Article 13. International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Commentary

(1) Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when the State is bound by the obligation. This is but the application in the field of State responsibility of the general principle of intertemporal law, as stated by Judge Huber in another context in the *Island of Palmas* case:

> [A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.[766] 219

Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation ("does not constitute … unless …") is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.

(2) International tribunals have applied the principle stated in article 13 in many cases. An instructive example is provided by the decision of Umpire Bates of the United States-Great Britain Mixed Commission concerning the conduct of British authorities who had seized United States vessels engaged in the slave trade and freed slaves belonging to United States nationals. The incidents referred to the Commission had taken place at different times and the umpire had to determine whether, at the time each incident took place, slavery was "contrary to the law of nations". Earlier incidents, dating back to a time when the slave trade was considered lawful, amounted to a breach on the part of the British authorities of the international obligation to respect and protect the property of foreign nationals.[767] 220 The later incidents occurred when the slave trade had been "prohibited by all civilized nations" and did not involve the responsibility of Great Britain.[768] 221

(3) Similar principles were applied by Arbitrator Asser in deciding whether the seizure and confiscation by Russian authorities of United States vessels engaged in seal hunting outside Russia's territorial waters should be considered internationally wrongful. In his award in the *"James Hamilton Lewis"* case, he observed that the question had to be settled "according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the

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[766] 219 *Island of Palmas* (Netherlands/United States of America), UNRIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845 (1928). Generally on intertemporal law, see resolution I adopted in 1975 by the Institute of International Law at its Wiesbaden session, *Annuaire de l'Institut de droit international*, vol. 56 (1975), pp. 536–540; for the debate, *ibid*., pp. 339–374; for M. Sørensen's reports, *ibid*., vol. 55 (1973), pp. 1–116. See further W. Karl, "The time factor in the law of State responsibility", Simma and Spinedi, eds., *op. cit*. (footnote [689] 175 above), p. 95.

[767] 220 See the *"Enterprize"* case, Lapradelle-Politis (footnote [520] 139 above), vol. I, p. 703 (1855); and Moore, *History and Digest*, vol. IV, p. 4349, at p. 4373. See also the *"Hermosa"* and *"Créole"* cases, Lapradelle-Politis, *op. cit*., p. 704 (1855); and Moore, *History and Digest*, vol. IV, pp. 4374–4375.

[768] 221 See the *"Lawrence"* case, Lapradelle-Politis, *op. cit*., p. 741; and Moore, *History and Digest*, vol. III, p. 2824. See also the *"Volusia"*case, Lapradelle-Politis, *op. cit*., p. 741.

vessel".[769] [222] Since, under the principles in force at the time, Russia had no right to seize the United States vessel, the seizure and confiscation of the vessel were unlawful acts for which Russia was required to pay compensation.[770] [223] The same principle has consistently been applied by the European Commission and the European Court of Human Rights to deny claims relating to periods during which the European Convention on Human Rights was not in force for the State concerned.[771] [224]

(4) State practice also supports the principle. A requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place is a common stipulation in arbitration agreements, [772] [225] and undoubtedly is made by way of explicit confirmation of a generally recognized principle. International law writers who have dealt with the question recognize that the wrongfulness of an act must be established on the basis of the obligations in force at the time when the act was performed.[773] [226]

(5) State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence, as contemplated by article 64 of the 1969 Vienna Convention, this does not entail any retrospective assumption of responsibility. Article 71, paragraph 2 (*b*), provides that such a new peremptory norm "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm".

(6) Accordingly, it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application. It is, however, without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for

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[769] [222] *Affaire des navires Cape Horn Pigeon, James Hamilton Lewis, C. H. White et Kate and Anna*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 66, at p. 69 (1902).

[770] [223] See also the *"C. H. White"* case, *ibid.*, p. 74. In these cases the arbitrator was required by the arbitration agreement itself to apply the law in force at the time the acts were performed. Nevertheless, the intention of the parties was clearly to confirm the application of the general principle in the context of the arbitration agreement, not to establish an exception. See further the *S.S. "Lisman"* case, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1767, at p. 1771 (1937).

[771] [224] See, *e.g.*, *X* v. *Germany*, application No. 1151/61, Council of Europe, European Commission of Human Rights, *Recueil des décisions*, No. 7 (March 1962), p. 119 (1961) and many later decisions.

