Chapter I

GENERAL PRINCIPLES

Commentary

(1) Chapter I of Part Two comprises six articles, which define in general terms the legal consequences of an internationally wrongful act of a State. Individual breaches of international law can vary across a wide spectrum from the comparatively trivial or minor up to cases which imperil the survival of communities and peoples, the territorial integrity and political independence of States and the environment of whole regions. This may be true whether the obligations in question are owed to one other State or to some or all States or to the international community as a whole. But over and above the gravity or effects of individual cases, the rules and institutions of State responsibility are significant for the maintenance of respect for international law and for the achievement of the goals which States advance through law-making at the international level.

(2) Within chapter I, article 28 is an introductory article, affirming the principle that legal consequences are entailed whenever there is an internationally wrongful act of a State. Article 29 indicates that these consequences are without prejudice to, and do not supplant, the continued obligation of the responsible State to perform the obligation breached. This point is carried further by , which deals with the obligation of cessation and assurances or guarantees of non-repetition. Article 31 sets out the general obligation of reparation for injury suffered in consequence of a breach of international law by a State. Article 32 makes clear that the responsible State may not rely on its internal law to avoid the obligations of cessation and reparation arising under Part Two. Finally, article 33 specifies the scope of the Part, both in terms of the States to which obligations are owed and also in terms of certain legal consequences which, because they accrue directly to persons or entities other than States, are not covered by Parts Two or Three of the articles.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Permanent Court of Arbitration (under UNCITRAL Rules)

Chevron Corporation and Texaco Petroleum Company v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* referred to articles 28 to 39 of the State responsibility articles under, part III, "Principal legal and other texts",[1186] [150] which were relevant with regard to the parties' claims for relief.[1187] [151]

[A/74/83, p. 28]

[1186] [150] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.

[1187] [151] *Ibid*., para. 9.9.

Article 28. Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Commentary

(1) Article 28 serves an introductory function for Part Two and is expository in character. It links the provisions of Part One which define when the international responsibility of a State arises with the provisions of Part Two which set out the legal consequences which responsibility for an internationally wrongful act involves.

(2) The core legal consequences of an internationally wrongful act set out in Part Two are the obligations of the responsible State to cease the wrongful conduct (art. 30) and to make full reparation for the injury caused by the internationally wrongful act (art. 31). Where the internationally wrongful act constitutes a serious breach by the State of an obligation arising under a peremptory norm of general international law, the breach may entail further consequences both for the responsible State and for other States. In particular, all States in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach and not to render aid or assistance to the responsible State in maintaining the situation so created (arts. 40–41).

(3) Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations *of* the State and not only those owed *to* other States. Thus, State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

Ioan Micula and others v. *Romania*

The arbitral tribunal in *Ioan Micula and others* v. *Romania*, recognized with reference to the commentary to article 28 that "the legal consequences of internationally wrongful acts, may not apply, at least directly, to cases involving persons or entities other than States".[1188] [133] However, the tribunal further emphasized that "the ILC Articles reflect customary international law in the matter of State responsibility, and to the extent that a mat-

[1188] [133] ICSID, Case No. ARB/05/20, Award, 11 December 2013, footnote 172.

ter is not ruled by the treaties applicable to this case and that there are no circumstances commanding otherwise, the Tribunal will turn to the ILC Articles for guidance".[1189] [134]

[A/71/80, para. 97]

Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. *Plurinational State of Bolivia*

In *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún* v. *Plurinational State of Bolivia*, while considering the applicability of Part Two of the State responsibility articles to investor-State disputes, the arbitral tribunal noted that "the ILC Articles restate customary international law and its rules on reparation have served as guidance to many tribunals in investor-State disputes".[1190] [135] This is despite the fact that, according to the commentary to article 28, Part Two "does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State".[1191] [136]

[A/71/80, para. 98]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Chevron Corporation and Texaco Petroleum Company v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* referred to articles 28 to 39 of the State responsibility articles under, part III, "Principal legal and other texts",[1192] [150] which were relevant with regard to the parties' claims for relief.[1193] [151]

[A/74/83, p. 28]]

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* referred to the commentary to article 28 of the State responsibility articles when noting that it:

> … is aware that Part Two of the ILC Articles, which sets out the legal consequences of internationally wrongful acts, may not apply, at least directly, to cases involving persons or entities other than States, such as in investment disputes as is the case here … That being said, the ILC Articles reflect customary international law in the matter of state responsibility, and to the extent that a matter is not addressed by the Treaty applicable to this case and that there are no circumstances commanding otherwise, the Tribunal will turn to the ILC Articles for guidance.[1194] [153]

[A/74/83, p. 28]

[1189] [134] *Ibid*., footnote 172.

