310 *Yearbook … 1956*, vol. II, pp. 219–225, document A/CN.4/96.

[956] 311 *Ibid.*, pp. 224–225. Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

[957] 312 *Yearbook … 1958*, vol. II, p. 72. For the discussion of the circumstances by Special Rapporteur García Amador, see his first report on State responsibility, *Yearbook … 1956*, vol. II, pp. 203–209, document A/CN.4/96, and his third report on State responsibility, *Yearbook … 1958*, vol. II, pp. 50–55, document A/CN.4/111.

[958] 313 See the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote [952] 307 above), pp. 44–47, and his comments, *ibid.*, pp. 63–74.

[959] 314 See article 73 of the Convention.

(7) Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, *i.e.* those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself. In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in chapter V are recognized by many legal systems, often under the same designation.[960] 315 On the other hand, there is no common approach to these circumstances in internal law, and the conditions and limitations in chapter V have been developed independently.

(8) Just as the articles do not deal with questions of the jurisdiction of courts or tribunals, so they do not deal with issues of evidence or the burden of proof. In a bilateral dispute over State responsibility, the onus of establishing responsibility lies in principle on the claimant State. Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V, however, the position changes and the onus lies on that State to justify or excuse its conduct. Indeed, it is often the case that only that State is fully aware of the facts which might excuse its non-performance.

(9) Chapter V sets out the circumstances precluding wrongfulness presently recognized under general international law.[961] 316 Certain other candidates have been excluded. For example, the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness.[962] 317 The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness.[963]318 The so-called "clean hands" doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It also does not need to be included here.[964] 319

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[960] 315 See the comparative review by C. von Bar, *The Common European Law of Torts* (Oxford University Press, 2000), vol. 2, pp. 499–592.

[961] 316 For the effect of contribution to the injury by the injured State or other person or entity, see article 39 and commentary. This does not preclude wrongfulness but is relevant in determining the extent and form of reparation.

[962] 317 Cf. *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70,* p. 4, especially at pp. 50 and 77. See also the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote [952] 307 above), pp. 43–47; D. W. Greig, "Reciprocity, proportionality and the law of treaties", *Virginia Journal of International Law,* vol. 34 (1994), p. 295; and for a comparative review, G. H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1988), pp. 245–317. For the relationship between the exception of non-performance and countermeasures, see below, paragraph (5) of commentary to Part Three, chap. II.

[963] 318 See, *e.g.*, *Case concerning the Factory at Chorzów, Jurisdiction* (footnote [28] 34 above), p. 31; cf. *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 67, para. 110.

[964] 319 See J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, vol. 10 (1964), p. 225; A. Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux", *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the

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 observed that France had alleged, "citing the report of the International Law Commission", [that] the reasons which may be invoked to justify non-execution of a treaty are a part of the general subject matter of the international responsibility of States".[965] 137 Having considered that, *inter alia*, the determination of the circumstances that may exclude wrongfulness was a subject that belonged to the customary law of State responsibility, the tribunal referred to the set of rules provisionally adopted by the International Law Commission under the title "circumstances precluding wrongfulness" (draft articles 29 to 35), and in particular to draft articles 31, 32 and 33, which it considered to be relevant to the decision on that case.[966] 138

[A/62/62, para. 86]

International arbitral tribunal (under Annex VII to the 1982 United Nations Convention on the Law of the Sea)

In the matter of an Arbitration Between Guyana and Suriname

In its 2007 award in the *Guyana* v. *Suriname* case, involving the delimitation of a maritime boundary between the two States, the arbitral tribunal constituted to hear the case considered a challenge by Suriname to the admissibility of the proceedings on the grounds of lack of good faith and clean hands. In dismissing such challenge, the tribunal maintained that "[n]o generally accepted definition of the clean hands doctrine has been elaborated in international law", and noted that "the Commentaries to the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely and, when it has been invoked, its expression has come in many forms".[967] 19

[A/65/76, para. 22]

dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), pp. 392–394.

[965] 137 See footnote [40] 46 above, para. 74.

[966] 138 *Ibid*., pp. 251–252, paras. 75–76.

[967] 19 *In the matter of an Arbitration Between Guyana and Suriname*, Award, 17 September 2007, para. 418 (footnote omitted), referring to paragraph (9) of the general commentary to Part One, Chapter V ("Circumstance precluding wrongfulness").

Article 20. Consent

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

Commentary

(1) Article 20 reflects the basic international law principle of consent in the particular context of Part One. In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.

(2) It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between consent in relation to a particular situation or a particular course of conduct, and consent in relation to the underlying obligation itself. In the case of a bilateral treaty the States parties can at any time agree to terminate or suspend the treaty, in which case obligations arising from the treaty will be terminated or suspended accordingly.[968] [320] But quite apart from that possibility, States have the right to dispense with the performance of an obligation owed to them individually, or generally to permit conduct to occur which (absent such permission) would be unlawful so far as they are concerned. In such cases, the primary obligation continues to govern the relations between the two States, but it is displaced on the particular occasion or for the purposes of the particular conduct by reason of the consent given.

(3) Consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. By contrast, cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility. This is dealt with in article 45.

(4) In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be "valid". Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor.[969] [321] Indeed there may be a question whether the State could validly consent at all. The reference to a "valid consent" in article 20 highlights the need to consider these issues in certain cases.

[968] [320] 1969 Vienna Convention, art. 54 (*b*).

[969] [321] See, *e.g.*, the issue of Austrian consent to the *Anschluss* of 1938, dealt with by the Nuremberg Tribunal. The tribunal denied that Austrian consent had been given; even if it had, it would have been coerced and did not excuse the annexation. See "International Military Tribunal (Nuremberg), judgment and sentences—October 1, 1946: judgment", reprinted in AJIL, vol. 41, No. 1 (January 1947) p. 172, at pp. 192–194.

(5) Whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State for the purposes of chapter II. For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central Government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State under article 4.[970] 322 In other cases, the "legitimacy" of the Government which has given the consent has been questioned. Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State's internal law. These questions depend on the rules of international law relating to the expression of the will of the State, as well as rules of internal law to which, in certain cases, international law refers.

(6) Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority. But in any case, certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.

(7) Apart from drawing attention to prerequisites to a valid consent, including issues of the authority to consent, the requirement for consent to be valid serves a further function. It points to the existence of cases in which consent may not be validly given at all. This question is discussed in relation to article 26 (compliance with peremptory norms), which applies to chapter V as a whole.[971] 323

(8) Examples of consent given by a State which has the effect of rendering certain conduct lawful include commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operations and the arrest or detention of persons on foreign territory. In the *Savarkar* case, the arbitral tribunal considered that the arrest of Savarkar was not a violation of French sovereignty as France had implicitly consented to the arrest through the conduct of its gendarme, who aided the British authorities in the arrest.[972] 324 In considering the application of article 20 to such cases it may be necessary to have regard to the relevant primary rule. For example, only the head of a diplomatic mission can consent to the receiving State's entering the premises of the mission.[973] 325

(9) Article 20 is concerned with the relations between the two States in question. In circumstances where the consent of a number of States is required, the consent of one State

[970] 322 This issue arose with respect to the dispatch of Belgian troops to the Republic of the Congo in 1960. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, particularly the statement of the representative of Belgium, paras. 186–188 and 209.

[971] 323 See paragraph (6) of the commentary to article 26.

[972] 324 UNRIAA, vol. XI (Sales No. 61.V.4), p. 243, at pp. 252–255 (1911).

[973] 325 Vienna Convention on Diplomatic Relations, art. 22, para. 1.

will not preclude wrongfulness in relation to another.[974] [326] Furthermore, where consent is relied on to preclude wrongfulness, it will be necessary to show that the conduct fell within the limits of the consent. Consent to overflight by commercial aircraft of another State would not preclude the wrongfulness of overflight by aircraft transporting troops and military equipment. Consent to the stationing of foreign troops for a specific period would not preclude the wrongfulness of the stationing of such troops beyond that period.[975][327] These limitations are indicated by the words "given act" in article 20 as well as by the phrase "within the limits of that consent".

(10) Article 20 envisages only the consent of States to conduct otherwise in breach of an international obligation. International law may also take into account the consent of non-State entities such as corporations or private persons. The extent to which investors can waive the rules of diplomatic protection by agreement in advance has long been controversial, but under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (art. 27, para. 1), consent by an investor to arbitration under the Convention has the effect of suspending the right of diplomatic protection by the investor's national State. The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual's free consent may be relevant to their application.[976] [328] In these cases the particular rule of international law itself allows for the consent in question and deals with its effect. By contrast, article 20 states a general principle so far as enjoyment of the rights and performance of the obligations of States are concerned.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

World Trade Organization Appellate Body

Peru—Additional Duty on Imports of Certain Agricultural Products

In *Peru—Additional Duty on Imports of Certain Agricultural Products*, the Appellate Body of the WTO noted that "without reaching the questions of whether the … ILC Articles 20 and 45 are 'rules of international law applicable in the relations between the parties' within the meaning of Article 31(3)(*c*) of the Vienna Convention …, we disagree with Peru

[974] [326] Austrian consent to the proposed customs union of 1931 would not have precluded its wrongfulness in regard of the obligation to respect Austrian independence owed by Germany to all the parties to the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles). Likewise, Germany's consent would not have precluded the wrongfulness of the customs union in respect of the obligation of the maintenance of its complete independence imposed on Austria by the Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye). See *Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41*, p. 37, at pp. 46 and 49.

[975] [327] The non-observance of a condition placed on the consent will not necessarily take conduct outside of the limits of the consent. For example, consent to a visiting force on the territory of a State may be subject to a requirement to pay rent for the use of facilities. While the non-payment of the rent would no doubt be a wrongful act, it would not transform the visiting force into an army of occupation.

[976] [328] See, *e.g.*, International Covenant on Civil and Political Rights, arts. 7; 8, para. 3; 14, para. 3 (*g*); and 23, para. 3.

that the … ILC Articles 20 and 45 are 'relevant' rules of international law within the meaning of Article 31(3)(*c*)".[977] 126 The Appellate Body thus found that

[h]aving concluded that the … ILC Articles 20 and 45 are not 'relevant' to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(*b*) of the GATT 1994 within the meaning of Article 31(3)(*c*) of the Vienna Convention …, there is no need for us to address whether the … ILC Articles 20 and 45 are 'rules of international law applicable in the relations between the parties', or the meaning of the term 'parties' in both Article 31(3)(*a*) and (*c*) of the Vienna Convention.[978] 127

[A/71/80, para. 92]

[The Appellate Body … indicated that "there is no need for us to address whether the … ILC Articles 20 and 45 are 'rules of international law applicable in the relations between the parties', or the meaning of the term 'parties' in both Article 31(3)(*a*) and (*c*) of the Vienna Convention".[979] 234

[A/71/80, para. 157]]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[980] 82

[A/77/74, p. 17]]

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[977] 126 WTO, Appellate Body Report, WT/DS457/AB/R and Add. 1, 20 July 2015, para. 5.104 (as restated in paras. 5.118 and 6.4).

[978] 127 *Ibid*., para. 5.105 (as restated in paras. 5.118 and 6.4).

[979] 234 [WTO, Appellate Body Report, WT/DS457/AB/R and Add. 1, 20 July 2015, para. 5.105 (as restated in paras. 5.118 and 6.4).]

[980] [82 See footnote [126] 14 above, para. 155.]

Article 21. Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Commentary

(1) The existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed. Article 51 of the Charter of the United Nations preserves a State's "inherent right" of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph 4. Thus, a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4.[981] 329

(2) Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war.[982] 330 In the Charter period, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at "peace" with each other.[983] 331 The 1969 Vienna Convention leaves such issues to one side by providing in article 73 that the Convention does not prejudice "any question that may arise in regard to a treaty … from the outbreak of hostilities between States".

(3) This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions for the protection of war victims of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law.[984] 332 Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.

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[981] 329 Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), p. 244, para. 38, and p. 263, para. 96, emphasizing the lawfulness of the use of force in self-defence.

[982] 330 See further Lord McNair and A. D. Watts, *The Legal Effects of War*, 4th ed. (Cambridge University Press, 1966).

[983] 331 In *Oil Platforms, Preliminary Objection* (footnote [750] 208 above), it was not denied that the 1955 Treaty of Amity, Economic Relations and Consular Rights remained in force, despite many actions by United States naval forces against the Islamic Republic of Iran. In that case both parties agreed that to the extent that any such actions were justified by self-defence they would be lawful.

[984] 332 As the Court said of the rules of international humanitarian law in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), p. 257, para. 79, "they constitute intransgressible principles of international customary law". On the relationship between human rights and humanitarian law in times of armed conflict, see page 240, para. 25.

(4) ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapon*s provided some guidance on this question. One issue before the Court was whether a use of nuclear weapons would necessarily be a breach of environmental obligations because of the massive and long-term damage such weapons can cause. The Court said:

[T]he issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.[985] [333]

A State acting in self-defence is "totally restrained" by an international obligation if that obligation is expressed or intended to apply as a definitive constraint even to States in armed conflict.[986] [334]

(5) The essential effect of article 21 is to preclude the wrongfulness of conduct of a State acting in self-defence *vis-à-vis* an attacking State. But there may be effects *vis-à-vis* third States in certain circumstances. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that:

[A]s in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.[987] [335]

The law of neutrality distinguishes between conduct as against a belligerent and conduct as against a neutral. But neutral States are not unaffected by the existence of a state of war. Article 21 leaves open all issues of the effect of action in self-defence *vis-à-vis* third States.

(6) Thus, article 21 reflects the generally accepted position that self-defence precludes the wrongfulness of the conduct taken within the limits laid down by international law. The reference is to action "taken in conformity with the Charter of the United Nations". In addition, the term "lawful" implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.

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[985] [333] *Ibid.*, p. 242, para. 30.

[986] [334] See, *e.g.*, the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques.

[987] [335] See footnote [48] 54 above, p. 261, para. 89.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[988] [82]

[A/77/74, p. 17]]

[988] [[82] See footnote [126] 14 above, para. 155.]

Article 22. Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

Commentary

(1) In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury. Article 22 deals with this situation from the perspective of circumstances precluding wrongfulness. Chapter II of Part Three regulates countermeasures in further detail.

(2) Judicial decisions, State practice and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. In the *Gabčíkovo-Nagymaros Project* case, ICJ clearly accepted that countermeasures might justify otherwise unlawful conduct "taken in response to a previous international wrongful act of another State and … directed against that State",[989] 336 provided certain conditions are met. Similar recognition of the legitimacy of measures of this kind in certain cases can be found in arbitral decisions, in particular the *"Naulilaa"*,[990] 337 *"Cysne"*,[991] 338 and *Air Service Agreement*[992] 339 awards.

(3) In the literature concerning countermeasures, reference is sometimes made to the application of a "sanction", or to a "reaction" to a prior internationally wrongful act; historically the more usual terminology was that of "legitimate reprisals" or, more generally, measures of "self-protection" or "self-help". The term "sanctions" has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the Charter of the United Nations—despite the fact that the Charter uses the term "measures", not "sanctions". The term "reprisals" is now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force. At least since the *Air Service Agreement* arbitration,[993] 340 the term "countermeasures" has been preferred, and it has been adopted for the purposes of the present articles.