[772] [225] See, *e.g.*, Declarations exchanged between the Government of the United States of America and the Imperial Government of Russia, for the submission to arbitration of certain disputes concerning the international responsibility of Russia for the seizure of American ships, UNRIAA, vol. IX (Sales No. 59.V.5), p. 57 (1900).

[773] [226] See, *e.g.*, P. Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public: problèmes de droit intertemporel ou de droit transitoire* (Paris, Librairie générale de droit et de jurisprudence, 1970), pp. 119, 135 and 292; D. Bindschedler-Robert, "De la rétroactivité en droit international public", *Recueil d'études de droit international en hommage à Paul Guggenheim* (University of Geneva Law Faculty/Graduate Institute of International Studies, 1968), p. 184; M. Sørensen, "Le problème intertemporel dans l'application de la Convention européenne des droits de l'homme", *Mélanges offerts à Polys Modinos* (Paris, Pedone, 1968), p. 304; T. O. Elias, "The doctrine of intertemporal law", AJIL, vol. 74, No. 2 (April 1980), p. 285; and R. Higgins, "Time and the law: international perspectives on an old problem", *International and Comparative Law Quarterly,* vol. 46 (July 1997), p. 501.

that State. In fact, cases of the retrospective assumption of responsibility are rare. The *lex specialis* principle (art. 55) is sufficient to deal with any such cases where it may be agreed or decided that responsibility will be assumed retrospectively for conduct which was not a breach of an international obligation at the time it was committed.[774] 227

(7) In international law, the principle stated in article 13 is not only a necessary but also a sufficient basis for responsibility. In other words, once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law. Thus, as ICJ said in the *Northern Cameroons* case:

> [I]f during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust.[775] 228

Similarly, in the *"Rainbow Warrior"* arbitration, the arbitral tribunal held that, although the relevant treaty obligation had terminated with the passage of time, France's responsibility for its earlier breach remained.[776] 229

(8) Both aspects of the principle are implicit in the ICJ decision in the *Certain Phosphate Lands in Nauru* case. Australia argued there that a State responsibility claim relating to the period of its joint administration of the Trust Territory for Nauru (1947–1968) could not be brought decades later, even if the claim had not been formally waived. The Court rejected the argument, applying a liberal standard of laches or unreasonable delay.[777] 230 But it went on to say that:

> [I]t will be for the Court, in due time, to ensure that Nauru's delay in seising [*sic*] it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.[778] 231

Evidently, the Court intended to apply the law in force at the time the claim arose. Indeed that position was necessarily taken by Nauru itself, since its claim was based on a breach of the Trusteeship Agreement, which terminated at the date of its accession to independence in 1968. Its claim was that the responsibility of Australia, once engaged under the law in force at a given time, continued to exist even if the primary obligation had subsequently terminated.[779] 232

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[774] 227 As to the retroactive effect of the acknowledgement and adoption of conduct by a State, see article 11 and commentary, especially paragraph (4). Such acknowledgement and adoption would not, without more, give retroactive effect to the obligations of the adopting State.

[775] 228 *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15, at p. 35.

[776] 229 *"Rainbow Warrior"* (footnote [40] 46 above), pp. 265–266.

[777] 230 *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at pp. 253–255, paras. 31–36. See article 45, subparagraph (*b*), and commentary.

[778] 213 *Certain Phosphate Lands in Nauru*, *ibid*., p. 255, para. 36.

[779] 232 The case was settled before the Court had the opportunity to consider the merits: *Certain Phosphate Lands in Nauru, Order of 13 September 1993, I.C.J. Reports 1993*, p. 322; for the settlement agreement, see Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru (Nauru, 10 August 1993) (United Nations, *Treaty Series*, vol. 1770, No. 30807, p. 379).

(9) The basic principle stated in article 13 is thus well established. One possible qualification concerns the progressive interpretation of obligations, by a majority of the Court in the *Namibia* case.[780] [233] But the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permissible in certain cases,[781] [234] but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct. Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation.[782] [235]

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Additional Facility Rules)

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

In its 2002 award, the arbitral tribunal constituted in accordance with chapter 11 of NAFTA to hear the *Mondev* v. *United States* case observed that the basic principle "that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach" was "stated both in [article 28 of] the Vienna Convention on the Law of Treaties and in the International Law Commission's articles on State responsibility, and has been repeatedly affirmed by international tribunals".[783] [119] It referred in a footnote to article 13 finally adopted by the International Law Commission in 2001.