[1190] [135] See footnote [65] 18 above, para. 555.

[1191] [136] *Ibid*., para. 555 (quoting para. (3) of the commentary to article 28).

[1192] [[150] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1193] [[151] *Ibid*., para. 9.9.]

[1194] [153] ICSID (Additional Facility), Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 848 and footnote 1242.

Article 29. Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Commentary

(1) Where a State commits a breach of an international obligation, questions as to the restoration and future of the legal relationship thereby affected are central. Apart from the question of reparation, two immediate issues arise, namely, the effect of the responsible State's conduct on the obligation which has been breached, and cessation of the breach if it is continuing. The former question is dealt with by article 29, the latter by article 30.

(2) Article 29 states the general principle that the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached. The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act (see article 14) and the obligation of cessation (see subparagraph (*a*) of article 30).

(3) It is true that in some situations the ultimate effect of a breach of an obligation may be to put an end to the obligation itself. For example, a State injured by a material breach of a bilateral treaty may elect to terminate the treaty.[1195] [424] But as the relevant provisions of the 1969 Vienna Convention make clear, the mere fact of a breach and even of a repudiation of a treaty does not terminate the treaty.[1196] [425] It is a matter for the injured State to react to the breach to the extent permitted by the Convention. The injured State may have no interest in terminating the treaty as distinct from calling for its continued performance. Where a treaty is duly terminated for breach, the termination does not affect legal relationships which have accrued under the treaty prior to its termination, including the obligation to make reparation for any breach.[1197] [426] A breach of an obligation under general international law is even less likely to affect the underlying obligation, and indeed will never do so *as such*. By contrast, the secondary legal relation of State responsibility arises on the occurrence of a breach and without any requirement of invocation by the injured State.

[1195] [424] See footnote [1184] 422 above.

[1196] [425] Indeed, in the *Gabčíkovo-Nagymaros Project* case, ICJ held that continuing material breaches by both parties did not have the effect of terminating the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System (footnote [31] 37 above), p. 68, para. 114.

[1197] [426] See, *e.g.*, *"Rainbow Warrior"* (footnote [40] 46 above), p. 266, citing Lord McNair (dissenting) in *Ambatielos, Preliminary Objection, I.C.J. Reports 1952*, p. 28, at p. 63. On that particular point the Court itself agreed, *ibid.*, p. 45. In the *Gabčíkovo-Nagymaros Project* case, Hungary accepted that the legal consequences of its termination of the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System on account of the breach by Czechoslovakia were prospective only, and did not affect the accrued rights of either party (footnote [31] 37 above), pp. 73–74, paras. 125–127. The Court held that the Treaty was still in force, and therefore did not address the question.

(4) Article 29 does not need to deal with such contingencies. All it provides is that the legal consequences of an internationally wrongful act within the field of State responsibility do not affect any continuing duty to comply with the obligation which has been breached. Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Arbitration Institute of the Stockholm Chamber of Commerce

Mohammad Ammar Al-Bahloul v. *The Republic of Tajikistan*

In *Mohammad Ammar Al-Bahloul* v. *The Republic of Tajikistan*, the arbitral tribunal cited article 29 as authority for the proposition that "it is a generally recognized international law principle that, where the breach is of a continuing character, a Contracting Party has a continuing duty to perform the obligation breached".[1198] 144

[A/68/72, para. 101]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Chevron Corporation and Texaco Petroleum Company v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* referred to articles 28 to 39 of the State responsibility articles under, part III, "Principal legal and other texts",[1199] 150 which were relevant with regard to the parties' claims for relief.[1200] 151

[A/74/83, p. 28]]

[1198] 144 SCC, Case No. V (064/2008), Final Award, 8 June 2010, para. 48.

