

CHAPTER IV

RESPONSIBILITY OF A STATE IN CONNECTION WITH
THE ACT OF ANOTHER STATE*Commentary*

(1) In accordance with the basic principles laid down in chapter I, each State is responsible for its own internationally wrongful conduct, *i.e.* for conduct attributable to it under chapter II which is in breach of an international obligation of that State in accordance with chapter III.^{[892] 261} The principle that State responsibility is specific to the State concerned underlies the present articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities.

(2) However, internationally wrongful conduct often results from the collaboration of several States rather than of one State acting alone.^{[893] 262} This may involve independent conduct by several States, each playing its own role in carrying out an internationally wrongful act. Or it may be that a number of States act through a common organ to commit a wrongful act.^{[894] 263} Internationally wrongful conduct can also arise out of situations where a State acts on behalf of another State in carrying out the conduct in question.

(3) Various forms of collaborative conduct can coexist in the same case. For example, three States, Australia, New Zealand and the United Kingdom, together constituted the Administering Authority for the Trust Territory of Nauru. In the *Certain Phosphate Lands in Nauru* case, proceedings were commenced against Australia alone in respect of acts performed on the “joint behalf” of the three States.^{[895] 264} The acts performed by Australia involved both “joint” conduct of several States and day-to-day administration of a territory by one State acting on behalf of other States as well as on its own behalf. By contrast, if the relevant organ of the acting State is merely “placed at the disposal” of the requesting State, in the sense provided for in article 6, only the requesting State is responsible for the act in question.

(4) In certain circumstances the wrongfulness of a State’s conduct may depend on the independent action of another State. A State may engage in conduct in a situation where another State is involved and the conduct of the other State may be relevant or even decisive in assess-

^[892] 261 See, in particular, article 2 and commentary.

^[893] 262 See M. L. Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (Milan, Giuffrè, 1990); Brownlie, *System of the Law of Nations ...* (footnote [195] 92 above), pp. 189–192; J. Quigley, “Complicity in international law: a new direction in the law of State responsibility”, *BYBIL*, 1986, vol. 57, p. 77; J. E. Noyes and B. D. Smith, “State responsibility and the principle of joint and several liability”, *Yale Journal of International Law*, vol. 13 (1988), p. 225; and B. Graefrath, “Complicity in the law of international responsibility”, *Revue belge de droit international*, vol. 29 (1996), p. 370.

^[894] 263 In some cases, the act in question may be committed by the organs of an international organization. This raises issues of the international responsibility of international organizations which fall outside the scope of the present articles. See article 57 and commentary.

^[895] 264 *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote [777] 230 above), p. 258, para. 47; see also the separate opinion of Judge Shahabuddeen, *ibid.*, p. 284.

ing whether the first State has breached its own international obligations. For example, in the *Soering* case the European Court of Human Rights held that the proposed extradition of a person to a State not party to the European Convention on Human Rights where he was likely to suffer inhuman or degrading treatment or punishment involved a breach of article 3 of the Convention by the extraditing State.^{[896] 265} Alternatively, a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from such conduct. Thus, the basis of responsibility in the *Corfu Channel* case^{[897] 266} was Albania's failure to warn the United Kingdom of the presence of mines in Albanian waters which had been laid by a third State. Albania's responsibility in the circumstances was original and not derived from the wrongfulness of the conduct of any other State.

(5) In most cases of collaborative conduct by States, responsibility for the wrongful act will be determined according to the principle of independent responsibility referred to in paragraph (1) above. But there may be cases where conduct of the organ of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, and this may be so even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of Part One defines these exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another.

(6) Three situations are covered in chapter IV. Article 16 deals with cases where one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter. Article 17 deals with cases where one State is responsible for the internationally wrongful act of another State because it has exercised powers of direction and control over the commission of an internationally wrongful act by the latter. Article 18 deals with the extreme case where one State deliberately coerces another into committing an act which is, or but for the coercion would be,^{[898] 267} an internationally wrongful act on the part of the coerced State. In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting State, and is or, but for the coercion, would be a breach of that State's international obligations. The implication of the second State in that breach arises from the special circumstance of its willing assistance in, its direction and control over or its coercion of the acting State. But there are important differences between the three cases. Under article 16, the State primarily responsible is the acting State and the assisting State has a mere supporting role. Similarly under article 17, the acting State commits the internationally wrongful act, albeit under the direction and control of another State. By contrast, in the case of coercion under article 18, the coercing State is the prime mover in respect of the conduct and the coerced State is merely its instrument.