[A/62/62, para. 73]

European Court of Human Rights

Blečić v. *Croatia*

In its 2006 judgement in the *Blečić* v. *Croatia* case, the European Court, sitting as a Grand Chamber, quoted the text of articles 13 and 14, as finally adopted by the International Law Commission in 2001, in the section devoted to the "relevant international law and practice".[784] [120] The European Court later observed that

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[780] [233] *Namibia* case (footnote [690] 176 above), pp. 31–32, para. 53.

[781] [234] See, *e.g.*, *Tyrer* v. *the United Kingdom, Eur. Court H.R., Series A, No. 26*, pp. 15–16 (1978).

[782] [235] See, *e.g.*, *Zana* v. *Turkey*, *Eur. Court H.R., Reports*, 1997–VII, p. 2533 (1997); and J. Pauwelyn, "The concept of a 'continuing violation' of an international obligation: selected problems", BYBIL*, 1995*, vol. 66, p. 415, at pp. 443–445.

[783] [119] NAFTA (ICSID Additional Facility), *Mondev International Ltd.* v. *United States of America*, Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 68 (footnotes omitted), reproduced in *International Law Reports*, vol. 125, p. 131.

[784] [120] ECHR, Grand Chamber, Application No. 59532/00, Judgment, 8 March 2006, para. 48.

while it is true that from the ratification date onwards all of the State's acts and omissions must conform to the [1950 European Convention on Human Rights] … the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to that date … Any other approach would undermine both the principle of non-retroactivity in the law of treaties and the fundamental distinction between violation and reparation that underlines the law of State responsibility.[785] 121

The European Court found thereafter that, on the basis of its jurisdiction *ratione temporis*, it could not take cognizance of the merits of the case, since the facts allegedly constitutive of interference preceded the date into force of the Convention in respect of Croatia.[786] 122

[A/62/62, para. 74]

Šilih v. *Slovenia*

In the *Šilih* v. *Slovenia* case, the European Court of Human Rights referred to article 13 of the State responsibility articles as constituting "relevant international law and practice" in the context of the consideration of the jurisdiction *ratione temporis* of the court.[787] 14

[A/65/76, para. 18]

International Court of Justice

Jurisdictional Immunities of the State (Germany v. *Italy)*

In its judgment in *Jurisdictional Immunities of the State (Germany* v. *Italy)*, the International Court of Justice referred to article 13 in support of the assertion that "the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred".[788] 104

[A/68/72, para. 76]

International arbitral tribunal (under the ICSID Convention)

Railroad Development Corporation v. *Republic of Guatemala*

The arbitral tribunal in *Railroad Development Corporation* v. *Republic of Guatemala* referred to article 13 in support of the assertion that a "[t]reaty cannot be breached before it entered into force … ".[789] 105

[A/68/72, para. 77]

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[785] 121 *Ibid*., para. 81.

[786] 122 *Ibid*., para. 92 and operative paragraph.

[787] 14 ECHR, Grand Chamber, Application No. 71463/01, Judgment, 9 April 2009, para. 107.

[788] 104 ICJ, Judgment, 3 February 2012, para. 58.

[789] 105 ICSID, Case No. ARB/07/23, second decision on objections to jurisdiction, 29 June 2012, para. 116 (quoting article 13).

