Article 12. Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Commentary

(1) As stated in article 2, a breach by a State of an international obligation incumbent upon it gives rise to its international responsibility. It is first necessary to specify what is meant by a breach of an international obligation. This is the purpose of article 12, which defines in the most general terms what constitutes a breach of an international obligation by a State. In order to conclude that there is a breach of an international obligation in any specific case, it will be necessary to take account of the other provisions of chapter III which specify further conditions relating to the existence of a breach of an international obligation, as well as the provisions of chapter V dealing with circumstances which may preclude the wrongfulness of an act of a State. But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.

(2) In introducing the notion of a breach of an international obligation, it is necessary again to emphasize the autonomy of international law in accordance with the principle stated in article 3. In the terms of article 12, the breach of an international obligation consists in the disconformity between the conduct required of the State by that obligation and the conduct actually adopted by the State—*i.e.* between the requirements of international law and the facts of the matter. This can be expressed in different ways. For example, ICJ has used such expressions as "incompatibility with the obligations" of a State,[734] [192] acts "contrary to" or "inconsistent with" a given rule,[735] [193] and "failure to comply with its treaty obligations".[736] [194] In the *ELSI* case, a Chamber of the Court asked the "question whether the requisition was in conformity with the requirements … of the FCN Treaty".[737] [195] The expression "not in conformity with what is required of it by that obligation" is the most appropriate to indicate what constitutes the essence of a breach of an international obligation by a State. It allows for the possibility that a breach may exist even if the act of the State is only partly contrary to an international obligation incumbent upon it. In some cases precisely defined conduct is expected from the State concerned; in others the obligation only sets a minimum standard above which the State is free to act. Conduct proscribed by an international obligation may involve an act or an omission or a combination of acts and omissions; it may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition. In every case, it is by comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation that one can determine whether

---

[734] [192] *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), p. 29, para. 56.

[735] [193] *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 64, para. 115, and p. 98, para. 186, respectively.

[736] [194] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 46, para. 57.

[737] [195] *ELSI* (footnote [144] 85 above), p. 50, para. 70.

or not there is a breach of that obligation. The phrase "is not in conformity with" is flexible enough to cover the many different ways in which an obligation can be expressed, as well as the various forms which a breach may take.

(3) Article 12 states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation "regardless of its origin". As this phrase indicates, the articles are of general application. They apply to all international obligations of States, whatever their origin may be. International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. States may assume international obligations by a unilateral act.[738] [196] An international obligation may arise from provisions stipulated in a treaty (a decision of an organ of an international organization competent in the matter, a judgment given between two States by ICJ or another tribunal, *etc.*). It is unnecessary to spell out these possibilities in article 12, since the responsibility of a State is engaged by the breach of an international obligation whatever the particular origin of the obligation concerned. The formula "regardless of its origin" refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law. The word "source" is sometimes used in this context, as in the preamble to the Charter of the United Nations which stresses the need to respect "the obligations arising from treaties and other sources of international law". The word "origin", which has the same meaning, is not attended by the doubts and doctrinal debates the term "source" has provoked.

(4) According to article 12, the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State, nor does it, as such, affect the regime of State responsibility thereby arising. Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act.[739] [197] Moreover, these various grounds of obligation interact with each other, as practice clearly shows. Treaties, especially multilateral treaties, can contribute to the formation of general international law; customary law may assist in the interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on. Thus, international courts and tribunals have treated responsibility as arising for a State by reason of any "violation of a duty imposed by an international juridical standard".[740] [198] In the *"Rainbow Warrior"* arbitration, the tribunal said that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility

---

[738] [196] Thus, France undertook by a unilateral act not to engage in further atmospheric nuclear testing: *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand v. France), ibid.*, p. 457. The extent of the obligation thereby undertaken was clarified in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand* v. *France) Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 288.

[739] [197] ICJ has recognized "[t]he existence of identical rules in international treaty law and customary law" on a number of occasions, *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 95, para. 177; see also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38–39, para. 63.

[740] [198] *Dickson Car Wheel Company* (footnote [36] 42 above); cf. the *Goldenberg* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 901, at pp. 908–909 (1928); *International Fisheries Company* (footnote [37] 43 above), p. 701 ("some principle of international law"); and *Armstrong Cork Company* (footnote [39] 45 above), p. 163 ("any rule whatsoever of international law").

and consequently, to the duty of reparation".[741] [199] In the *Gabčíkovo-Nagymaros Project* case, ICJ referred to the relevant draft article provisionally adopted by the Commission in 1976 in support of the proposition that it is "well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect".[742] [200]

(5) Thus, there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, *i.e.* for responsibility arising *ex contractu* or *ex delicto*. In the *"Rainbow Warrior"* arbitration, the tribunal affirmed that "in the field of international law there is no distinction between contractual and tortious responsibility".[743] [201] As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the "civil" and "criminal" responsibility as is the case in internal legal systems.