(4) Where countermeasures are taken in accordance with article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied. These conditions are set out in Part Three, chapter II, to which article 22 refers. As a response to internationally wrongful conduct of another State countermeasures may be justified only in relation to that State. This is emphasized by the phrases "if and to the

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[989] 336 *Gabčíkovo-Nagymaros Project* (see footnote [31] 37 above), p. 55, para. 83.

[990] 337 *Portuguese Colonies* case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1011, at pp. 1025–1026 (1928).

[991] 338 *Ibid*., p. 1035, at p. 1052 (1930).

[992] [339 *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 415.]

[993] 340 *Ibid*., especially pp. 443–446, paras. 80–98.

extent" and "countermeasures taken against" the responsible State. An act directed against a third State would not fit this definition and could not be justified as a countermeasure. On the other hand, indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside the scope of article 22.

(5) Countermeasures may only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act. The principle is clearly expressed in the *"Cysne"* case, where the tribunal stressed that:

> reprisals, which constitute an act in principle contrary to the law of nations, are defensible only insofar as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible.* Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible.[994] [341]

Accordingly, the wrongfulness of Germany's conduct *vis-à-vis* Portugal was not precluded. Since it involved the use of armed force, this decision concerned belligerent reprisals rather than countermeasures in the sense of article 22. But the same principle applies to countermeasures, as the Court confirmed in the *Gabčíkovo-Nagymaros Project* case when it stressed that the measure in question must be "directed against" the responsible State.[995] [342]

(6) If article 22 had stood alone, it would have been necessary to spell out other conditions for the legitimacy of countermeasures, including in particular the requirement of proportionality, the temporary or reversible character of countermeasures and the status of certain fundamental obligations which may not be subject to countermeasures. Since these conditions are dealt with in Part Three, chapter II, it is sufficient to make a cross reference to them here. Article 22 covers any action which qualifies as a countermeasure in accordance with those conditions. One issue is whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed the obligation which has been breached.[996] [343] For example, in the case of an obligation owed to the international community as a whole ICJ has affirmed that all States have a legal interest in compliance.[997] [344] Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.

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[994] [341] *"Cysne"* (footnote [991] 338 above), pp. 1056–1057.

[995] [342] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 55, para. 83.

[996] [343] For the distinction between injured States and other States entitled to invoke State responsibility, see articles 42 and 48 and commentaries.

[997] [344] *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33.

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* cited article 22 of the State responsibility articles in support of its assertion that:

> Countermeasures may constitute a valid defence against a breach of Chapter Eleven [of NAFTA] insofar as the Respondent State proves that the measure in question meets each of the conditions required by customary international law, as applied to the facts of the case.[998] [20]

The tribunal provided further that

> [it] took as an authoritative statement of customary international law on countermeasures the position of the International Court of Justice [in the *Gabčíkovo-Nagymaros* case], as confirmed by [articles 22 and 49 of] the ILC Articles.[999] [21]

[A/65/76, para. 23]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Corn Products International Inc. v. *The United Mexican States*

In its 2008 Decision on Responsibility, the tribunal established to hear the case of *Corn Products International Inc.* v. *Mexico* held that adverse rulings by a WTO panel and Appellate Body did not preclude the respondent from raising the defence of the taking of lawful countermeasures in the case before it which involved alleged violations of obligations under NAFTA. The tribunal explained that

> … the fact that the tax violated Mexico's obligations under the GATT [did not] mean that it could not constitute a countermeasure which operated to preclude wrongfulness under the NAFTA. It is a feature of countermeasures that they may operate to preclude wrongfulness in respect of one obligation of the State which takes them, while not affecting another obligation of that State. This is apparent from the text of Article 50 of the ILC Articles on State Responsibility … [which] appears to contemplate that a measure which is contrary to one of [the obligations referred to in article 50, paragraph 1,] will entail a breach of *that* obligation by the State which undertakes it but may nevertheless preclude the wrongfulness in relation to another obligation of the State which does not fall within paragraphs (*a*) to (*d*).[1000] [22]

Nonetheless, the tribunal subsequently held that, since NAFTA conferred upon investors substantive rights separate and distinct from those of the State of which they are nationals, a countermeasure ostensibly taken against the United States could not deprive investors of such rights, and accordingly could not be raised as a circumstance precluding

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[998] [20] See footnote [3] 4 above, para. 121.

[999] [21] *Ibid*., para. 125.

[1000] [22] See footnote [4] 5 above, para. 158, emphasis in the original.

wrongfulness in relation to a violation of the investor's rights.[1001] [23] The tribunal also held that the defence of the taking of lawful countermeasures could not be upheld because the Respondent had failed to establish the existence of a prior breach of international law by the United States, in response to which the Respondent was taking the countermeasure. As the United States was not a party to the proceedings, the tribunal held that it did not have the jurisdiction to evaluate such a claim. [1002] [24]

[A/65/76, para. 24]

International Court of Justice

Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. *Greece)*

In its judgment in the *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia* v. *Greece)*, the International Court of Justice referred to the State responsibility articles when rejecting the respondent's claim that "its objection could be justified as a countermeasure precluding the wrongfulness of the Respondent's objection to the Applicant's admission to NATO".[1003] [121]

[A/68/72, para. 88]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[1004] [82]

[A/77/74, p. 17]]

[1001] [23] *Ibid*., paras. 167 and 176. See also article 49.

[1002] [24] *Ibid*., paras. 182–189. See also article 49.

[1003] [121] ICJ, Judgment, 5 December 2011, *I.C.J. Reports 2011*, p. 644, at p. 692, para. 164.

[1004] [[82] See footnote [126] 14 above, para. 155.]

Article 23. Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the State has assumed the risk of that situation occurring.

Commentary

(1) *Force majeure* is quite often invoked as a ground for precluding the wrongfulness of an act of a State.[1005] [345] It involves a situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it. *Force majeure* differs from a situation of distress (art. 24) or necessity (art. 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.

(2) A situation of *force majeure* precluding wrongfulness only arises where three elements are met: (*a*) the act in question must be brought about by an irresistible force or an unforeseen event; (*b*) which is beyond the control of the State concerned; and (*c*) which makes it materially impossible in the circumstances to perform the obligation. The adjective "irresistible" qualifying the word "force" emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been "unforeseen" the event must have been neither foreseen nor of an easily foreseeable kind. Further the "irresistible force" or "unforeseen event" must be causally linked to the situation of material impossibility, as indicated by the words "due to *force majeure* … making it materially impossible". Subject to paragraph 2, where these elements are met, the wrongfulness of the State's conduct is precluded for so long as the situation of *force majeure* subsists.

(3) Material impossibility of performance giving rise to *force majeure* may be due to a natural or physical event (*e.g.* stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (*e.g.* loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two. Certain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the various requirements of article 23. In particular, the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects. *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic

[1005] [345] "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine", study prepared by the Secretariat (*Yearbook … 1978*, vol. II (Part One), p. 61, document A/CN.4/315).

crisis. Nor does it cover situations brought about by the neglect or default of the State concerned,[1006] [346] even if the resulting injury itself was accidental and unintended.[1007] [347]

(4) In drafting what became article 61 of the 1969 Vienna Convention, ILC took the view that *force majeure* was a circumstance precluding wrongfulness in relation to treaty performance, just as supervening impossibility of performance was a ground for termination of a treaty.[1008] [348] The same view was taken at the United Nations Conference on the Law of Treaties.[1009] [349] But in the interests of the stability of treaties, the Conference insisted on a narrow formulation of article 61 so far as treaty termination is concerned. The degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 for termination of a treaty on grounds of supervening impossibility, as ICJ pointed out in the *Gabčíkovo-Nagymaros Project* case:

> Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties … Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.[1010] [350]

(5) In practice, many of the cases where "impossibility" has been relied upon have not involved actual impossibility as distinct from increased difficulty of performance and the plea of *force majeure* has accordingly failed. But cases of material impossibility have occurred, *e.g.* where a State aircraft is forced, due to damage or loss of control of the aircraft

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[1006] [346] For example, in relation to occurrences such as the bombing of La Chaux-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airman on 26 April 1917, ascribed to negligence on the part of the airmen, the belligerent undertook to punish the offenders and make reparation for the damage suffered (study prepared by the Secretariat, *ibid*., paras. 255–256).

[1007] [347] For example, in 1906 an American officer on the USS *Chattanooga* was mortally wounded by a bullet from a French warship as his ship entered the Chinese harbour of Chefoo. The United States Government obtained reparation, having maintained that:

> "While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the unavoidable class whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the *Chattanooga*, in the course of her regular passage through the public channel, came into the line of fire."

M. M. Whiteman, *Damages in International Law* (Washington, D. C., United States Government Printing Office, 1937), vol. I, p. 221. See also the study prepared by the Secretariat (footnote [1005] 345 above), para. 130.

[1008] [348] *Yearbook … 1966*, vol. II, p. 255.

[1009] [349] See, *e.g.*, the proposal of the representative of Mexico, *United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, p. 182, para. 531 (*a*).

[1010] [350] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 63, para. 102.

owing to weather, into the airspace of another State without the latter's authorization. In such cases the principle that wrongfulness is precluded has been accepted.[1011] 351

(6) Apart from aerial incidents, the principle in article 23 is also recognized in relation to ships in innocent passage by article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone (the United Nations Convention on the Law of the Sea, art. 18, para. 2), as well as in article 7, paragraph 1, of the Convention on Transit Trade of Land-locked States. In these provisions, *force majeure* is incorporated as a constituent element of the relevant primary rule; nonetheless, its acceptance in these cases helps to confirm the existence of a general principle of international law to similar effect.

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited the unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.[1012] 352 In the *Lighthouses* arbitration, a lighthouse owned by a French company had been requisitioned by the Government of Greece in 1915 and was subsequently destroyed by enemy action. The arbitral tribunal denied the French claim for restoration of the lighthouse on grounds of *force majeure*.[1013] 353 In the *Russian Indemnity* case, the principle was accepted but the plea of *force majeure* failed because the payment of the debt was not materially impossible.[1014] 354 *Force majeure* was acknowledged as a general principle of law (though again the plea was rejected on the facts of the case) by PCIJ in the *Serbian Loans* and *Brazilian Loans* cases.[1015] 355 More recently, in the *"Rainbow Warrior"* arbitration, France relied on *force majeure* as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical treatment. The tribunal dealt with the point briefly:

[1011] 351 See, *e.g.*, the cases of accidental intrusion into airspace attributable to weather, and the cases of accidental bombing of neutral territory attributable to navigational errors during the First World War discussed in the study prepared by the Secretariat (footnote [1005] 345 above), paras. 250–256. See also the exchanges of correspondence between the States concerned in the incidents involving United States military aircraft entering the airspace of Yugoslavia in 1946, United States of America, *Department of State Bulletin* (Washington, D. C.), vol. XV, No. 376 (15 September 1946), p. 502, reproduced in the study prepared by the Secretariat, para. 144, and the incident provoking the application to ICJ in 1954, *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of the United States of America*, p. 14 (note to the Hungarian Government of 17 March 1953). It is not always clear whether these cases are based on distress or *force majeure*.

[1012] 352 See, *e.g.*, the decision of the American-British Claims Commission in the *Saint Albans Raid* case, Moore, *History and Digest*, vol. IV, p. 4042 (1873), and the study prepared by the Secretariat (footnote [1005] 345 above), para. 339; the decisions of the United States-Venezuela Claims Commission in the *Wipperman* case, Moore, *History and Digest*, vol. III, p. 3039, and the study prepared by the Secretariat, paras. 349–350; *De Brissot and others* case (footnote [234] 117 above), and the study prepared by the Secretariat, para. 352; and the decision of the British-Mexican Claims Commission in the *Gill* case, UNRIAA, vol. V (Sales No. 1952.V.3), p. 157 (1931), and the study prepared by the Secretariat, para. 463.

[1013] 353 *Lighthouses* arbitration (footnote [702] 182 above), pp. 219–220.

[1014] 354 UNRIAA, vol. XI (Sales No. 61.V.4), p. 421, at p. 443 (1912).

[1015] 355 *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, pp. 39–40; *Brazilian Loans, Judgment No. 15, ibid., No. 21*, p. 120.

New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.[1016] [356]

(8) In addition to its application in inter-State cases as a matter of public international law, *force majeure* has substantial currency in the field of international commercial arbitration, and may qualify as a general principle of law.[1017] [357]

(9) A State may not invoke *force majeure* if it has caused or induced the situation in question. In *Libyan Arab Foreign Investment Company and The Republic of Burundi*, the arbitral tribunal rejected a plea of *force majeure* because "the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of that State … "[1018] [358] Under the equivalent ground for termination of a treaty in article 61 of the 1969 Vienna Convention, material impossibility cannot be invoked "if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty". By analogy with this provision, paragraph 2 (*a*) excludes the plea in circumstances where *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it. For paragraph 2 (*a*) to apply it is not enough that the State invoking *force majeure* has contributed to the situation of material impossibility; the situation of *force majeure* must be "due" to the conduct of the State invoking it. This allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen. Paragraph 2 (*a*) requires that the State's role in the occurrence of *force majeure* must be substantial.

(10) Paragraph 2 (*b*) deals with situations in which the State has already accepted the risk of the occurrence of *force majeure*, whether it has done so in terms of the obligation itself or by its conduct or by virtue of some unilateral act. This reflects the principle that *force majeure* should not excuse performance if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk.[1019] [359] Once a State accepts the responsibility for a particular risk it cannot then claim *force majeure* to avoid responsibility. But the assumption of risk must be unequivocal and directed towards those to whom the obligation is owed.

[1016] [356] *"Rainbow Warrior"* (footnote [40] 46 above), p. 253.

[1017] [357] On *force majeure* in the case law of the Iran-United States Claims Tribunal, see G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 306–320. *Force majeure* has also been recognized as a general principle of law by the European Court of Justice: see, *e.g.*, case 145/85, *Denkavit* v. *Belgium*, *Eur. Court H.R., Reports* 1987–2, p. 565; case 101/84, *Commission of the European Communities* v. *Italian Republic*, *ibid.*, *Reports* 1985–6, p. 2629. See also article 79 of the United Nations Convention on Contracts for the International Sale of Goods; P. Schlechtriem, ed., *Commentary on the UN Convention on the International Sale of Goods*, 2nd ed. (trans. G. Thomas) (Oxford, Clarendon Press, 1998), pp. 600–626; and article 7.1.7 of the UNIDROIT Principles, *Principles of International Commercial Contracts* (Rome, Unidroit, 1994), pp. 169–171.

[1018] [358] ILR, vol. 96 (1994), p. 318, para. 55.

[1019] [359] As the study prepared by the Secretariat (footnote [1005] 345 above), para. 31, points out, States may renounce the right to rely on *force majeure* by agreement. The most common way of doing so would be by an agreement or obligation assuming in advance the risk of the particular *force majeure* event.

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 referred to the text of draft article 31 provisionally adopted by the International Law Commission,[1020] [139] as well as to the commentary thereto, and concluded that France could not invoke the excuse of *force majeure* to preclude the wrongfulness of the removal of Major Mafart from the island of Hao for health reasons, in violation of the agreement between the Parties. Having quoted paragraph 1 of draft article 31, the tribunal stated the following:

In the light of this provision, there are several reasons for excluding the applicability of the excuse of *force majeure* in this case. As pointed out in the report of the International Law Commission, article 31 refers to "a situation facing the subject taking the action, which leads it, as it were, *despite itself*, to act in a manner not in conformity with the requirements of an international obligation incumbent on it" (*Yearbook … 1979*, vol. II, p. 122, para. 2, emphasis in the original). *Force majeure* is "generally invoked to justify *involuntary*, or at least unintentional conduct", it refers "to an irresistible force or an unforeseen external event against which it has no remedy and which makes it 'materially impossible' for it to act in conformity with the obligation", since "no person is required to do the impossible" (*ibid*., p. 123, para. 4).

