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

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[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.

[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': …

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.
>
> Conversely, as the Chamber explained:
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>> … 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

[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]

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[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.