

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}

^[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 discontinuity 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

^{[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, UNRI-AA, 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.

^[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

^{[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)

Compañía 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]

^{[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

^[766] 219 *Island of Palmas* (Netherlands/United States of America), UNRIIAA, 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 “*Enterprise*” 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

^[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}

^{[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

^{[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]

^[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]

^[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]

^[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

^{[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

^{[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-Nagyymaros 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*

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-Nagyymaros 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 delicti*, 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]

^{[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]

^{[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

Ilașcu and others v. Moldova and Russia

In its 2004 judgement in the *Ilașcu 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-

^{[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]

^[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]

^[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]

^[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]]

^{[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}

^{[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-

^{[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]]

^{[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.]