The report of the International Law Commission insists on the strict meaning of article 31, in the following terms:

> the wording of paragraph 1 emphasizes, by the use of the adjective "irresistible" qualifying the word "force", that there must, in the case in point, be a constraint which the State was unable to avoid or to oppose by its own means … The event must be an act which occurs and produces its effect without the State being able to do anything which might rectify the event or might avert its consequences. The adverb "materially" preceding the word "impossible" is intended to show that, for the purposes of the article, it would not suffice for the "irresistible force" or the "unforeseen external event" to have made it *very difficult* for the State to act in conformity with the obligation … the Commission has sought to emphasize that the State must not have had any option in that regard (*Yearbook … 1979*, vol. II, p. 133, para. 40, emphasis in the original).

In conclusion, New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because

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[1020] [139] The part of this provision concerning *force majeure* was amended and incorporated in article 23 finally adopted by the International Law Commission in 2001. Draft article 31 provisionally adopted read as follows:

Article 31

Force majeure and fortuitous event

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*. Consequently, this excuse is of no relevance in the present case.[1021] 140

[A/62/62, para. 87]

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 stated that the defence by Burundi according to which it was objectively impossible for the shareholder, Libyan Arab Foreign Investment company (LAFICO), to continue to participate in the management of the Libyan Arab Republic-Burundi Holding Company (HALB)[1022] 141 was to be appraised in light of "certain circumstances precluding wrongfulness which the International Law Commission has sought to codify in its draft articles on State responsibility". The tribunal first referred to the exception of *force majeure*, and in this regard quoted in extenso draft article 31 provisionally adopted by the International Law Commission. The tribunal found that it was "not possible to apply this provision to the case … because the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi".[1023] 142

[A/62/62, para. 88]

International arbitral tribunal (under the ICSID Convention)

Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. *Bolivarian Republic of Venezuela*

In its 2003 award, the arbitral tribunal constituted to hear the *Aucoven* v. *Venezuela* case, in examining whether Venezuela's failure to increase the toll rates (as provided by the relevant concession agreement) was excused by the civil unrest existing in the country in 1997, considered that *force majeure* was "a valid excuse for the non-performance of a contractual obligation in both Venezuelan and international law".[1024] 143 It then referred, *inter alia*, to the International Law Commission articles on State responsibility in general (and implicitly to article 23 finally adopted in 2001) to support its finding that international law did not impose a standard which would displace the application of Venezuela's national law referring to *force majeure*:

… the Arbitral Tribunal is not satisfied that international law imposes a different standard which would be called to displace the application of national law. The Tribunal reaches this conclusion on the basis of a review of the decisions issued under international law to which the parties have referred (see in particular *General Dynamics Telephone Sys. Ctr.* v. *The Islamic Republic of Iran*,

[1021] 140 See footnote [40] 46 above, pp. 252–253.

[1022] 141 In this case, LAFICO had contended that the expulsion from Burundi of Libyan managers of HALB and one of its subsidiaries, and the prohibition against LAFICO carrying out any activities in Burundi constituted an infringement by Burundi of its shareholder rights and had prevented HALB from realizing its objectives (*i.e.* to invest in companies operating within certain sectors of the Burundi economy), thereby violating *inter alia* the 1973 Technical and Economic Cooperation Agreement between the Libyan Arab Republic and the Republic of Burundi.

[1023] 142 See footnote [824] 127, para. 55 (English version in: *International Law Reports*, vol. 96, p. 318).

[1024] 143 ICSID, Case No. ARB/00/5, Award, 23 September 2003, para. 108.

Award No. 192–285–2 (4 Oct. 1985), 9 Iran-U.S. Cl. Trib. Rep. 153, 160, Resp. Auth. 18. See also *Gould Marketing, Inc.* v. *Ministry of Defense of Iran*, Award No. ITL 24–49–2 (27 July 1983), 3 Iran-US Cl. Trib. Rep. 147, Cl. Auth. 23, and *Sylvania Tech. Sys., Inc.* v. *Iran*, Award No. 180–64–1 (27 June 1985), 8 Iran-U.S. Cl. Trib. Rep. 298, Cl. Auth. 32.), as well as on the basis of the draft articles on State Responsibility of the International Law Commission, and the legal arguments of the parties.[1025] 144

[A/62/62, para. 89]

Sempra Energy International v. Argentine Republic

In its 2007 award, the arbitral tribunal constituted to hear the *Sempra Energy International* v. *Argentina* case, which arose under the 1991 bilateral investment treaty between the United States and Argentina, was faced with a claim arising out of changes in the regulatory framework for private investments made in the wake of the economic crisis in Argentina in the late 1990s. The tribunal was presented, *inter alia*, with an argument on the part of the respondent that "the theory of 'imprévision' has been incorporated into Argentine law", to which the tribunal responded:

Insofar as the theory of 'imprévision' is expressed in the concept of *force majeure*, this other concept requires, under Article 23 of the Articles on State Responsibility, that the situation involve the occurrence of an irresistible force, beyond the control of the State, making it materially impossible under the circumstances to perform the obligation. In the commentary to this article, it is stated that '[*f*]*orce majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis'.[1026] 25

[A/65/76, para. 25]

Ad hoc committee (under the ICSID Convention)

Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. *The Argentine Republic*

In *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P.* v. *The Argentine Republic*, the *ad hoc* committee upheld the arbitral tribunal's rejection of the applicability of the principle of "*imprevisión*" under Argentine law, as well as the tribunal's comparison with article 23 of the State responsibility articles, made in support of its decision, to the extent that "the theory of 'imprevisión' is expressed in the concept of *force majeure*".[1027] 122

[A/68/72, para. 89]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct

[1025] 144 *Ibid.*, para. 123.

[1026] 25 ICSID, Case No. ARB/02/16, Award, 28 September 2007, para. 246.

[1027] 122 ICSID, Case No. ARB/01/13, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 287.

of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness”.[1028] [82]

[A/77/74, p. 17]]

International arbitral tribunal (under the ICSID Convention)

(DS)2, S.A., Peter de Sutter and Kristof de Sutter v. *Republic of Madagascar*

The arbitral tribunal in *(DS)2, S.A., Peter de Sutter and Kristof de Sutter* v. *Republic of Madagascar* cited article 23, indicating that “under the law, *force majeure* occurs when a wrongful act is due to ‘the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation’.”[1029] [108] However, the tribunal concluded that in the facts of the case, there was nothing to indicate that it had been materially impossible for the State to perform its obligation.

[A/77/74, p. 21]

[1028] [[82] See footnote [126] 14 above, para. 155.]

[1029] [108] ICSID, Case No. ARB/17/18, Award, 17 April 2020, para. 347.

Article 24. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the act in question is likely to create a comparable or greater peril.

Commentary

(1) Article 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. The article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life. Unlike situations of *force majeure* dealt with in article 23, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril.[1030] [360] Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterize situations of necessity under article 25. The interest concerned is the immediate one of saving people's lives, irrespective of their nationality.

(2) In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.[1031] [361] An example is the entry of United States military aircraft into Yugoslavia's airspace in 1946. On two occasions, United States military aircraft entered Yugoslav airspace without authorization and were attacked by Yugoslav air defences. The United States Government protested the Yugoslav action on the basis that the aircraft had entered Yugoslav airspace solely in order to escape extreme danger. The Yugoslav Government responded by denouncing the systematic violation of its airspace, which it claimed could only be intentional in view of its frequency. A later note from the Yugoslav chargé d'affaires informed the United States Department of State that Marshal Tito had forbidden any firing on aircraft which flew over Yugoslav territory without authorization, presuming that, for its part, the United States Government "would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities".[1032] [362] The reply of the United States Acting Secretary of State reiterated the assertion that no United States planes had flown over Yugoslavia intentionally without prior authorization from Yugoslav authorities "unless forced to do so in an emergency". However, the Acting Secretary of State added:

[1030] [360] For this reason, writers who have considered this situation have often defined it as one of "relative impossibility" of complying with the international obligation. See, *e.g.*, O. J. Lissitzyn, "The treatment of aerial intruders in recent practice and international law", AJIL, vol. 47, No. 4 (October 1953), p. 588.

[1031] [361] See the study prepared by the Secretariat (footnote [1005] 345 above), paras. 141–142 and 252.

[1032] [362] United States of America, *Department of State Bulletin* (footnote [1011] 351 above), reproduced in the study prepared by the Secretariat (footnote [1005] 345 above), para. 144.

I presume that the Government of Yugoslavia recognizes that *in case a plane and its occupants are jeopardized, the aircraft may change its course so as to seek safety, even though such action may result in flying over Yugoslav territory without prior clearance*.[1033] 363

(3) Claims of distress have also been made in cases of violation of maritime boundaries. For example, in December 1975, after British naval vessels entered Icelandic territorial waters, the British Government claimed that the vessels in question had done so in search of "shelter from severe weather, as they have the right to do under customary international law".[1034] 364 Iceland maintained that British vessels were in its waters for the sole purpose of provoking an incident, but did not contest the point that if the British vessels had been in a situation of distress, they could enter Icelandic territorial waters.

(4) Although historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases.[1035] 365 The *"Rainbow Warrior"* arbitration involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft. France sought to justify its conduct in removing the two officers from the island of Hao on the ground of "circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State".[1036] 366 The tribunal unanimously accepted that this plea was admissible in principle, and by majority that it was applicable to the facts of one of the two cases. As to the principle, the tribunal required France to show three things:

(1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.

(2) The reestablishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.

(3) The existence of a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.[1037] 367

In fact the danger to one of the officers, though perhaps not life-threatening, was real and might have been imminent, and it was not denied by the New Zealand physician who subsequently examined him. By contrast, in the case of the second officer, the justifications given (the need for medical examination on grounds of pregnancy and the desire to see a dying father) did not justify emergency action. The lives of the agent and the child were at no stage threatened and there were excellent medical facilities nearby. The tribunal held that:

[1033] 363 Study prepared by the Secretariat (footnote [1005] 345 above), para. 145. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to ICJ in relation to another aerial incident (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 358–359).

[1034] 364 *Official Records of the Security Council, Thirtieth Year*, 1866th meeting, 16 December 1975, para. 24; see the study prepared by the Secretariat (footnote [1005] 345 above), para. 136.

[1035] 365 There have also been cases involving the violation of a land frontier in order to save the life of a person in danger. See, *e.g.*, the case of violation of the Austrian border by Italian soldiers in 1862, study prepared by the Secretariat (footnote [1005] 345 above), para. 121.

[1036] 366 *"Rainbow Warrior"* (footnote [40] 46 above), pp. 254–255, para. 78.

[1037] 367 *Ibid*., p. 255, para. 79.

[C]learly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations.[1038] 368

(5) The plea of distress is also accepted in many treaties as a circumstance justifying conduct which would otherwise be wrongful. Article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone permits stopping and anchoring by ships during their passage through foreign territorial seas insofar as this conduct is rendered necessary by distress. This provision is repeated in much the same terms in article 18, paragraph 2, of the United Nations Convention on the Law of the Sea.[1039] 369 Similar provisions appear in the international conventions on the prevention of pollution at sea.[1040] 370

(6) Article 24 is limited to cases where human life is at stake. The tribunal in the *"Rainbow Warrior"* arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice. The problem with extending article 24 to less than life-threatening situations is where to place any lower limit. In situations of distress involving aircraft there will usually be no difficulty in establishing that there is a threat to life, but other cases present a wide range of possibilities. Given the context of chapter V and the likelihood that there will be other solutions available for cases which are not apparently life-threatening, it does not seem necessary to extend the scope of distress beyond threats to life itself. In situations in which a State agent is in distress and has to act to save lives, there should however be a certain degree of flexibility in the assessment of the conditions of distress. The "no other reasonable way" criterion in article 24 seeks to strike a balance between the desire to provide some flexibility regarding the choices of action by the agent in saving lives and need to confine the scope of the plea having regard to its exceptional character.

(7) Distress may only be invoked as a circumstance precluding wrongfulness in cases where a State agent has acted to save his or her own life or where there exists a special relationship between the State organ or agent and the persons in danger. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.

(8) Article 24 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening situation. Thus, it does not exempt the State or its agent from complying with other requirements (national or international), *e.g.* the requirement to notify

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[1038] 368 *Ibid*., p. 263, para. 99.

[1039] 369 See also articles 39, paragraph 1 (*c*), 98 and 109, of the Convention.

[1040] 370 See, *e.g.*, the International Convention for the Prevention of Pollution of the Sea by Oil, article IV, paragraph 1 (*a*), of which provides that the prohibition on the discharge of oil into the sea does not apply if the discharge takes place "for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea". See also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, article V, paragraph 1, of which provides that the prohibition on dumping of wastes does not apply when it is "necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea … in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat." See also the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (art. 8, para. 1); and the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention), annex I, regulation 11 (*a*).

arrival to the relevant authorities, or to give relevant information about the voyage, the passengers or the cargo.[1041] 371

(9) As in the case of *force majeure*, a situation which has been caused or induced by the invoking State is not one of distress. In many cases the State invoking distress may well have contributed, even if indirectly, to the situation. Priority should be given to necessary life-saving measures, however, and under paragraph 2 (*a*), distress is only excluded if the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it. This is the same formula as that adopted in respect of article 23, paragraph 2 (*a*).[1042] 372

(10) Distress can only preclude wrongfulness where the interests sought to be protected (*e.g.* the lives of passengers or crew) clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress. For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious breakdown might cause radioactive contamination to a port in which it sought refuge. Paragraph 2 (*b*) stipulates that distress does not apply if the act in question is likely to create a comparable or greater peril. This is consistent with paragraph 1, which in asking whether the agent had "no other reasonable way" to save life establishes an objective test. The words "comparable or greater peril" must be assessed in the context of the overall purpose of saving lives.

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 referred to draft article 32 provisionally adopted by the International Law Commission,[1043] 145 as well as to the

[1041] 371 See *Cashin and Lewis* v. *The King*, *Canada Law Reports* (1935), p. 103 (even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). See also the *"Rebecca"*, Mexico-United States General Claims Commission, AJIL, vol. 23, No. 4 (October 1929), p. 860 (vessel entered port in distress; merchandise seized for customs offence: held, entry reasonably necessary in the circumstances and not a mere matter of convenience; seizure therefore unlawful); the *"May"* v. *The King*, *Canada Law Reports* (1931), p. 374; the *"Queen City"* v. *The King*, *ibid*., p. 387; and *Rex* v. *Flahaut*, *Dominion Law Reports* (1935), p. 685 (test of "real and irresistible distress" applied).

[1042] 372 See paragraph (9) of the commentary to article 23.

[1043] 145 This provision was amended and incorporated in article 24 finally adopted by the International Law Commission in 2001. Draft article 32 provisionally adopted read as follows:

Article 32
Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of

commentary thereto, to determine whether the wrongfulness of France's behaviour could be excluded on the basis of distress. The tribunal also clarified, in this context, the difference between this ground of justification and, first, that of *force majeure*, and, second, that of state of necessity, dealt with under draft article 33 provisionally adopted by the Commission:[1044] 146

Article 32 of the articles drafted by the International Law Commission deals with another circumstance which may preclude wrongfulness in international law, namely, that of the 'distress' of the author of the conduct which constitutes the act of State whose wrongfulness is in question.