(6) State responsibility can arise from breaches of bilateral obligations or of obligations owed to some States or to the international community as a whole. It can involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law. Questions of the gravity of the breach and the peremptory character of the obligation breached can affect the consequences which arise for the responsible State and, in certain cases, for other States also. Certain distinctions between the consequences of certain breaches are accordingly drawn in Parts Two and Three of these articles.[744] [202] But the regime of State responsibility for breach of an international obligation under Part One is comprehensive in scope, general in character and flexible in its application: Part One is thus able to cover the spectrum of possible situations without any need for further distinctions between categories of obligation concerned or the category of the breach.

(7) Even fundamental principles of the international legal order are not based on any special source of law or specific law-making procedure, in contrast with rules of constitutional character in internal legal systems. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts. But this is an issue belonging to the content of State responsibility.[745] [203] So far at least as Part One of the articles is concerned, there is a unitary regime of State responsibility which is general in character.

---

[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)

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

In its 2002 decision on annulment in the *CAA and Vivendi Universal* v. *Argentina* case, the ICSID *ad hoc* committee referred to the text and commentaries to articles 2, 4 and 12 finally adopted by the International Law Commission. The relevant passages are quoted [on pages 26 and 67] above.

[A/62/62, para. 72]

---

[756] [214] Cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (footnote [142] 83 above), p. 30, para. 42.

[757] [215] A uniform law treaty will generally be construed as requiring immediate implementation, *i.e.* as embodying an obligation to make the provisions of the uniform law a part of the law of each State party: see, *e.g.*, B. Conforti, "Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme", *Rivista di diritto internazionale privato e processuale*, vol. 24 (1988), p. 233.

[758] [216] See article 4 and commentary. For illustrations, see, e. g., the findings of the European Court of Human Rights in *Norris* v. *Ireland*, *Eur. Court H.R., Series A, No. 142*, para. 31 (1988), citing *Klass and Others* v. *Germany*, *ibid.*, *No. 28*, para. 33, (1978); *Marckx* v. *Belgium*, *ibid.*, *No. 31*, para. 27 (1979); *Johnston and Others* v. *Ireland*, *ibid.*, *No. 112*, para. 42 (1986); *Dudgeon* v. *the United Kingdom*, *ibid.*, *No. 45*, para. 41 (1981); and *Modinos* v. *Cyprus*, *ibid.*, *No. 259*, para. 24 (1993). See also *International responsibility for the promulgation and enforcement of laws in violation of the Convention (arts. 1 and 2 American Convention on Human Rights)*, Advisory Opinion OC–14/94, Inter-American Court of Human Rights, Series A, No. 14 (1994). The Inter-American Court also considered it possible to determine whether draft legislation was compatible with the provisions of human rights treaties: *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC–3/83, Series A, No. 3 (1983).

[759] [217] As ICJ held in *LaGrand*, *Judgment* (footnote [236] 119 above), p. 497, paras. 90–91.

[760] [218] See, *e.g.*, WTO, Report of the Panel[, United States–Sections 301–310 of the Trade Act of 1974 (WT/DS152/R), 22 December 1999] (footnote [94] 73 above), paras. 7.34–7.57.

International arbitral tribunal (under the ICSID Convention)

ConocoPhillips Petrozuata B.V., and others v. *Bolivarian Republic of Venezuela*

In *ConocoPhillips Petrozuata B.V., and others* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal cited the commentary to article 12 when considering that "a breach of obligation does not occur until the law in issue is actually applied in breach of that obligation and that cannot happen before the law in question is in force".[761] 109

[A/71/80, para. 81]

Special Tribunal for Lebanon

The Prosecutor v. *Salim Jamil Ayyash et al.*

In *The Prosecutor* v. *Salim Jamil Ayyash et al.*, the Special Tribunal for Lebanon referred to article 12 and the pertinent commentary in explaining that "the standard for determining a State's non-compliance may be objective" but "[i]nterpretation, obviously, depends upon the circumstances".[762] 110

[A/71/80, para. 82]

Caribbean Court of Justice

Maurice Tomlinson v. *The State of Belize and The State of Trinidad and Tobago*

The Caribbean Court of Justice in *Maurice Tomlinson* v. *The State of Belize and The State of Trinidad and Tobago* accepted that "[a]rticle 12 [of the State responsibility articles] repeats the rule of customary international law that there is a breach of an international obligation by a State when an act of the State is not in conformity with what is required of it by that obligation".[763] 120

[A/74/83, p. 23]

African Commission on Human and Peoples' Rights

Hossam Ezzat & Rania Enayet v. *The Arab Republic of Egypt*

In *Hossam Ezzat & Rania Enayet* v. *The Arab Republic of Egypt*, the African Commission on Human and Peoples' Rights, citing article 12, observed that "[a] [S]tate breaches an international obligation when its conduct or conduct attributable to it in the form of action or omission is not in conformity or is inconsistent with what is expected of it by the obligation in question".[764] 121

[A/74/83, p. 23]

---

[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.