[1199] [150 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1200] [151 *Ibid*., para. 9.9.]

Article 30. Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(*a*) to cease that act, if it is continuing;

(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Commentary

(1) Article 30 deals with two separate but linked issues raised by the breach of an international obligation: the cessation of the wrongful conduct and the offer of assurances and guarantees of non-repetition by the responsible State if circumstances so require. Both are aspects of the restoration and repair of the legal relationship affected by the breach. Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performance. The continuation in force of the underlying obligation is a necessary assumption of both, since if the obligation has ceased following its breach, the question of cessation does not arise and no assurances and guarantees can be relevant.[1201] 427

(2) Subparagraph (*a*) of article 30 deals with the obligation of the State responsible for the internationally wrongful act to cease the wrongful conduct. In accordance with article 2, the word "act" covers both acts and omissions. Cessation is thus relevant to all wrongful acts extending in time "regardless of whether the conduct of a State is an action or an omission … since there may be cessation consisting in abstaining from certain actions".[1202] 428

(3) The tribunal in the *"Rainbow Warrior"* arbitration stressed "two essential conditions intimately linked" for the requirement of cessation of wrongful conduct to arise, "namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".[1203] 429 While the obligation to cease wrongful conduct will arise most commonly in the case of a continuing wrongful act,[1204] 430 article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions. The phrase "if it is continuing" at the end of subparagraph (*a*) of the article is intended to cover both situations.

(4) Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act. Cessation is often the main focus of the controversy produced by conduct in breach of an international obligation.[1205] 431 It is

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[1201] 427 1969 Vienna Convention [on the Law of Treaties], art. 70, para. 1.

[1202] 428 *"Rainbow Warrior"* (footnote [40] 46 above), p. 270, para. 113.

[1203] 429 *Ibid*., para. 114.

[1204] 430 For the concept of a continuing wrongful act, see paragraphs (3) to (11) of the commentary to article 14.

[1205] 431 The focus of the WTO dispute settlement mechanism is on cessation rather than reparation: Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), especially article 3, paragraph 7, which provides for compensation "only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement".

frequently demanded not only by States but also by the organs of international organizations such as the General Assembly and Security Council in the face of serious breaches of international law. By contrast, reparation, important though it is in many cases, may not be the central issue in a dispute between States as to questions of responsibility.[1206] 432

(5) The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.

(6) There are several reasons for treating cessation as more than simply a function of the duty to comply with the primary obligation. First, the question of cessation only arises in the event of a breach. What must then occur depends not only on the interpretation of the primary obligation but also on the secondary rules relating to remedies, and it is appropriate that they are dealt with, at least in general terms, in articles concerning the consequences of an internationally wrongful act. Secondly, continuing wrongful acts are a common feature of cases involving State responsibility and are specifically dealt with in article 14. There is a need to spell out the consequences of such acts in Part Two.

(7) The question of cessation often arises in close connection with that of reparation, and particularly restitution. The result of cessation may be indistinguishable from restitution, for example in cases involving the freeing of hostages or the return of objects or premises seized. Nonetheless, the two must be distinguished. Unlike restitution, cessation is not subject to limitations relating to proportionality.[1207] 433 It may give rise to a continuing obligation, even when literal return to the *status quo ante* is excluded or can only be achieved in an approximate way.

(8) The difficulty of distinguishing between cessation and restitution is illustrated by the *"Rainbow Warrior"* arbitration. New Zealand sought the return of the two agents to detention on the island of Hao. According to New Zealand, France was obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was no question of cessation.[1208] 434 Evidently, the return of the two agents to the island was of no use to New Zealand if there was no continuing obligation on the part of France to keep them there. Thus, a return to the *status quo ante* may be of little or no value if the obligation breached no longer exists. Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not competent to release it from

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On the distinction between cessation and reparation for WTO purposes, see, *e.g.*, Report of the Panel, Australia-Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126/RW), 21 January 2000, para. 6.49.

[1206] 432 For cases where ICJ has recognized that this may be so, see, *e.g.*, *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at pp. 201–205, paras. 65–76; and *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 81, para. 153. See also C. D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 77–92.