…

The commentary of the International Law Commission explains that '"distress" means a situation of extreme peril in which the organ of the State which adopts that conduct has, at that particular moment, no means of saving himself or persons entrusted to his care other than to act in a manner not in conformity with the requirements of the obligation in question' (*Yearbook … 1979*, p. 133, para. 1).

The report adds that in international practice distress, as a circumstance capable of precluding the wrongfulness of an otherwise wrongful act of the State, 'has been invoked and recognized primarily in cases involving the violation of a frontier of another State, particularly its airspace and its sea—for example, when the captain of a State vessel in distress seeks refuge from storm in a foreign port without authorization, or when the pilot of a State aircraft lands without authorization on foreign soil to avoid an otherwise inevitable disaster' (*ibid*., p. 134, para. 4). Yet the Commission found that 'the ratio of the actual principle suggests that it is applicable, if only by analogy, to other comparable cases' (*ibid*., p. 135, para. 8).

The report points out the difference between this ground for precluding wrongfulness and that of *force majeure*: 'in these circumstances, the State organ admittedly has a choice, even if it is only between conduct not in conformity with an international obligation and conduct which is in conformity with the obligation but involves a sacrifice that it is unreasonable to demand' (*Yearbook … 1979*, p. 122, para. 3). But 'this choice is not a "real choice" or "free choice" as to the decision to be taken, since the person acting on behalf of the State knows that if he adopts the conduct required by the international obligation, he, and the persons entrusted to his care, will almost inevitably perish. In such circumstances, the "possibility" of acting in conformity with the international obligation is therefore only apparent. In practice it is nullified by the situation of extreme peril which, as we have just said, characterizes situations of distress' (*Yearbook … 1979*, p. 133, para. 2).

The report adds that the situation of distress 'may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned. The protection of something other than life, particularly where the physical integrity of a person is still involved, may admittedly represent an interest that is capable of severely restricting an individual's freedom of decision and induce him to act in a manner that is justifiable, although not in conformity with an international obligation of the State' (*Yearbook … 1979*, p. 135, para. 10). Thus, this circumstance may also apply to safeguard other essential rights of human beings such as the physical integrity of a person.

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that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril. (*Yearbook … 1980*, vol. II (Part Two), para. 34.)

[1044] 146 This provision was amended and incorporated in article 25 finally adopted in 2001. The text of that provision was identical to that of draft article 33 adopted on first reading (see *Yearbook … 1996*, vol. II (Part Two), para. 65) and is contained in the passage of the judgement of the ICJ in the *Gabčíkovo-Nagymaros Project* case reproduced [on pp. 278–280] below.

The report also distinguishes with precision the ground of justification of article 32 from the controversial doctrine of the state of necessity dealt with in article 33. Under article 32, on distress, what is 'involved is situations of necessity' with respect to the actual person of the State organs or of persons entrusted to his care, 'and not any real "necessity" of the State'.

On the other hand, article 33, which allegedly authorizes a State to take unlawful action invoking a state of necessity, refers to situations of grave and imminent danger to the State as such and to its vital interests.

This distinction between the two grounds justifies the general acceptance of article 32 and at the same time the controversial character of the proposal in article 33 on state of necessity.

It has been stated in this connection that there is no general principle allowing the defence of necessity. There are particular rules of international law making allowance for varying degrees of necessity, but these cases have a meaning and a scope entirely outside the traditional doctrine of state of necessity. Thus, for instance, vessels in distress are allowed to seek refuge in a foreign port, even if it is closed … in the case of famine in a country, a foreign ship proceeding to another port may be detained and its cargo expropriated … In these cases—in which adequate compensation must be paid—it is not the doctrine of the state of necessity which provides the foundation of the particular rules, but humanitarian considerations, which do not apply to the State as a body politic but are designed to protect essential rights of human beings in a situation of distress. (*Manual of Public International Law*, ed. Soerensen, p. 543.)

The question therefore is to determine whether the circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State may exclude wrongfulness in this case.[1045] 147

The arbitral tribunal then examined France's behaviour in accordance with these legal considerations. It concluded that

the circumstances of distress, of extreme urgency and the humanitarian considerations invoked by France may have been circumstances excluding responsibility for the unilateral removal of Major Mafart [from the island of Hao] without obtaining New Zealand's consent [as provided for by the agreement between the Parties], but clearly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared).[1046] 148

[A/62/62, para. 90]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[1047] 82

[A/77/74, p. 17]]

[1045] 147 See footnote [40] 46 above.

[1046] 148 *Ibid*., p. 263, para. 99.

[1047] [82 See footnote [126] 14 above, para. 155.]

International arbitral tribunal (under the ICSID Convention)

(DS)2, S.A., Peter de Sutter and Kristof de Sutter v. *Republic of Madagascar*

In *(DS)2, S.A., Peter de Sutter and Kristof de Sutter* v. *Republic of Madagascar*, the arbitral tribunal quoted article 24, noting that, in a situation of distress, "the author of a wrongful act … 'has no other reasonable way … of saving the author's life or the lives of other persons entrusted to the author's care.' Again, as already indicated, it is not clear how inaction by law enforcement could have been the only way to save lives".[1048] [109]

[A/77/74, p. 21]

[1048] [109] [ICSID, Case No. ARB/17/18, Award, 17 April 2020], para. 349.

Article 25. Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(*a*) the international obligation in question excludes the possibility of invoking necessity; or

(*b*) the State has contributed to the situation of necessity.

Commentary

(1) The term "necessity" (*état de nécessité*) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.

(2) The plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.[1049][373]

(3) There is substantial authority in support of the existence of necessity as a circumstance precluding wrongfulness. It has been invoked by States and has been dealt with by a number of international tribunals. In these cases the plea of necessity has been accepted in principle, or at least not rejected.

(4) In an Anglo-Portuguese dispute of 1832, the Portuguese Government argued that the pressing necessity of providing for the subsistence of certain contingents of troops engaged

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[1049] [373] Perhaps the classic case of such an abuse was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of necessity. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs, in J. B. Scott, ed., *Diplomatic Documents relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), part I, pp. 749–750, and the speech in the Reichstag by the German Chancellor von Bethmann-Hollweg, on 4 August 1914, containing the well-known words: *wir sind jetzt in der Notwehr; und Not kennt kein Gebot!* (we are in a state of self-defence and necessity knows no law), *Jahrbuch des Völkerrechts*, vol. III (1916), p. 728.

in quelling internal disturbances had justified its appropriation of property owned by British subjects, notwithstanding a treaty stipulation. The British Government was advised that:

the Treaties between this Country and Portugal are [not] of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.

The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.[1050] [374]

(5) The *"Caroline"* incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has at present. In that case, British armed forces entered United States territory and attacked and destroyed a vessel owned by United States citizens which was carrying recruits and military and other material to Canadian insurgents. In response to the protests by the United States, the British Minister in Washington, Fox, referred to the "necessity of self-defence and self-preservation"; the same point was made by counsel consulted by the British Government, who stated that "the conduct of the British Authorities" was justified because it was "absolutely necessary as a measure of precaution".[1051][375] Secretary of State Webster replied to Minister Fox that "nothing less than a clear and absolute necessity can afford ground of justification" for the commission "of hostile acts within the territory of a Power at Peace", and observed that the British Government must prove that the action of its forces had really been caused by "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[1052] [376] In his message to Congress of 7 December 1841, President Tyler reiterated that:

This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government."[1053] [377]

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed that "a strong overpowering necessity may arise when this great principle may and must be suspended". "It must be so", added Lord Ashburton, the British Government's *ad hoc* envoy to Washington, "for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity."[1054] [378]

[1050] [374] Lord McNair, ed., *International Law Opinions* (Cambridge University Press, 1956), vol. II, *Peace*, p. 232.

[1051] [375] See respectively W. R. Manning, ed., *Diplomatic Correspondence of the United States: Canadian Relations 1784–1860* (Washington, D. C., Carnegie Endowment for International Peace, 1943), vol. III, p. 422; and Lord McNair, ed., *International Law Opinions* (footnote [1050] 374 above), p. 221, at p. 228.

[1052] [376] *British and Foreign State Papers, 1840–1841* (London, Ridgway, 1857), vol. 29, p. 1129.

[1053] [377] *Ibid.*, 1841–1842, vol. 30, p. 194.

[1054] [378] *Ibid.*, p. 195. See Secretary of State Webster's reply on page 201.

(6) In the *Russian Fur Seals* controversy of 1893, the "essential interest" to be safeguarded against a "grave and imminent peril" was the natural environment in an area not subject to the jurisdiction of any State or to any international regulation. Facing the danger of extermination of a fur seal population by unrestricted hunting, the Russian Government issued a decree prohibiting sealing in an area of the high seas. In a letter to the British Ambassador dated 12 February (24 February) 1893, the Russian Minister for Foreign Affairs explained that the action had been taken because of the "absolute necessity of immediate provisional measures" in view of the imminence of the hunting season. He "emphasize[d] the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances"[1055] 379 and declared his willingness to conclude an agreement with the British Government with a view to a longer-term settlement of the question of sealing in the area.

(7) In the *Russian Indemnity* case, the Government of the Ottoman Empire, to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which it described as "*force majeure*" but which was more like a state of necessity. The arbitral tribunal accepted the plea in principle:

> *The exception of force majeure*, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits … that the obligation for a State to execute treaties may be weakened "if the very existence of the State is endangered, if observation of the international duty is … *self-destructive*".[1056] 380

It considered, however, that:

> It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation.[1057] 381

In its view, compliance with an international obligation must be "self-destructive" for the wrongfulness of the conduct not in conformity with the obligation to be precluded.[1058] 382

(8) In *Société commerciale de Belgique*,[1059] 383 the Greek Government owed money to a Belgian company under two arbitral awards. Belgium applied to PCIJ for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its inter-

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[1055] 379 *Ibid*., *1893–1894* (London, H. M. Stationery Office, 1899), vol. 86, p. 220; and the study prepared by the Secretariat (footnote [1005] 345 above), para. 155.

[1056] 380 See footnote [1014] 354 above; see also the study prepared by the Secretariat (footnote [1005] 345 above), para. 394.

[1057] 381 *Ibid*.

[1058] 382 A case in which the parties to the dispute agreed that very serious financial difficulties could justify a different mode of discharging the obligation other than that originally provided for arose in connection with the enforcement of the arbitral award in *Forests of Central Rhodopia*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405 (1933); see League of Nations, *Official Journal*, 15th Year, No. 11 (part I) (November 1934), p. 1432.

[1059] 383 *Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78,* p. 160.

national obligations. The Greek Government pleaded the country's serious budgetary and monetary situation.[1060] 384 The Court noted that it was not within its mandate to declare whether the Greek Government was justified in not executing the arbitral awards. However, the Court implicitly accepted the basic principle, on which the two parties were in agreement.[1061] 385

(9) In March 1967 the Liberian oil tanker *Torrey Canyon* went aground on submerged rocks off the coast of Cornwall outside British territorial waters, spilling large amounts of oil which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully. The British Government did not advance any legal justification for its conduct, but stressed the existence of a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed.[1062] 386 No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution.[1063] 387

(10) In the *"Rainbow Warrior"* arbitration, the arbitral tribunal expressed doubt as to the existence of the excuse of necessity. It noted that the Commission's draft article "allegedly authorizes a State to take unlawful action invoking a state of necessity" and described the Commission's proposal as "controversial".[1064] 388

(11) By contrast, in the *Gabčíkovo-Nagymaros Project* case, ICJ carefully considered an argument based on the Commission's draft article (now article 25), expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the principle itself, the Court noted that the parties had both relied on the Commission's draft article as an appropriate formulation, and continued:

> The Court considers … that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words …

[1060] 384 *P.C.I.J., Series C, No. 87*, pp. 141 and 190; study prepared by the Secretariat (footnote [1005] 345 above), para. 278. See generally paragraphs 276–287 for the Greek arguments relative to the state of necessity.

[1061] 385 See footnote [1059] 383 above; and the study prepared by the Secretariat (footnote [1005] 345 above), para. 288. See also the *Serbian Loans* case, where the positions of the parties and the Court on the point were very similar (footnote [1015] 355 above); the *French Company of Venezuelan Railroads* case (footnote [692] 178 above) p. 353; and the study prepared by the Secretariat (footnote [1005] 345 above), paras. 263–268 and 385–386. In his separate opinion in the *Oscar Chinn* case, Judge Anzilotti accepted the principle that "necessity may excuse the non-observance of international obligations", but denied its applicability on the facts (*Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65, at pp. 112–114).

[1062] 386 *The "Torrey Canyon"*, Cmnd. 3246 (London, H. M. Stationery Office, 1967).

[1063] 387 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

[1064] 388 *"Rainbow Warrior"* (footnote [40] 46 above), p. 254. In *Libyan Arab Foreign Investment Company and The Republic of Burundi* (footnote [1018] 358 above), p. 319, the tribunal declined to comment on the appropriateness of codifying the doctrine of necessity, noting that the measures taken by Burundi did not appear to have been the only means of safeguarding an essential interest "against a grave and imminent peril".

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

… In the present case, the following basic conditions … are relevant: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law. [1065] 389

(12) The plea of necessity was apparently an issue in the *Fisheries Jurisdiction* case.[1066] 390 Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization (NAFO) but had, in Canada's opinion, proved ineffective for various reasons. By the Coastal Fisheries Protection Act 1994, Canada declared that the straddling stocks of the Grand Banks were "threatened with extinction", and asserted that the purpose of the Act and regulations was "to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding". Canadian officials subsequently boarded and seized a Spanish fishing ship, the *Estai*, on the high seas, leading to a conflict with the European Union and with Spain. The Spanish Government denied that the arrest could be justified by concerns as to conservation "since it violates the established provisions of the NAFO Convention [Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries] to which Canada is a party".[1067] 391 Canada disagreed, asserting that "the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen".[1068] 392 The Court held that it had no jurisdiction over the case.[1069] 393

(13) The existence and limits of a plea of necessity have given rise to a long-standing controversy among writers. It was for the most part explicitly accepted by the early writers,

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[1065] 389 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), pp. 40–41, paras. 51–52.

[1066] 390 *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432.

[1067] 391 *Ibid*., p. 443, para. 20. For the European Community protest of 10 March 1995, asserting that the arrest "cannot be justified by any means", see Memorial of Spain (Jurisdiction of the Court), *I.C.J. Pleadings, Fisheries Jurisdiction (Spain* v. *Canada)*, p. 17, at p. 38, para. 15.

[1068] 392 *Fisheries Jurisdiction* (footnote [1066] 390 above), p. 443, para. 20. See also the Canadian Counter-Memorial (29 February 1996), *I.C.J. Pleadings* (footnote [1067] 391 above), paras. 17–45.