African Commission on Human and Peoples' Rights

Al-Asad v. *Djibouti*

In *Al-Asad* v. *Djibouti*, the African Commission on Human and Peoples' Rights referred to article 13 as a "simple and well-articulated" principle.[790] [112]

[A/71/80, para. 83]

International arbitral tribunal (under the ICSID Convention)

Renee Rose Levy and Gremcitel S.A. v. *Republic of Peru*

The arbitral tribunal in *Renee Rose Levy and Gremcitel S.A.* v. *Republic of Peru* cited article 13 in support of "the principle of non-retroactivity of treaties".[791] [113]

[A/71/80, para. 84]

Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company Limited v. *The Government of Belgium*

In *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company Limited* v. *The Government of Belgium*, the arbitral tribunal cited article 13 as codifying the "general principle (perhaps more accurately described as a presumption) of non-retroactivity of treaties".[792] [114] More specifically, the tribunal relied on article 13 in support of its view that

> the substantive provisions of a BIT may not be relied on in relation to acts and omissions occurring before its entry into force (unless they are continuing or composite acts) even where (as here) the BIT applies to investments made prior to the entry into force of the BIT, or where the dispute arose after the entry into force of the BIT.[793] [115]

[A/71/80, para. 85]

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

In *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman*, the arbitral tribunal noted that "Article 13 of the ILC Articles on State Responsibility confirms that an act of State will not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs".[794] [116]

[A/71/80, para. 86]

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[790] [112] ACHPR, Communication 383/10, Decision on Admissibility, 12 May 2014, para. 130.

[791] [113] ICSID, Case No. ARB/11/17, Award, 9 January 2015, para. 147, note 170.

[792] [114] ICSID, Case No. ARB/12/29, Award, 30 April 2015, paras. 168–169.

[793] [115] *Ibid*., para. 172.

[794] [116] See footnote [340] 66 above, para. 395.

Permanent Court of Arbitration (under UNCITRAL Rules)

Mesa Power Group v. *Government of Canada*

In *Mesa Power Group* v. *Government of Canada*, the arbitral tribunal cited article 13 with regard to the non-retroactivity of treaties when concluding that "State conduct cannot be governed by rules that are not applicable when the conduct occurs".[795] 122

[A/74/83, p. 23]

Renco Group v. *Republic of Peru*

In *Renco Group* v. *Republic of Peru*, the arbitral tribunal noted that articles 13 and 14 reflected

> the general principle that the lawfulness of State conduct must be assessed contemporaneously with that conduct. Since a State is not bound by a conventional obligation it has assumed under a treaty until such treaty enters into force, that treaty obligation cannot be breached until the treaty giving rise to that obligation has come into force.[796] 83

[A/77/74, p. 17]

Permanent Court of Arbitration (under UNCITRAL Rules)

Spółdzielnia Pracy Muszynianka v. *Slovak Republic*

In *Spółdzielnia Pracy Muszynianka* v. *Slovak Republic*, the arbitral tribunal quoted paragraph (7) of the commentary to article 13 and noted that, at the time that the facts occurred, the relevant bilateral investment treaty was in force and, "[a]s a result, … the Respondent's responsibility as well as the monetary consequences of a breach are governed by the BIT irrespective of the latter's termination".[797] 84

[A/77/74, p. 17]

International arbitral tribunal (under the ICSID Convention)

Astrida Benita Carrizosa v. *Republic of Colombia*

The arbitral tribunal in *Astrida Benita Carrizosa* v. *Republic of Colombia* referred to article 13, noting that conduct prior to the entry into force of the investment treaty could not constitute a breach, as "confirmed by the rule of State responsibility, according to which there can be no breach of an international obligation if that obligation did not apply at the time of the commission of the allegedly unlawful conduct".[798] 85

[A/77/74, p. 17]

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[795] 122 PCA, Case No. 2012–17, Award, 24 March 2016, para. 325 and footnote 69.

[796] 83 PCA, Case No. 2019–46, Decision on Expedited Preliminary Objections, 30 June 2020, paras. 141–142.

[797] 84 PCA, Case No. 2017–08, Award, 7 October 2020, para. 264.

[798] 85 ICSID, Case No. ARB/18/5, Award, 19 April 2021, para. 126.

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

OOO Manolium Processing v. *Republic of Belarus*

The arbitral tribunal in *OOO Manolium Processing* v. *Republic of Belarus* referred to article 13 and the commentary thereto. It noted that article 13 reflected a principle "which is considered 'well established' and supported by State practice", namely that "[t]he prohibition of retroactivity implies that the legality of a Member State's actions under the [Treaty on the Eurasian Economic Union] can only be assessed if the Treaty was in force at the time the act was performed".[799] [86]

[A/77/74, p. 17]

[799] [86] PCA, Case No. 2018–06, Final Award, 22 June 2021, para. 269.