[1207] 433 See article 35 (*b*) and commentary.

[1208] 434 UNRIAA, vol. XX (Sales No. E/F.93.V3), p. 217, at p. 266, para. 105 (1990).

such performance. The distinction between cessation and restitution may have important consequences in terms of the obligations of the States concerned.

(9) Subparagraph (*b*) of article 30 deals with the obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Assurances and guarantees are concerned with the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases. They are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily. For example, following repeated demonstrations against the United States Embassy in Moscow from 1964 to 1965, President Johnson stated that:

> The U. S. Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between states. Expressions of regret and compensation are no substitute for adequate protection.[1209] 435

Such demands are not always expressed in terms of assurances or guarantees, but they share the characteristics of being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation and they are included in article 30.

(10) The question whether the obligation to offer assurances or guarantees of non-repetition may be a legal consequence of an internationally wrongful act was debated in the *LaGrand* case. This concerned an admitted failure of consular notification contrary to article 36 of the Vienna Convention on Consular Relations. In its fourth submission Germany sought both general and specific assurances and guarantees as to the means of future compliance with the Convention. The United States argued that to give such assurances or guarantees went beyond the scope of the obligations in the Convention and that ICJ lacked jurisdiction to require them. In any event, formal assurances and guarantees were unprecedented and should not be required. Germany's entitlement to a remedy did not extend beyond an apology, which the United States had given. Alternatively, no assurances or guarantees were appropriate in the light of the extensive action it had taken to ensure that federal and State officials would in future comply with the Convention. On the question of jurisdiction, the Court held

> that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation … Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.[1210] 436

On the question of appropriateness, the Court noted that an apology would not be sufficient in any case in which a foreign national had been "subjected to prolonged detention or sentenced to severe penalties" following a failure of consular notification.[1211] 437 But in

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[1209] 435 Reprinted in ILM, vol. 4, No. 2 (July 1965), p. 698.

[1210] 436 *LaGrand, Judgment* (footnote [236] 119 above), p. 485, para. 48, citing *Case concerning the Factory at Chorzów, Jurisdiction* (footnote [28] 34 above).

[1211] 437 *LaGrand, Judgment* (footnote [236] 119 above), p. 512, para. 123.

the light of information provided by the United States as to the steps taken to comply in future, the Court held:

> that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (*b*), must be regarded as meeting Germany's request for a general assurance of non-repetition.[1212] 438

As to the specific assurances sought by Germany, the Court limited itself to stating that:

> if the United States, notwithstanding its commitment referred to … should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.[1213] 439

The Court thus upheld its jurisdiction on Germany's fourth submission and responded to it in the operative part. It did not, however, discuss the legal basis for assurances of non-repetition.

(11) Assurances or guarantees of non-repetition may be sought by way of satisfaction (*e.g.* the repeal of the legislation which allowed the breach to occur) and there is thus some overlap between the two in practice.[1214] 440 However, they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past. In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48.

(12) Assurances are normally given verbally, while guarantees of non-repetition involve something more—for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested, international practice is not uniform. The injured State usually demands either safeguards against the repetition of the wrongful act without any specification of the form they are to take[1215] 441 or, when the wrongful act affects its nationals, assurances of better protection of persons and property.[1216] 442 In the *LaGrand* case, ICJ spelled out with some specificity the obligation that would arise for the United States from a future breach, but added that "[t]his obligation can be carried out in various ways. The choice of means must be left to the United States".[1217] 443 It noted further that a State

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[1212] 438 *Ibid*., p. 513, para. 124; see also the operative part, p. 516, para. 128 (6).

[1213] 439 *Ibid*., pp. 513–514, para. 125. See also paragraph 127 and the operative part (para. 128 (7)).

[1214] 440 See paragraph (5) of the commentary to article 36.

[1215] 441 In the "Dogger Bank" incident in 1904, the United Kingdom sought "security against the recurrence of such intolerable incidents", G. F. de Martens, *Nouveau recueil général de traités*, 2nd series, vol. XXXIII, p. 642. See also the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General in Jakarta, in which the Chinese Deputy Minister for Foreign Affairs sought a guarantee that such incidents would not be repeated in the future, RGDIP, vol. 70 (1966), pp. 1013 *et seq*.