[1069] 393 By an Agreed Minute between Canada and the European Community, Canada undertook to repeal the regulations applying the 1994 Act to Spanish and Portuguese vessels in the NAFO area and to release the *Estai*. The parties expressly maintained "their respective positions on the conformity of the amendment of 25 May 1994 to Canada's Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention" and reserved "their ability to preserve and defend their rights in conformity with international law". See Canada-European Community: Agreed Minute on the Conservation and Management of Fish Stocks (Brussels, 20 April 1995), ILM, vol. 34, No. 5 (September 1995), p. 1260. See also the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

subject to strict conditions.[1070] 394 In the nineteenth century, abuses of necessity associated with the idea of "fundamental rights of States" led to a reaction against the doctrine. During the twentieth century, the number of writers opposed to the concept of state of necessity in international law increased, but the balance of doctrine has continued to favour the existence of the plea.[1071] 395

(14) On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25. The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin.[1072] 396 It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population. But stringent conditions are imposed before any such plea is allowed. This is reflected in article 25. In particular, to emphasize the exceptional nature of necessity and concerns about its possible abuse, article 25 is cast in negative language ("Necessity may not be invoked … unless").[1073] 397 In this respect it mirrors the language of article 62 of the 1969 Vienna Convention dealing with fundamental change of circumstances. It also mirrors that language in establishing, in paragraph 1, two conditions without which necessity may not be invoked and excluding, in paragraph 2, two situations entirely from the scope of the excuse of necessity.[1074] 398

(15) The first condition, set out in paragraph 1 (*a*), is that necessity may only be invoked to safeguard an essential interest from a grave and imminent peril. The extent to which a given interest is "essential" depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole. Whatever the interest may be, however, it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave,

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[1070] 394 See B. Ayala, *De jure et officiis bellicis et disciplina militari, libri tres* (1582) (Washington, D. C., Carnegie Institution, 1912), vol. II, p. 135; A. Gentili, *De iure belli, libri tres* (1612) (Oxford, Clarendon Press, 1933), vol. II, p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646) (Oxford, Clarendon Press, 1925), vol. II, pp. 193 *et seq.*; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688) (Oxford, Clarendon Press, 1934), vol. II, pp. 295–296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764) (Oxford, Clarendon Press, 1934), pp. 173–174; and E. de Vattel, *The Law of Nations or the Principles of Natural Law* (1758) (Washington, D. C., Carnegie Institution, 1916), vol. III, p. 149.

[1071] 395 For a review of the earlier doctrine, see *Yearbook … 1980*, vol. II (Part Two), pp. 47–49; see also P. A. Pillitu, *Lo stato di necessità nel diritto internazionale* (University of Perugia/Editrice Licosa, 1981); J. Barboza, "Necessity (revisited) in international law", *Essays in International Law in Honour of Judge Manfred Lachs*, J. Makarczyk, ed. (The Hague, Martinus Nijhoff, 1984), p. 27; and R. Boed, "State of necessity as a justification for internationally wrongful conduct", *Yale Human Rights and Development Law Journal*, vol. 3 (2000), p. 1.

[1072] 396 Generally on the irrelevance of the source of the obligation breached, see article 12 and commentary.

[1073] 397 This negative formulation was referred to by ICJ in the *Gabčíkovo-Nagymaros Project* case (footnote [31] 37 above), p. 40, para. 51.

[1074] 398 A further exclusion, common to all the circumstances precluding wrongfulness, concerns peremptory norms (see article 26 and commentary).

the peril has to be imminent in the sense of proximate. However, as the Court in the *Gabčíkovo-Nagymaros Project* case said:

> That does not exclude … that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.[1075] [399]

Moreover, the course of action taken must be the "only way" available to safeguard that interest. The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient. Thus, in the *Gabčíkovo-Nagymaros Project* case, the Court was not convinced that the unilateral suspension and abandonment of the Project was the only course open in the circumstances, having regard in particular to the amount of work already done and the money expended on it, and the possibility of remedying any problems by other means.[1076] [400] The word "ways" in paragraph 1 (*a*) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations (for example, conservation measures for a fishery taken through the competent regional fisheries agency). Moreover, the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered.

(16) It is not sufficient for the purposes of paragraph 1 (*a*) that the peril is merely apprehended or contingent. It is true that in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be issues of scientific uncertainty and different views may be taken by informed experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances. By definition, in cases of necessity the peril will not yet have occurred. In the *Gabčíkovo-Nagymaros Project* case the Court noted that the invoking State could not be the sole judge of the necessity,[1077] [401] but a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.

(17) The second condition for invoking necessity, set out in paragraph 1 (*b*), is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as a whole (see paragraph (18) below). In other words, the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.[1078] [402]

(18) As a matter of terminology, it is sufficient to use the phrase "international community as a whole" rather than "international community of States as a whole", which is used in the specific context of article 53 of the 1969 Vienna Convention. The insertion of the words "of States" in article 53 of the Convention was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of

[1075] [399] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 42, para. 54.

[1076] [400] *Ibid.,* pp. 42–43, para. 55.

[1077] [401] *Ibid*., p. 40, para. 51.

[1078] [402] In the *Gabčíkovo-Nagymaros Project* case ICJ affirmed the need to take into account any countervailing interest of the other State concerned (footnote [31] 37 above), p. 46, para. 58.

norms of a peremptory character. On the other hand, ICJ used the phrase "international community as a whole" in the *Barcelona Traction* case,[1079] 403 and it is frequently used in treaties and other international instruments in the same sense as in paragraph 1(*b*).[1080] 404

(19) Over and above the conditions in paragraph 1, paragraph 2 lays down two general limits to any invocation of necessity. This is made clear by the use of the words "in any case". Paragraph 2 (*a*) concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus, certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.

(20) According to paragraph 2 (*b*), necessity may not be relied on if the responsible State has contributed to the situation of necessity. Thus in the *Gabčíkovo-Nagymaros Project* case, ICJ considered that because Hungary had "helped, by act or omission to bring about" the situation of alleged necessity, it could not then rely on that situation as a circumstance precluding wrongfulness.[1081] 405 For a plea of necessity to be precluded under paragraph 2 (*b*), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral. Paragraph 2 (*b*) is phrased in more categorical terms than articles 23, paragraph 2 (*a*), and 24, paragraph 2 (*a*), because necessity needs to be more narrowly confined.

(21) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of "military necessity". It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention.[1082] 406 The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25.[1083] 407

[1079] 403 *Barcelona Traction* (footnote [46] 52 above), p. 32, para. 33.

[1080] 404 See, *e.g.*, third preambular paragraph of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; fourth preambular paragraph of the International Convention Against the Taking of Hostages,; fifth preambular paragraph of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; third preambular paragraph of the Convention on the Safety of United Nations and Associated Personnel; tenth preambular paragraph of the International Convention for the Suppression of Terrorist Bombings; ninth preambular paragraph of the Rome Statute of the International Criminal Court; and ninth preambular paragraph of the International Convention for the Suppression of the Financing of Terrorism.

[1081] 405 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 46, para. 57.

[1082] 406 For example, in 1960 Belgium invoked necessity to justify its military intervention in the Congo. The matter was discussed in the Security Council but not in terms of the plea of necessity as such. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, paras. 144, 182 and 192; 877th meeting, 20–21 July 1960, paras. 31 *et seq.* and para. 142; 878th meeting, 21 July 1960, paras. 23 and 65; 879th meeting, 21–22 July 1960, paras. 80 *et seq.* and paras. 118 and 151. For the *"Caroline"* incident, see above, paragraph (5).

[1083] 407 See also article 26 and commentary for the general exclusion of the scope of circumstances precluding wrongfulness of conduct in breach of a peremptory norm.

The same thing is true of the doctrine of "military necessity" which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law.[1084] 408 In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.[1085] 409

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

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 stated that the defence by Burundi according to which it was objectively impossible for the shareholder LAFICO to continue to participate in the management of the Libyan Arab Republic-Burundi Holding Company (HALB)[1086] 149 was to be appraised in light of "certain circumstances precluding wrongfulness which the International Law Commission has sought to codify in its draft articles on State responsibility".[1087] 150 The tribunal, after excluding the exception of *force majeure*, then considered "whether it [was] possible to apply the notion of 'state of necessity' elaborated in article 33 of the draft articles", as provisionally adopted by the International Law Commission. After having quoted in extenso the said provision, the tribunal stated:

> It is not desired here to express a view on the appropriateness of seeking to codify rules on "state of necessity" and the adequacy of the concrete proposals made by the International Law Commission, which has been a matter of debate in the doctrine.[1088] 151

[1084] 408 See, *e.g.*, article 23 (*g*) of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907), which prohibits the destruction of enemy property "unless such destruction or seizure be imperatively demanded by the necessities of war". Similarly, article 54, paragraph 5, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), appears to permit attacks on objects indispensable to the survival of the civilian population if "imperative military necessity" so requires.

[1085] 409 See, *e.g.*, M. Huber, "Die Kriegsrechtlichen Verträge und die Kriegsraison", *Zeitschrift für Völkerrecht*, vol. VII (1913), p. 351; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, p. 207; C. De Visscher, "Les lois de la guerre et la théorie de la nécessité", RGDIP, vol. 24 (1917), p. 74; N. C. H. Dunbar, "Military necessity in war crimes trials", BYBIL, *1952*, vol. 29, p. 442; C. Greenwood, "Historical development and legal basis", *The Handbook of Humanitarian Law in Armed Conflicts*, D. Fleck, ed. (Oxford University Press, 1995), p. 1, at pp. 30–33; and Y. Dinstein, "Military necessity", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 1997), vol. 3, pp. 395–397.

[1086] 149 See footnote [1023] 142 above.

[1087] 150 See footnote [824] 127 above, para. 55.

[1088] 151 *Ibid*., p. 319, para. 56.

The tribunal found that "the various measures taken by [Burundi] against the rights of the shareholder LAFICO [did] not appear to the Tribunal to have been the only means of safeguarding an essential interest of Burundi against a grave and imminent peril".[1089] 152

[A/62/62, para. 91]

International Court of Justice

Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

In its 1997 judgment in the *Gabčíkovo-Nagymaros Project* case, the Court examined "the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments".[1090] 153 In this respect, relying on draft article 33 (State of necessity) as adopted by the International Law Commission on first reading, which it quoted, it considered that "the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation":

50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in article 33 of the draft articles on the international responsibility of States that it adopted on first reading. That provision is worded as follows:

Article 33. State of necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(*a*) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(*b*) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(*a*) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(*b*) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(*c*) if the State in question has contributed to the occurrence of the state of necessity. (*Yearbook of the International Law Commission, 1980*, vol. II, Part Two, p. 34.)

[1089] 152 *Ibid.*

[1090] 153 ICJ, Judgment, *I.C.J. Reports 1997*, p. 39, para. 49.

In its Commentary, the Commission defined the 'state of necessity' as being

> 'the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State' (*ibid*., para. 1).

It concluded that 'the notion of state of necessity is … deeply rooted in general legal thinking' (*ibid*., p. 49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in article 33 of its draft

> 'in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception—and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness … ' (*ibid*., p. 51, para. 40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.[1091] 154

The Court later referred to the commentary by the International Law Commission when examining the meaning given to some terms used in the said draft provision. With regard to the expression "essential interest", the Court noted:

The Commission, in its Commentary, indicated that one should not, in that context, reduce an 'essential interest' to a matter only of the 'existence' of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see *Yearbook of the International Law Commission*, *1980*, vol. II, Part Two, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, 'a grave danger to … the ecological preservation of all or some of [the] territory [of a State]' (*ibid*., p. 35, para. 3); and specified, with reference to State practice, that 'It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an "essential interest" of all States.' (*ibid*., p. 39, para. 14).[1092] 155

With regard to the terms "grave and imminent peril", the Court stated that:

As the International Law Commission emphasized in its commentary, the 'extremely grave and imminent' peril must 'have been a threat to the interest at the actual time' (*Yearbook of the International Law Commission*, *1980*, vol. II, Part Two, p. 49, para. 33). That does not exclude, in the view of the Court, that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.[1093] 156

In its conclusion on the issue of the existence of a "state of necessity", the Court referred again to the commentary of the International Law Commission:

[1091] 154 *Ibid*., pp. 39–40, paras. 50–51.

[1092] 155 *Ibid*., p. 41, para. 53.

[1093] 156 *Ibid*., p. 42, para. 54.

The Court concludes from the foregoing that, with respect to both Nagymaros and Gabcíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they 'imminent'; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation 'characterized so aptly by the maxim *summum jus summa injuria*' (*Yearbook of the International Law Commission*, *1980*, vol. II, Part Two, p. 49, para. 31).[1094] [157]

[A/62/62, para. 92]

International Tribunal for the Law of the Sea

The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. *Guinea)*

In its 1999 judgment in the *M/V "SAIGA" (No. 2)* case, the Tribunal referred to draft article 33 adopted by the International Law Commission on first reading, as well as to the earlier judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case,[1095] [158] to identify the conditions for the defence based on the "state of necessity" under customary international law. In the context of its examination of the issue whether the otherwise wrongful application by Guinea of its customs laws to the exclusive economic zone could be justified under general international law by Guinea's appeal to "state of necessity",[1096] [159] the Tribunal stated the following:

133. In the Case Concerning the *Gabčíkovo-Nagymaros Project (Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 40 and 41, paras. 51 and 52), the International Court of Justice noted with approval two conditions for the defence based on 'state of necessity' which in general international law justifies an otherwise wrongful act. These conditions, as set out in article 33, paragraph 1, of the International Law Commission's draft articles on State responsibility, are:

(*a*) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(*b*) the act did not seriously impair an essential interest of the State towards which the obligation existed.

134. In endorsing these conditions, the Court stated that they 'must be cumulatively satisfied' and that they 'reflect customary international law'.[1097] [160]

[A/62/62, para. 93]

International Court of Justice

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

In its 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court reaffirmed its earlier finding in the

[1094] [157] *Ibid*., p. 45, para. 57.

[1095] [158] See above [pp. 278–280].

[1096] [159] ITLOS, Judgment, *ITLOS Reports*, p. 65, para. 170 (1999), para. 132.

[1097] [160] *Ibid*., paras. 133–134.

Gabčíkovo-Nagymaros Project case on the state of necessity (see [pages 278–280] above), by reference to article 25 finally adopted by the International Law Commission in 2001:

The Court has … considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance [*i.e.* conventions on international humanitarian law and human rights law] include qualifying clauses of the rights guaranteed or provisions for derogation … Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, "the state of necessity is a ground recognized by customary international law" that "can only be accepted on an exceptional basis"; it "can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met" (*I.C.J. Reports 1997*, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be "the only way for the State to safeguard an essential interest against a grave and imminent peril" (article 25 of the International Law Commission's articles on responsibility of States for internationally wrongful acts; see also former article 33 of the draft articles on the international responsibility of States, with slightly different wording in the English text). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.[1098] [161]

[A/62/62, para. 94]

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case[1099] [162] examined the respondent's subsidiary argument according to which Argentina should be exempted from liability for its alleged breach of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic in light of the existence of a state of necessity or state of emergency due to the severe economic, social and political crisis in the country as of 2000. Argentina having based its argument on article 25 finally adopted by the International Law Commission in 2001 and the pronouncement of the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case (see [pages 278–280] above), the tribunal noted in particular that the said provision "adequately reflect[ed] the state of customary international law on the question of necessity":

315. The Tribunal, like the parties themselves, considers that article 25 of the articles on State responsibility adequately reflects the state of customary international law on the question of necessity. This article, in turn, is based on a number of relevant historical cases discussed in the Commentary, with particular reference to the *Caroline*, the *Russian Indemnity, Société Commerciale de Belgique*, the *Torrey Canyon* and the *Gabcíkovo-Nagymaros* cases.

[1098] [161] ICJ, Advisory Opinion, 9 July 2004, p. 136, para. 140.