(7) A feature of this chapter is that it specifies certain conduct as internationally wrongful. This may seem to blur the distinction maintained in the articles between the primary

^{[896] 265} *Soering v. The United Kingdom*, Eur. Court H.R., Series A, No. 161, pp. 33–36, paras. 85–91 (1989). See also *Cruz Varas and Others v. Sweden*, *ibid.*, No. 201, p. 28, paras. 69–70 (1991); and *Vilvarajah and Others v. The United Kingdom*, *ibid.*, No. 215, p. 37, paras. 115–116 (1991).

^{[897] 266} *Corfu Channel, Merits* (footnote [29] 35 above), p. 22.

^{[898] 267} If a State has been coerced, the wrongfulness of its act may be precluded by *force majeure*: see article 23 and commentary.

or substantive obligations of the State and its secondary obligations of responsibility.^{[899] 268} It is justified on the basis that responsibility under chapter IV is in a sense derivative.^{[900]269} In national legal systems, rules dealing, for example, with conspiracy, complicity and inducing breach of contract may be classified as falling within the “general part” of the law of obligations. Moreover, the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in chapter II.

(8) On the other hand, the situations covered in chapter IV have a special character. They are exceptions to the principle of independent responsibility and they only cover certain cases. In formulating these exceptional cases where one State is responsible for the internationally wrongful acts of another, it is necessary to bear in mind certain features of the international system. First, there is the possibility that the same conduct may be internationally wrongful so far as one State is concerned but not for another State having regard to its own international obligations. Rules of derived responsibility cannot be allowed to undermine the principle, stated in article 34 of the 1969 Vienna Convention, that a “treaty does not create either obligations or rights for a third State without its consent”; similar issues arise with respect to unilateral obligations and even, in certain cases, rules of general international law. Hence it is only in the extreme case of coercion that a State may become responsible under this chapter for conduct which would not have been internationally wrongful if performed by that State. Secondly, States engage in a wide variety of activities through a multiplicity of organs and agencies. For example, a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be internationally unlawful. Thus, it is necessary to establish a close connection between the action of the assisting, directing or coercing State on the one hand and that of the State committing the internationally wrongful act on the other. Thus, the articles in this part require that the former State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of the assisting, directing or coercing State. This is done without prejudice to the general question of “wrongful intent” in matters of State responsibility, on which the articles are neutral.^{[901] 270}

(9) Similar considerations dictate the exclusion of certain situations of “derived responsibility” from chapter IV. One of these is incitement. The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State.^{[902] 271} However, there can be specific treaty

^{[899] 268} See above, in the introduction to the articles, paras. (1)–(2) and (4) for an explanation of the distinction.

^{[900] 269} Cf. the term *responsabilité dérivée* used by Arbitrator Huber in *British Claims in the Spanish Zone of Morocco* (footnote [38] 44 above), p. 648.

^{[901] 270} See above, the commentary to paragraphs (3) and (10) of article 2.

^{[902] 271} See the statement of the United States-French Commissioners relating to the *French Indemnity of 1831* case in Moore, *History and Digest*, vol. V, p. 4447, at pp. 4473–4476. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote [30] 36 above), p. 129, para. 255, and the dissenting opinion of Judge Schwebel, p. 389, para. 259.

obligations prohibiting incitement under certain circumstances.^{[903] 272} Another concerns the issue which is described in some systems of internal law as being an “accessory after the fact”. It seems that there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred. Again it is a matter for specific treaty obligations to establish any such obligation of suppression after the event. There are, however, two important qualifications here. First, in some circumstances assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that act by the former State. In such cases responsibility for that act potentially arises pursuant to article 11. Secondly, special obligations of cooperation in putting an end to an unlawful situation arise in the case of serious breaches of obligations under peremptory norms of general international law. By definition, in such cases States will have agreed that no derogation from such obligations is to be permitted and, faced with a serious breach of such an obligation, certain obligations of cooperation arise. These are dealt with in article 41.

^{[903] 272} See, *e.g.*, article III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide; and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.