[1216] 442 Such assurances were given in the *Doane* incident (1886), Moore, *Digest*, vol. VI, pp. 345–346.

[1217] 443 *LaGrand, Judgment* (footnote [236] 119 above), p. 513, para. 125.

may not be in a position to offer a firm guarantee of non—repetition.[1218] [444] Whether it could properly do so would depend on the nature of the obligation in question.

(13) In some cases, the injured State may ask the responsible State to adopt specific measures or to act in a specified way in order to avoid repetition. Sometimes the injured State merely seeks assurances from the responsible State that, in future, it will respect the rights of the injured State.[1219] [445] In other cases, the injured State requires specific instructions to be given,[1220] [446] or other specific conduct to be taken.[1221] [447] But assurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words "if the circumstances so require" at the end of subparagraph (*b*). The obligation of the responsible State with respect to assurances and guarantees of non-repetition is formulated in flexible terms in order to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by States in the past.

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 noted that France had alleged that New Zealand was demanding, rather than *restitutio in integrum*, the cessation of the denounced behaviour, made reference to the concept of cessation, and its distinction with restitution, with reference to the reports submitted to the International Law Commission by Special Rapporteurs Riphagen and Arangio-Ruiz.[1222] [178] The arbitral

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[1218] [444] *Ibid*., para. 124.

[1219] [445] See, *e.g.*, the 1901 case in which the Ottoman Empire gave a formal assurance that the British, Austrian and French postal services would henceforth operate freely in its territory, RGDIP, vol. 8 (1901), p. 777, at pp. 788 and 792.

[1220] [446] See, *e.g.*, the incidents involving the *"Herzog"* and the *"Bundesrath"*, two German ships seized by the British Navy in December 1899 and January 1900, during the Boer war, in which Germany drew the attention of Great Britain to "the necessity for issuing instructions to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war", Martens, *op. cit.* (footnote [1215] 441 above), vol. XXIX, p. 456 at p. 486.

[1221] [447] In the *Trail Smelter* case (footnote [817] 253 above), the arbitral tribunal specified measures to be adopted by the Trail Smelter, including measures designed to "prevent future significant fumigations in the United States" (p. 1934). Requests to modify or repeal legislation are frequently made by international bodies. See, *e.g.*, the decisions of the Human Rights Committee: *Torres Ramirez* v. *Uruguay*, decision of 23 July 1980, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40* (A/35/40), p. 126, para. 19; *Lanza* v. *Uruguay*, decision of 3 April 1980, *ibid*., p. 119, para. 17; and *Dermit Barbato* v. *Uruguay*, decision of 21 October 1982, *ibid*., *Thirty-eighth Session, Supplement No. 40* (A/38/40), p. 133, para. 11.

[1222] [178] At the time of the said award, the draft articles on the legal consequences of the commission of an internationally wrongful act were still under consideration, on the basis of the reports by Special

tribunal observed in particular that, by inserting a separate article concerning cessation, the International Law Commission had endorsed the view of Special Rapporteur Arangio-Ruiz that "cessation has inherent properties of its own which distinguish it from reparation":

Recent studies on State responsibility undertaken by the Special Rapporteurs of the International Law Commission have led to an analysis in depth of the distinction between an order for the cessation of the unlawful act and *restitutio in integrum*. Professor Riphagen observed that in numerous cases 'stopping the breach was involved, rather than reparation or *restitutio in integrum stricto sensu*' (*Yearbook … 1981*, vol. II, Part One, document A/CN.4/342 and Add.1–4, para. 76).

The present Special Rapporteur, Professor Arangio-Ruiz, has proposed a distinction between the two remedies (International Law Commission report to the General Assembly for 1988, para. 538).

…

The International Law Commission has accepted the insertion of an article separate from the provisions on reparation and dealing with the subject of cessation, thus endorsing the view of the Special Rapporteur Arangio-Ruiz that cessation has inherent properties of its own which distinguish it from reparation (International Law Commission report to the General Assembly for 1989, para. 259).