[1099] [162] It should be noted that, on 8 September 2005, Argentina filed an application requesting the annulment of this award on the grounds that the tribunal had allegedly manifestly exceeded its powers and that the award had allegedly failed to state the reasons on which it is based. […]

316. Article 25 reads as follows:

…

317. While the existence of necessity as a ground for precluding wrongfulness under international law is no longer disputed, there is also consensus to the effect that this ground is an exceptional one and has to be addressed in a prudent manner to avoid abuse. The very opening of the article to the effect that necessity 'may not be invoked' unless strict conditions are met, is indicative of this restrictive approach of international law. Case law, state practice and scholarly writings amply support this restrictive approach to the operation of necessity. The reason is not difficult to understand. If strict and demanding conditions are not required or are loosely applied, any State could invoke necessity to elude its international obligations. This would certainly be contrary to the stability and predictability of the law.

318. The Tribunal must now undertake the very difficult task of finding whether the Argentine crisis meets the requirements of article 25, a task not rendered easier by the wide variety of views expressed on the matter and their heavy politicization. Again here the Tribunal is not called upon to pass judgement on the measures adopted in that connection but simply to establish whether the breach of the Treaty provisions discussed is devoid of legal consequences by the preclusion of wrongfulness.

…

324. The International Law Commission's comment to the effect that the plea of necessity is 'excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient,' is persuasive in assisting this Tribunal in concluding that the measures adopted were not the only steps available.

325. A different condition for the admission of necessity relates to the requirement that the measures adopted do not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. As the specific obligations towards another State are embodied in the Treaty, this question will be examined in the context of the applicable treaty provisions. It does not appear, however, that the essential interest of the international community as a whole was affected in any relevant way, nor that a peremptory norm of international law might have been compromised, a situation governed by article 26 of the articles.

326. In addition to the basic conditions set out under paragraph 1 of article 25, there are two other limits to the operation of necessity arising from paragraph 2. As noted in the commentary, the use of the expression 'in any case' in the opening of the text means that each of these limits must be considered over and above the conditions of paragraph 1.

327. The first such limit arises when the international obligation excludes necessity, a matter which again will be considered in the context of the Treaty.

328. The second limit is the requirement for the State not to have contributed to the situation of necessity. The commentary clarifies that this contribution must be 'sufficiently substantial and not merely incidental or peripheral'. In spite of the view of the parties claiming that all factors contributing to the crisis were either endogenous or exogenous, the Tribunal is again persuaded that similar to what is the case in most crises of this kind the roots extend both ways and include a number of domestic as well as international dimensions. This is the unavoidable consequence of the operation of a global economy where domestic and international factors interact.

329. The issue, however, is whether the contribution to the crisis by Argentina has or has not been sufficiently substantial. The Tribunal, when reviewing the circumstances of the present dispute, must conclude that this was the case. The crisis was not of the making of one particular administra-

tion and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.

330. There is yet another important element which the Tribunal must take into account. The International Court of Justice has in the *Gabcíkovo-Nagymaros* case convincingly referred to the International Law Commission's view that all the conditions governing necessity must be 'cumulatively' satisfied.

331. In the present case there are, as concluded, elements of necessity partially present here and there but when the various elements, conditions and limits are examined as a whole it cannot be concluded that all such elements meet the cumulative test. This in itself leads to the inevitable conclusion that the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts."[1100] [163]

The tribunal then turned to the discussion on necessity and emergency under article XI of the bilateral treaty[1101] [164] and noted *inter alia* in this context that the consequences stemming from Argentina's economic crisis "while not excusing liability or precluding wrongfulness from the legal point of view … ought nevertheless to be considered by the Tribunal when determining compensation".[1102] [165]

[A/62/62, para. 95]

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

In its 2006 decision on liability, the arbitral tribunal constituted to hear the *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *Argentina* found that Argentina was excused, under article XI of the 1991 bilateral investment treaty between the United States of America and the Argentine Republic, from liability for any breaches of that treaty between 1 December 2001 and 26 April 2003, given that it was under a state of necessity. The tribunal then underlined that its conclusion was supported by "the state of necessity standard as it exists in international law (reflected in article 25 of the International Law Commission's draft articles on State responsibility)" and gave a lengthy commentary on the conditions thereon:

245. … The concept of excusing a State for the responsibility for violation of its international obligations during what is called a 'state of necessity' or 'state of emergency' also exists in international law. While the Tribunal considers that the protections afforded by article XI have been triggered in this case, and are sufficient to excuse Argentina's liability, the Tribunal recognizes that satisfaction of the state of necessity standard as it exists in international law (reflected in article 25 of the International Law Commission's draft articles on State responsibility) supports the Tribunal's conclusion.

246. In international law, a state of necessity is marked by certain characteristics that must be present in order for a State to invoke this defense. As articulated by Roberto Ago, one of the mentors of the draft articles on State responsibility, a state of necessity is identified by those conditions in which

[1100] [163] ICSID, Case No. ARB/01/8, Award, 12 May 2005, paras. 315–331 (footnotes omitted).

[1101] [164] The said provision read as follows: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

[1102] [165] See footnote [1100] 163 above, para. 356.

a State is threatened by a serious danger to its existence, to its political or economic survival, to the possibility of maintaining its essential services in operation, to the preservation of its internal peace, or to the survival of part of its territory. In other words, the State must be dealing with interests that are essential or particularly important.

247. The United Nations Organization has understood that the invocation of a state of necessity depends on the concurrent existence of three circumstances, namely: a danger to the survival of the State, and not for its interests, is necessary; that danger must not have been created by the acting State; finally, the danger should be serious and imminent, so that there are no other means of avoiding it.

248. The concept of state of necessity and the requirements for its admissibility lead to the idea of prevention: the State covers itself against the risk of suffering certain damages. Hence, the possibility of alleging the state of necessity is closely bound by the requirement that there should be a serious and imminent threat and no means to avoid it. Such circumstances, in principle, have been left to the State's subjective appreciation, a conclusion accepted by the International Law Commission. Nevertheless, the Commission was well aware of the fact that this exception, requiring admissibility, has been frequently abused by States, thus opening up a very easy opportunity to violate the international law with impunity. The Commission has set in its draft articles on State responsibility very restrictive conditions to account for its admissibility, reducing such subjectivity.

…

250. Taking each element in turn, article 25 requires first that the act must be the only means available to the State in order to protect an interest …

251. The interest subject to protection also must be essential for the State. What qualifies as an 'essential' interest is not limited to those interests referring to the State's existence. As evidence demonstrates, economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests …

…

253. The interest must be threatened by a serious and imminent danger …

254. The action taken by the State may not seriously impair another State's interest. In this respect, the Commission has observed that the interest sacrificed for the sake of necessity must be, evidently, less important than the interest sought to be preserved through the action. The idea is to prevent against the possibility of invoking the state of necessity only for the safeguard of a non-essential interest.

255. The international obligation at issue must allow invocation of the state of necessity. The inclusion of an article authorizing the state of necessity in a bilateral investment treaty constitutes the acceptance, in the relations between States, of the possibility that one of them may invoke the state of necessity.

…

258. While this analysis concerning article 25 of the draft articles on State responsibility alone does not establish Argentina's defence, it supports the Tribunal's analysis with regard to the meaning of article XI's requirement that the measures implemented by Argentina had to have been necessary either for the maintenance of public order or the protection of its own essential security interests.

259. Having found that the requirements for invoking the state of necessity were satisfied, the Tribunal considers that it is the factor excluding the State from its liability *vis-à-vis* the damage caused as a result of the measures adopted by Argentina in response to the severe crisis suffered by the country.

…

261. Following this interpretation the Tribunal considers that article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability. This exception is appropriate only in emergency situations; and once the situation has been overcome, *i.e.* certain degree of stability has been recovered; the State is no longer exempted from responsibility for any violation of its obligations under the international law and shall reassume them immediately."[1103] 166

[A/62/62, para. 96]

Sempra Energy International v. *Argentine Republic*

The arbitral tribunal constituted to hear the *Sempra Energy International* v. *Argentine Republic* case, in its 2007 award, dealt with a plea, raised by the respondent, of the existence of a state of necessity. In considering the assertions of the parties as to the customary international law status of article 25 of the State responsibility articles, the tribunal

… share[d] the parties' understanding of Article 25 of the Articles on State Responsibility as reflecting the state of customary international law on the matter. This is not to say that the Articles are a treaty or even themselves a part of customary law. They are simply the learned and systematic expression of the law on state of necessity developed by courts, tribunals and other sources over a long period of time.

…

345. There is no disagreement either about the fact that a state of necessity is a most exceptional remedy that is subject to very strict conditions because otherwise it would open the door to States to elude compliance with any international obligation. Article 25 accordingly begins by cautioning that the state of necessity 'may not be invoked' unless such conditions are met … [1104] 27

In applying article 25, the tribunal held that while the economic crisis which Argentina faced in the late 1990s was severe, it nonetheless did not find the argument that such a situation compromised the very existence of the State and its independence, and thereby qualified as one involving an essential State interest, to be convincing.[1105] 28 Furthermore, the tribunal referred to the requirement in article 25 that the State cannot invoke necessity if it has contributed to the situation giving rise to a state of necessity, which it understood to be a mere "expression of a general principle of law devised to prevent a party from taking legal advantage of its own fault".[1106] 29 On an analysis of the facts, the tribunal held that there had to some extent been a substantial contribution of the State to the situation giving rise to the state of necessity, and that it therefore could not be claimed that the burden fell entirely on exogenous factors.[1107] 30 Finally, the tribunal recalled the decision of the International Court of Justice in the *Gabčíkovo-Nagymaros* case[1108] 31 in which the Court referred to the work of the International Law Commission and held that the conditions in the predecessor provision to article 25 were to be cumulatively met. Since that was not

[1103] 166 ICSID, Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras. 245–259 and 261 (footnotes omitted).

[1104] 27 See footnote [1026] 25 above, paras. 344 and 345.

[1105] 28 *Ibid.*, para. 348.

[1106] 29 *Ibid.*, para. 353.

[1107] 30 *Ibid.*, para. 354.

[1108] 31 See footnote [31] 37 above, p. 7.

the case on the facts before it, the tribunal concluded that “the requirements for a state of necessity under customary international law ha[d] not been fully met”.[1109] [32] The tribunal further considered the interplay between the State responsibility articles, operating at the level of secondary rules, and the bilateral treaty between the parties in the context of an invocation by the respondent of the state of necessity under article XI of the treaty, which envisaged either party taking measures for the “protection of its own essential security interests”. In considering what was meant by “essential security interest”, the tribunal explained that “the requirements for a state of necessity under customary international law, as outlined … in connection with their expression in Article 25 of the State responsibility articles, become relevant to the matter of establishing whether the necessary conditions have been met for its invocation under the Treaty. Different might have been the case if the Treaty had defined this concept and the conditions for its exercise, but this was not the case.”[1110] [33] Furthermore, the tribunal confirmed that it did not “believe that because Article XI did not make an express reference to customary law, this source of rights and obligations becomes inapplicable. International law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle.”[1111] [34] As the Tribunal found that the crisis invoked did not meet the customary law requirements of Article 25, it likewise concluded that it was not necessary to undertake further judicial review under Article XI given that the article did not set out conditions different from customary law.[1112] [35]

[A/65/76, para. 26]

Special Court for Sierra Leone

Prosecutor v. *Fofana and Kondewa (CDF Case)*

A Trial Chamber of the Special Court for Sierra Leone, in *Prosecutor* v. *Fofana and Kondewa (CDF Case)*, Case No. SCSL-04–14-T, in a judgment handed down on 2 August 2007, made an indirect reference, at para. 84, to the predecessor article to draft article 25 of the 2001 articles on responsibility of States for internationally wrongful acts (namely, draft article 33, as adopted on first reading) by referring to the 1997 judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case, as “clearly express[ing] the view that the defence of necessity was in fact recognised by customary international law and it was a ground available to States in order to evade international responsibility for wrongful acts”.

[A/65/76, footnote 26]

[1109] [32] See footnote [1026] 25 above, para. 355.

[1110] [33] *Ibid*., para. 375.

[1111] [34] *Ibid*., para. 378.

[1112] [35] *Ibid*., para. 388.

Ad hoc committee (under the ICSID Convention)

Sempra Energy International v. *Argentine Republic*

The *ad hoc* committee in *Sempra Energy International* v. *Argentine Republic*, while acknowledging the customary international law status of article 25, indicated that "[i]t does not follow, however, that customary law … establishes a peremptory 'definition of necessity and the conditions for its operation'. While some norms of customary law are peremptory (*jus cogens*), others are not, and States may contract otherwise … ".[1113] 123

The committee highlighted the differences between article 25 and article XI of the bilateral investment treaty in question, in the following terms:

> 200. … Article 25 is concerned with the invocation by a State Party of necessity 'as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State'. Article 25 presupposes that an act has been committed that is incompatible with the State's international obligations and is therefore 'wrongful'. Article XI, on the other hand, provides that 'This Treaty shall not preclude' certain measures so that, where Article XI applies, the taking of such measures is not incompatible with the State's international obligations and is not therefore 'wrongful'. Article 25 and Article XI therefore deal with quite different situations. Article 25 cannot therefore be assumed to 'define necessity and the conditions for its operation' for the purpose of interpreting Article XI, still less to do so as a mandatory norm of international law.[1114] 124

[A/68/72, paras. 90–91]

Ad hoc committee (under the ICSID Convention)

Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. *The Argentine Republic*

The *ad hoc* committee in *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P.* v. *The Argentine Republic* treated article 25 as reflecting the "principle of necessity under customary international law".[1115] 125 Following an in-depth analysis[1116] 126 of the "only way" requirement in article 25, paragraph 1(*a*), the committee observed that the arbitral tribunal had been required "to determine whether, on the proper construction of Article 25(1)(*a*) of the ILC Articles, the 'only way' requirement in that provision was satisfied, and not merely whether, from an economic perspective, there were other options available for dealing with the economic crisis".[1117] 127 It concluded that "the Tribunal did not in fact apply Article 25(1)(*a*) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue".[1118] 128 The committee further found the tribunal's treatment of the requirement that the measures adopted by Argentina "seriously impair[ed] an essential interest of the State or States towards which the obligation exists, or of the international community as a

[1113] 123 See footnote [6] 4 above, para. 197.

[1114] 124 *Ibid*., para. 200.

[1115] 125 See footnote [1027] 122 above, para. 349.

[1116] 126 *Ibid*., paras. 368–376.

[1117] 127 *Ibid*., para. 377.

[1118] 128 *Ibid*.

whole”,[1119] [129] within the meaning of paragraph 1(*b*), to be obscure.[1120] [130] The committee also analysed, and found shortcomings with, the tribunal’s consideration of the aspect of “contribution to the situation of necessity”, in paragraph 2(*b*).[1121] [131] The committee found fault with the tribunal’s reliance on an expert opinion on an economic issue. It held that:

> [t]he Tribunal’s process of reasoning should have been as follows. First, the Tribunal should have found the relevant facts based on all of the evidence before it, including the [expert opinion]. Secondly, the Tribunal should have applied the legal elements of the Article 25(2)(*b*) to the facts as found (having if necessary made legal findings as to what those legal elements are). Thirdly, in the light of the first two steps, the Tribunal should have concluded whether or not Argentina had “*contributed to the situation of necessity*” within the meaning of Article 25(2)(*b*). For the Tribunal to leap from the first step to the third without undertaking the second amount[ed] in the Committee’s view to a failure to apply the applicable law.[1122] [132]

[A/68/72, para. 92]

International arbitral tribunal (under the ICSID Convention)

Suez, Sociedad General de Aguas de Barcelona S.A. & InterAgua Servicios Integrales del Agua S.A. v. *The Argentine Republic*

In *Suez, Sociedad General de Aguas de Barcelona S.A. & InterAgua Servicios Integrales del Agua S.A.* v. *The Argentine Republic*, the arbitral tribunal, upon consideration of the plea of necessity raised by the respondent, noted that:

> [t]he severity of a crisis, no matter the degree, is not sufficient to allow a plea of necessity to relieve a state of its treaty obligations. The customary international law, as restated by Article 25 of the ILC Articles … imposes additional strict conditions. The reason of course is that given the frequency of crises and emergencies that nations, large and small, face from time to time, to allow them to escape their treaty obligations would threaten the very fabric of international law and indeed the stability of the system of international relations … .[1123] [133]

[A/68/72, para. 93]

Total S.A. v. *Argentine Republic*

The arbitral tribunal in *Total S.A.* v. *Argentine Republic* “recall[ed] that customary international law impose[d] strict conditions in order for a State to successfully avail itself of the defence of necessity” and continued that “Article 25 of the ILC Articles on State Responsibility [was] generally considered as having codified customary international law in the matter … ”.[1124] [134]

[A/68/72, para. 94]

[1119] [129] *Ibid*., para. 379 (emphasis omitted).

[1120] [130] *Ibid*. paras. 380–384.

[1121] [131] *Ibid*., paras. 385–392.

[1122] [132] *Ibid*., para. 393.

[1123] [133] ICSID, Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 236.

[1124] [134] See footnote [164] 29 above, para. 220.

Impregilo S.p.A. v. *Argentine Republic*

In *Impregilo S.p.A.* v. *Argentine Republic*, the arbitral tribunal, in considering a case arising from the 2001 Argentine financial crisis, evaluated *in extenso*,

> … Argentina's necessity plea under the standard set by customary international law, which the Parties agree has been codified in Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts", and determined that the applicable standard "by definition is stringent and difficult to satisfy.[1125] 135

[A/68/72, para. 95]

Ad hoc committee (under the ICSID Convention)

Continental Casualty Company v. *The Argentine Republic*

The *ad hoc* committee in *Continental Casualty Company* v. *The Argentine Republic* rejected the applicant's claim that the arbitral tribunal had failed to address its arguments in connection with "continuing post-'state of necessity' period loss" on the basis that it had not been a major argument in the proceedings before the tribunal.[1126] 136 In reaching such conclusion, the committee recalled the "differences between Article XI of the BIT and the principle of necessity".[1127] 137

[A/68/72, para. 96]

International arbitral tribunal (under the ICSID Convention)

El Paso Energy International Company v. *The Argentine Republic*

In *El Paso Energy International Company* v. *The Argentine Republic*, the arbitral tribunal analysed the differences between article XI of the treaty in question (which it deemed to be the *lex specialis*), and article 25 of the State responsibility articles (the *lex generalis*),[1128] 138 and referred to the reasoning of the Decision on Annulment in *Continental Casualty Company* v. *The Argentine Republic*.[1129] 139 Notwithstanding such differences, it considered, *inter alia*, the rule on "contributory behaviour", contained in article 25(2)(*b*), to be a "rule of general international law[] applicable between the Parties to the BIT and, hence, a rule which may be used to interpret Article XI of the [BIT]".[1130] 140

[A/68/72, para. 97]

[1125] 135 ICSID, Case No. ARB/07/17, Award, 21 June 2011, paras. 344, 345–359.

[1126] 136 ICSID, Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para. 128.

[1127] 137 *Ibid*., paras. 116, 117–124.

[1128] 138 See footnote [56] 16 above, paras. 553–555.

[1129] 139 See footnote [1126] 136 above.

[1130] 140 See footnote [56] 16 above, para. 621.

EDF International S.A. et al. v. *Argentine Republic*

The arbitral tribunal in *EDF International S.A. et al.* v. *Argentine Republic*, upon considering the state of necessity defence as articulated in the State responsibility articles, found that the respondent had failed to meet its burden to demonstrate certain key elements as required by article 25, particularly that the wrongful act had been the only way to safeguard its essential interest, and that the respondent had not contributed to the situation of necessity. The Tribunal concluded that "[n]ecessity must be construed strictly and objectively, not as an easy escape hatch for host states wishing to avoid treaty obligations which prove difficult".[1131] 141

[A/68/72, para. 98]

Ad hoc committee (under the ICSID Convention)

Impregilo S.p.A. v. *Argentine Republic*

In *Impregilo S.p.A.* v. *Argentine Republic*, the *ad hoc* committee constituted to hear Argentina's application for annulment of the award found that, in considering, *inter alia*, article 25 of the State responsibility articles, the arbitral tribunal had "based its decision on several solid sources".[1132] 128

[A/71/80, para. 93]

El Paso Energy International Company v. *The Argentine Republic*

The *ad hoc* committee in *El Paso Energy International Company* v. *The Argentine Republic*, noted that "[i]n paragraphs 621 to 623 [the arbitral tribunal] stated what other rules of the ILC's Draft Articles and the Unidroit Principles provide on the exclusion of liability and the degree of contribution to a state of necessity",[1133] 129 and concluded that the arbitral tribunal's analysis "was clear …; it stated reasons and explained amply the decisions taken on this issue".[1134] 130

[A/71/80, para. 94]

International arbitral tribunal (under the ICSID Convention)

Bernhard von Pezold and others v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal stated that "the international law analysis [under Article 25 of the ILC Articles] is not affected by the domestic test which gives rise to a state of emergency. Accordingly, a domestic declaration of a state of emergency can only serve as evidence of a state of emergency that may give rise to a necessity defence under international law".[1135] 131

[A/71/80, para. 95]

[1131] 141 See footnote [167] 31 above, para. 1171.

[1132] 128 ICSID, Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment, 24 January 2014, para. 203.

[1133] 129 See footnote [874] 123 above, para. 254 (emphasis omitted).

[1134] 130 *Ibid*., para. 256.

[1135] 131 See footnote [114] 24 above, para. 624.

Ad hoc committee (under the ICSID Convention)

Total S.A. v. *Argentine Republic*

In *Total S.A.* v. *Argentine Republic*, the *ad hoc* committee constituted to hear Argentina's application for annulment of the award considered, *inter alia*, article 25 of the State responsibility articles when concluding that "Argentina is not correct in claiming that the Tribunal never specified the legal standards to be met in relation to the necessity of protection of essential interest and the 'only way' requirement".[1136] 136

[A/74/83, p. 25]

EDF International SA and ors v. *Argentina*

The *ad hoc* committee constituted to decide on the annulment of the award in *EDF International SA and ors* v. *Argentina*, did:

> not consider that the Tribunal can be faulted for having taken the provisions of ILC Article 25 as its point of reference. It is true that Argentina questioned whether all of the detail of Article 25 reflected customary international law and disputed what it described as the Claimants' propensity to 'refer to each of the paragraphs of Article 25 as though it were the final text of a treaty in full force and effect'. At no point, however, did Argentina indicate what aspects of Article 25 it considered did not reflect customary international law. Nor, more importantly, did it at any stage advance a positive case in favour of a standard of necessity materially different from that set out in Article 25.

The committee "therefore conclude[d] that the Tribunal was correct in stating that 'neither side has argued for application of a standard more favourable to host states than the norms of Article 25' and committed no annullable error in treating Article 25 as a statement of the applicable customary international law".[1137] 137

[A/74/83, p. 25]

Permanent Court of Arbitration (under UNCITRAL Rules)

CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. *The Republic of India*

In *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited* v. *The Republic of India*, the arbitral tribunal, referring to article 25 of the State responsibility articles, determined "that the conditions attached to the state of necessity defence under customary international law are not applicable in the present situation".[1138] 138

[A/74/83, p. 26]

[1136] 136 ICSID, Case No. ARB/04/01, Decision on Annulment, 1 February 2016, para. 238.

[1137] 137 ICSID, Case No. ARB/03/23, Decision on Annulment, 5 February 2016, para. 319.

[1138] 138 PCA, Case No. 2013–09, Award on Jurisdiction and the Merits, 25 July 2016, para. 256.

Ad hoc committee (under the ICSID Convention)

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. *Argentine Republic*

The *ad hoc* committee constituted to decide on the annulment of the award in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.* v. *Argentine Republic* determined that, although both the "only way" and the "noncontribution" requirements under article 25 were "susceptible to a certain degree of interpretation",[1139] [139] "[r]egardless of the merits of the interpretation adopted by the Tribunal, which is not for this Committee to re-consider, the Committee is of the view that the Tribunal thereby sufficiently established the standard it was going to apply to the facts of the case".[1140] [140]

[A/74/83, p. 26]

International arbitral tribunal (under the ICSID Convention)

Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. *The Argentine Republic*

The arbitral tribunal in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic* found that "it is not necessary for the Tribunal to consider Respondent's defense of necessity or Claimants' specific arguments opposing that defense" under article 25 of the State responsibility articles because it had previously dismissed the claims that the defendant had breached the relevant obligations.[1141] [141]

[A/74/83, p. 26]

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal, while addressing the defence of necessity under customary international law,[1142] [142] quoted article 25 and:

> decide[d] that the Respondent bears the legal burden of proving its defence of 'necessity' under customary international law, as a positive allegation. Moreover, the elements of that defence, as listed in Article 25 of the ILC Articles, are cumulative. In other words, it is for the Respondent to prove each of the relevant elements and not for the Claimant to disprove any of them. That is clear from the negative formulation of Article 25(1) and 25(2) ('may not be invoked', 'unless' and 'if"), together with elements that fall almost exclusively within the actual knowledge of the State invoking the defence of 'necessity.' This approach also accords with the ILC's Commentary applicable to Article 25 of the ILC Articles.[1143] [143]

[A/74/83, p. 26]

[1139] [139] ICSID, Case No. ARB/03/19, Decision on Argentina's Application for Annulment, 5 May 2017, para. 290.

[1140] [140] *Ibid*., para. 295.

[1141] [141] See footnote [355] 45 above, paras. 1045–1046.

[1142] [142] ICSID, Case No. ARB/14/4, Award, 31 August 2018, paras. 8.2–8.3.

[1143] [143] *Ibid*., paras. 8.38 *et seq*.

Ad hoc committee (under the ICSID Convention)

Bernhard Friedrich Arnd Rüdiger von Pezold et al. v. *Republic of Zimbabwe*

In *Bernhard Friedrich Arnd Rüdiger von Pezold et al.* v. *Republic of Zimbabwe*, the *ad hoc* committee constituted to hear Zimbabwe's application for annulment of the award noted that:

Zimbabwe raised its necessity defense in the arbitration proceedings primarily in terms of Article 25 of the ILC Articles, and that the Tribunal devoted a significant part of the Award to this issue. Having analyzed the issue extensively, the Tribunal eventually dismissed the defense, concluding that Zimbabwe had not satisfied the requirements of Article 25. Consequently, the Tribunal did apply international law rather than Zimbabwean law when determining Zimbabwe's necessity defense.[1144] 144

[A/74/83, p. 27]

Suez, Sociedad General De Aguas De Barcelona S.A. and Interagua Servicios Integrales De Agua S.A. v. *Argentine Republic*

In *Suez, Sociedad General De Aguas De Barcelona S.A. and Interagua Servicios Integrales De Agua S.A.* v. *Argentine Republic*, the *ad hoc* committee, discussing the arbitral tribunals application of article 25, found that the tribunal had not manifestly exceeded its powers or failed to state reasons when applying the necessity defence under article 25 of the State responsibility articles.[1145] 145

[A/74/83, p. 27]

[International arbitral tribunal (under the ICSID Convention)

Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa v. *the Argentine Republic*

In *Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa* v. *the Argentine Republic*, the arbitral tribunal recognized articles 25 and 27 of the State responsibility articles as reflecting "in large part general principles of international law".[1146] 148

[A/74/83, p. 27]]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Venezuela US, S.R.L. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Venezuela US, S.R.L.* v. *Bolivarian Republic of Venezuela* referred to articles 12 and 20 to 25, noting that "[t]here is a breach only when the conduct

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[1144] 144 ICSID, Case No. ARB/10/15, Decision on Annulment, 21 November 2018, paras. 278–279.

[1145] 145 ICSID, Case No. ARB/03/17, Decision on Annulment, 14 December 2018, paras. 182–190.

[1146] [148 ICSID, Case No. ARB/07/26, Award, 8 December 2016, para. 709.]

of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness".[1147] 82

[A/77/74, p. 17]]

International arbitral tribunal (under the ICSID Convention)

(DS)2, S.A., Peter de Sutter and Kristof de Sutter v. *Republic of Madagascar*

In *(DS)2, S.A., Peter de Sutter and Kristof de Sutter* v. *Republic of Madagascar*, the arbitral tribunal referred to article 25, explaining that, in a situation of necessity,

> a State is exempted from its responsibility for acting contrary to its international obligations if its conduct is 'the only way for the State to safeguard an essential interest against a grave and imminent peril'. This means that, in this case, the inaction of Malagasy law enforcement on the ground … would have had to be this 'only way'. It is sufficient to articulate the hypothesis to see that it has no basis.[1148] 110

[A/77/74, p. 21]

[1147] [82 See footnote [126] 14 above, para. 155.]

[1148] 110 [ICSID, Case No. ARB/17/18, Award, 17 April 2020], para. 348.

Article 26. Compliance with peremptory norms

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

Commentary

(1) In accordance with article 53 of the 1969 Vienna Convention, a treaty which conflicts with a peremptory norm of general international law is void. Under article 64, an earlier treaty which conflicts with a new peremptory norm becomes void and terminates.[1149] [410] The question is what implications these provisions may have for the matters dealt with in chapter V.

(2) Sir Gerald Fitzmaurice as Special Rapporteur on the Law of Treaties treated this question on the basis of an implied condition of "continued compatibility with international law", noting that:

> A treaty obligation the observance of which is incompatible with a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility …
>
> The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty.[1150] [411]

The Commission did not, however, propose any specific articles on this question, apart from articles 53 and 64 themselves.

(3) Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory, one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred.[1151] [412] Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.

(4) It is, however, desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law. For example, a State taking countermeasures may not

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[1149] [410] See also article 44, paragraph 5, which provides that in cases falling under article 53, no separation of the provisions of the treaty is permitted.

[1150] [411] Fourth report on the law of treaties, *Yearbook … 1959* (footnote [952] 307 above), p. 46. See also S. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985), p. 63.

[1151] [412] For a possible analogy, see the remarks of Judge *ad hoc* Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 325, at pp. 439–441. ICJ did not address these issues in its order.

derogate from such a norm: for example, a genocide cannot justify a counter-genocide.[1152][413] The plea of necessity likewise cannot excuse the breach of a peremptory norm. It would be possible to incorporate this principle expressly in each of the articles of chapter V, but it is both more economical and more in keeping with the overriding character of this class of norms to deal with the basic principle separately. Hence, article 26 provides that nothing in chapter V can preclude the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.[1153] [414]

(5) The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.[1154] [415] Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[1155] [416]

(6) In accordance with article 26, circumstances precluding wrongfulness cannot justify or excuse a breach of a State's obligations under a peremptory rule of general international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V. One State cannot dispense another from the obligation to comply with a peremptory norm, *e.g.* in relation to genocide or torture, whether by treaty or otherwise.[1156] [417] But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility.[1157] [418]

[1152] [413] As ICJ noted in its decision in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, "in no case could one breach of the Convention serve as an excuse for another" (*Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243, at p. 258, para. 35).

[1153] [414] For convenience, this limitation is spelled out again in the context of countermeasures in Part Three, chapter II. See article 50 and commentary, paras. (9) and (10).

[1154] [415] See, *e.g.*, the decisions of the International Tribunal for the Former Yugoslavia in case IT-95–17/1-T, *Prosecutor* v. *Furundzija*, judgement of 10 December 1998; ILM, vol. 38, No. 2 (March 1999), p. 317, and of the British House of Lords in *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate and Others,* ex parte *Pinochet Ugarte (No. 3)*, ILR, vol. 119. Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote [48] 54 above), p. 257, para. 79.

[1155] [416] Cf. *East Timor* (footnote [48] 54 above).

[1156] [417] See paragraph (4) of the commentary to article 45.

[1157] [418] See paragraphs (4) to (7) of the commentary to article 20.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina* case,[1158] 167 in the context of its examination of Argentina's defence based on state of necessity,[1159] 168 made incidental reference to article 26, as finally adopted by the International Law Commission in 2001, noting that there did not appear "that a peremptory norm of international law might have been compromised [by Argentina's conduct], a situation governed by article 26 of the articles".[1160] 169

[A/62/62, para. 97]

Bernhard von Pezold and others v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal found that "Zimbabwe's violation of its obligation *erga omnes* means that it has breached ILC Article 26 and is therefore precluded from raising the necessity defence in relation to any events upon which the FTLRP [Fast Track Land Reform Programme] policy touches".[1161] 132

[A/71/80, para. 96]

European Court of Human Rights

Al-Dulimi and Montana Management Inc. Switzerland

In *Al-Dulimi and Montana Management Inc. Switzerland*, the European Court of Human Rights referred to article 26 and the commentary thereto as relevant international law.[1162] 146

[A/74/83, p. 27]

Inter-American Court of Human Rights

Herzog et al. v. *Brazil*

In *Herzog et al.* v. *Brazil*, the Inter-American Court of Human Rights, citing the commentary to article 26 of the State responsibility articles, recalled that the Commission had confirmed that the prohibition on crimes against humanity was clearly accepted and recognized as a peremptory norm of international law.[1163] 147

[A/74/83, p. 27]

[1158] 167 See footnote [1100] 163 above.

[1159] 168 See [pp. 281–283] above.

[1160] 169 See footnote [1100] 163 above, para. 325.

[1161] 132 See footnote [114] 24 above, para. 657.

[1162] 146 ECHR, Grand Chamber, Application No. 5809/08, Judgment, 21 June 2016, para. 57.

[1163] 147 IACHR, Preliminary Objections, Merits, Reparations and Costs. Series C No. 353 (Spanish), Judgment, 15 March 2018.

Committee on the Elimination of Racial Discrimination

State of Palestine v. *Israel*

In its decision on jurisdiction regarding the inter-State communication *State of Palestine* v. *Israel*, the Committee on the Elimination of Racial Discrimination cited the commentary to article 26, noting that "several international bodies have recognized the essential character of the principle of the prohibition of racial discrimination for the international community as a whole", and emphasizing that "the International Law Commission has stated that the peremptory norms (*jus cogens*) that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".[1164] [111]

[A/77/74, p. 22]

[1164] [111] Decision on jurisdiction, CERD/C/100/5, 12 December 2019, para. 40.

Article 27. Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) the question of compensation for any material loss caused by the act in question.

Commentary

(1) Article 27 is a without prejudice clause dealing with certain incidents or consequences of invoking circumstances precluding wrongfulness under chapter V. It deals with two issues. First, it makes it clear that circumstances precluding wrongfulness do not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect. Secondly, it refers to the possibility of compensation in certain cases. Article 27 is framed as a without prejudice clause, because, as to the first point, it may be that the effect of the facts which disclose a circumstance precluding wrongfulness may also give rise to the termination of the obligation, and as to the second point, because it is not possible to specify in general terms when compensation is payable.

(2) Subparagraph (*a*) of article 27 addresses the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate. It makes it clear that chapter V has a merely preclusive effect. When and to the extent that a circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming it is still in force) will again have to be complied with, and the State whose earlier non-compliance was excused must act accordingly. The words "and to the extent" are intended to cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation.

(3) This principle was affirmed by the tribunal in the *"Rainbow Warrior"* arbitration,[1165]419 and even more clearly by ICJ in the *Gabčíkovo-Nagymaros Project* case. In considering Hungary's argument that the wrongfulness of its conduct in discontinuing work on the Project was precluded by a state of necessity, the Court remarked that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives."[1166] 420 It may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation. Thus a breach of a treaty justifying countermeasures may be "material" in terms of article 60 of the 1969 Vienna Convention and permit termination of the treaty by the injured State. Conversely, the obligation may be fully reinstated or its operation fully restored in principle, but modalities for resuming performance may need to be settled. These are not matters which article 27 can resolve, other than by providing that the invocation of circumstances precluding wrongfulness is without prejudice to "compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists". Here "compliance with the obligation in question" includes cessation of the wrongful conduct.

[1165] 419 *"Rainbow Warrior"* (footnote [40] 46 above), pp. 251–252, para. 75.

[1166] 420 *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 63, para 101; see also *ibid*., page 38, para. 47.

(4) Subparagraph (*b*) of article 27 is a reservation as to questions of possible compensation for damage in cases covered by chapter V. Although the article uses the term "compensation", it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather, it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference to "material loss" is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.

(5) Subparagraph (*b*) is a proper condition, in certain cases, for allowing a State to rely on a circumstance precluding wrongfulness. Without the possibility of such recourse, the State whose conduct would otherwise be unlawful might seek to shift the burden of the defence of its own interests or concerns onto an innocent third State. This principle was accepted by Hungary in invoking the plea of necessity in the *Gabčíkovo-Nagymaros Project* case. As ICJ noted, "Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner."[1167] 421.

(6) Subparagraph (*b*) does not attempt to specify in what circumstances compensation should be payable. Generally, the range of possible situations covered by chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

CMS Gas Transmission Company v. *Argentine Republic*

In its 2005 award, the arbitral tribunal constituted to hear the *CMS Gas Transmission Company* v. *Argentina case*,[1168] 170 after having concluded its examination of Argentina's defence based on state of necessity and article XI of the relevant bilateral treaty,[1169] 171 stated that it was "also mindful" of the rule embodied in subparagraph (*a*) of article 27, as finally adopted by the International Law Commission in 2001 (which it quoted), adding thereafter:

> 380. The temporary nature of necessity is thus expressly recognized and finds support in the decisions of courts and tribunals. The commentary cites in this connection the *Rainbow Warrior* and *Gabcíkovo Nagymaros* cases. In this last case the International Court of Justice held that as soon 'as the state of necessity ceases to exist, the duty to comply with treaty obligations revives'.

…

[1167] 421 *Ibid*., p. 39, para. 48. A separate issue was that of accounting for accrued costs associated with the Project (*ibid*., p. 81, paras. 152–153).

[1168] 170 See footnote [1100] 163 above.

[1169] 171 See [pp. 281–283] above.

382. Even if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present.[1170] 172

The tribunal then quoted subparagraph (*b*) of article 27 finally adopted by the International Law Commission, observing that it found support again in the *Gabcíkovo Nagymaros Project* case, as well as in earlier decisions such as the *Compagnie générale de l'Orinoco*, the *Properties of the Bulgarian Minorities in Greece* and *Orr & Laubenheimer* cases (in the latter cases, the tribunal noted, "the concept of damages appears to have been broader than that of material loss in article 27"). After having described the positions of the parties on this issue, the tribunal continued as follows:

390. The Tribunal is satisfied that article 27 establishes the appropriate rule of international law on this issue. The Respondent's argument is tantamount to the assertion that a Party to this kind of treaty, or its subjects, are supposed to bear entirely the cost of the plea of the essential interests of the other Party. This is, however, not the meaning of international law or the principles governing most domestic legal systems.

391. The Tribunal's conclusion is further reaffirmed by the record. At the hearing the Tribunal put the question whether there are any circumstances in which an investor would be entitled to compensation in spite of the eventual application of article XI and the plea of necessity.

392. The answer to this question by the Respondent's expert clarifies the issue from the point of view of both its temporary nature and the duty to provide compensation: while it is difficult to reach a determination as long as the crisis is unfolding, it is possible to envisage a situation in which the investor would have a claim against the government for the compliance with its obligations once the crisis was over; thereby concluding that any suspension of the right to compensation is strictly temporary, and that this right is not extinguished by the crisis events.

393. The Tribunal also notes that, as in the *Gaz de Bordeaux* case, the International Law Commission's commentary to article 27 suggests that the States concerned should agree on the possibility and extent of compensation payable in a given case.

394. It is quite evident then that in the absence of agreement between the parties the duty of the Tribunal in these circumstances is to determine the compensation due. This the Tribunal will do next.[1171] 173

[A/62/62, para. 98]

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

In its 2006 decision on liability, the arbitral tribunal constituted to hear the *LG&E Energy Corp.*, *LG&E Capital Corp.*, *LG&E International Inc.* v. *Argentina*, having found that Argentina was under a state of necessity that excused it from liability for any breaches of the 1991 bilateral investment treaty under article XI of that treaty,[1172] 174 responded to the claimants argument, based on article 27 finally adopted by the International Law Commission in 2001, that Argentina should compensate them for losses incurred as a result of the government's actions:

With regard to article 27 of the United Nations draft articles alleged by Claimants, the Tribunal opines that the article at issue does not specifically refer to the compensation for one or all the losses incurred

[1170] 172 See footnote [1100] 163 above, paras. 379, 380 and 382.

[1171] 173 *Ibid*., paras. 390–394 (footnotes omitted).

[1172] 174 See [pp. 283–285] above.

by an investor as a result of the measures adopted by a State during a state of necessity. The commentary introduced by the Special Rapporteur establishes that article 27 "does not attempt to specify in what circumstances compensation would be payable". The rule does not specify if compensation is payable during the state of necessity or whether the State should reassume its obligations. In this case, this Tribunal's interpretation of article XI of the Treaty provides the answer.[1173] 175

The tribunal later added that:

Article 27 of the International Law Commission's draft articles, as well as article XI of the Treaty, does not specify if any compensation is payable to the party affected by losses during the state of necessity. Nevertheless, … this Tribunal has decided that the damages suffered during the state of necessity should be borne by the investor.[1174] 176

[A/62/62, para. 99]

Ad hoc committee (under the ICSID Convention)

Patrick Mitchell v. *Democratic Republic of the Congo*

In its 2006 decision on the application for annulment of the award rendered on 9 February 2004 in the *Patrick Mitchell* v. *Democratic Republic of the Congo* case, the *ad hoc* committee noted that even if the arbitral tribunal had concluded that the measures at issue were not wrongful by reason of the state of war in the Congo, "this would not necessarily have had any impact on evaluating the act of dispossessing Mr. Mitchell, and on the need for compensation; possibly, it could have had an influence on the calculation of the amount of such compensation". The *ad hoc* committee thereafter quoted in a footnote the text of article 27 finally adopted by the International Law Commission in 2001, "bearing witness to the existence of a principle of international law in this regard".[1175] 177

[A/62/62, para. 100]

International arbitral tribunal (under the ICSID Convention)

Sempra Energy International v. *Argentine Republic*

The arbitral tribunal constituted to hear the *Sempra Energy International* v. *Argentina* case, in its 2007 award, noted that the requirement of temporality in subparagraph (*a*) of article 27 was not disputed by the parties, even though "the continuing extension of the emergency … [did] not seem to be easily reconciled with the requirement of temporality". That in turn resulted in "uncertainty as to what will be the legal consequences of the Emergency Law's conclusion",[1176] 36 which related to the application of subparagraph (*b*) of article 27. In the face of an interpretation of subparagraph (*b*), offered by the respondent, that the provision would require compensation only for the damage arising after the emer-

[1173] 175 ICSID, Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 260 (footnote omitted).

[1174] 176 *Ibid*., para. 264.

[1175] 177 ICSID, *Ad Hoc* Committee, Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 57, footnote 30.

[1176] 36 See footnote [1026] 25 above, para. 392.

gency was over, and not for that taking place during the emergency period, the tribunal expressed the following view:

> Although [Article 27] does not specify the circumstances in which compensation should be payable because of the range of possible scenarios, it has also been considered that this is a matter to be agreed with the affected party. The Article thus does not exclude the possibility of an eventual compensation for past events. The 2007 agreements between the Respondent and the Licensees appear to confirm this interpretation … [1177] 37

[A/65/76, para. 27]

Ad hoc committee (under the ICSID Convention)

Continental Casualty Company v. *The Argentine Republic*

The *ad hoc* committee in *Continental Casualty Company* v. *The Argentine Republic* noted that the applicant's claim relied primarily on article 27 of the State responsibility articles. The committee recalled that the "Tribunal [had] expressly found … that the effect of the application of Article XI of the BIT [was] different to the effect of the application of Article 25 (and by logical implication, of Article 27) of the ILC Articles".[1178] 142

[A/68/72, para. 99]

International arbitral tribunal (under the ICSID Convention)

EDF International S.A. et al. v. *Argentine Republic*

The arbitral tribunal in *EDF International S.A. et al.* v. *Argentine Republic* found that the respondent had failed to demonstrate, as required under article 27, that it had "return[ed] to the pre-necessity *status quo* when possible, or compensate[d] Claimants for damage suffered as a result of the relevant measures".[1179] 143

[A/68/72, para. 100]

Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa v. *the Argentine Republic*

In *Urbaser S.A. and Consorcio De Aguas Bilbao Bizkaia, Bilbao Bizkaia UR Partzuergoa* v. *the Argentine Republic*, the arbitral tribunal recognized articles 25 and 27 of the State responsibility articles as reflecting "in large part general principles of international law".[1180] 148

[A/74/83, p. 27]

[1177] 37 *Ibid*., para. 394 (footnote omitted).

[1178] 142 See footnote [1126] 136 above, para. 127.

[1179] 143 See footnote [167] 31 above, para. 1171.

[1180] 148 ICSID, Case No. ARB/07/26, Award, 8 December 2016, para. 709.

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

The tribunal in *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, referred to the commentary of Article 27 and stated that "the defence of necessity under international law lapses 'if and to the extent that the circumstance precluding wrongfulness no longer exists'".[1181] 149

[A/74/83, p. 28]

Eco Oro Minerals Corp. v. *Republic of Colombia*

The arbitral tribunal in *Eco Oro Minerals Corp.* v. *Republic of Colombia* referred to articles 27, under which the invocation of a circumstance precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act in question, and to article 36.[1182] 112 The tribunal therefore determined that under the applicable investment treaty, "whilst a State may adopt or enforce a measure pursuant to the stated objectives" in the treaty, "this does not prevent an investor claiming … that such a measure entitles it to the payment of compensation".[1183] 113

[A/77/74, p. 22]

[1181] 149 ICSID, Case No. ARB/14/4, Award, 31 August 2018, para. 8.47.

[1182] 112 See footnote [401] 51 above, para. 835.

[1183] 113 *Ibid*., para. 830.