Special Rapporteur Arangio-Ruiz has also pointed out that the provision on cessation comprises all unlawful acts extending in time, regardless of whether the conduct of a State is an action or an omission (International Law Commission report to the General Assembly for 1988, para. 537).

This is right, since there may be cessation consisting in abstaining from certain actions—such as supporting the 'contras'—or consisting in positive conduct, such as releasing the United States hostages in Teheran.

…

Undoubtedly the order requested by the New Zealand Government for the return of the two agents would really be an order for the cessation of the wrongful omission rather than a *restitutio in integrum*. This characterization of the New Zealand request is relevant to the Tribunal's decision, since in those cases where material restitution of an object is possible, the expiry of a treaty obligation may not be, by itself, an obstacle for ordering restitution.[1223] [179]

[A/62/62, para. 101]

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 consequences for the parties of Burundi's responsibility in the case, quoted draft article 6 of Part Two of the draft articles ("Content, forms and degrees of international responsibility"),[1224] [180] as provisionally adopted by the International Law

Rapporteurs Riphagen and Arangio-Ruiz. The provisions finally adopted by the International Law Commission in 2001 on cessation and restitution are, respectively, articles 30 and 35.

[1223] [179] See footnote [40] 46 above.

[1224] [180] This provision was amended and incorporated in article 30(*a*) finally adopted by the International Law Commission in 2001. Draft article 6 of Part Two read as follows:

Commission. It considered that the nature as a rule of customary international law of this provision concerning the obligation to put an end to a wrongful act "is not in doubt".[1225] 181

[A/62/62, para. 102]

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, in response to a request by Germany that the Court "order Italy to take, by means of its own choosing, any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable",[1226] 145 indicated that:

> [t]his is to be understood as implying that the relevant decisions should cease to have effect.
>
> According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 (*a*) of the International Law Commission's Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing.[1227] 146

[A/68/72, para. 102]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER UNCITRAL RULES)

Valeri Belokon v. *Kyrgyz Republic*

In *Valeri Belokon* v. *Kyrgyz Republic*, the arbitral tribunal noted that, while it had "been directed to the ILC Articles on State Responsibility with regards to questions of attribution (Articles 4 and 8), no reference appears to have been made to this Tribunal's authority to grant Satisfaction (Article 37) or Assurances (Article 30) of the form requested".[1228] 137 It therefore held that its authority to grant the requested relief under international law had "not been sufficiently established" and so declined to grant it.[1229] 138

[A/71/80, para. 99]

Article 6

Cessation of wrongful conduct

A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

[1225] 181 See footnote [824] 127 above.

[1226] 145 See footnote [788] 104 above, paras. 15 and 137.

[1227] 146 *Ibid*., para. 137.

[1228] 137 Award, 24 October 2014, para. 275.

[1229] 138 *Ibid*., para. 276.

[Permanent Court of Arbitration (under UNCITRAL Rules)

Chevron Corporation and Texaco Petroleum Company v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* referred to articles 28 to 39 of the State responsibility articles under, part III, "Principal legal and other texts",[1230] [150] which were relevant with regard to the parties' claims for relief.[1231] [151]

[A/74/83, p. 28]]

International arbitral tribunal (under the ICSID Convention)

Mobil Investments Canada Inc. v. *Government of Canada*

In *Mobil Investments Canada Inc.* v. *Government of Canada*, the arbitral tribunal stated that:

> [o]nce a Chapter Eleven tribunal found that the imposition and enforcement of the 2004 Guidelines was contrary to Article 1106 [of NAFTA], it is difficult to see how Canada could discharge its duty to perform its obligations under Article 1106 in good faith while still enforcing the Guidelines. That conclusion is reinforced by the ILC Articles on State Responsibility, Article 30 of which provides that a State which is responsible for an internationally wrongful act is under an obligation to cease that act if it is a continuing one.[1232] [154]

[A/74/83, p. 28]

European Court of Human Rights

Case of Georgia v. *Russia (I)*

In *Case of Georgia* v. *Russia (I)*, the European Court of Human Rights stated

> [t]hat the just-satisfaction rule [under the European Convention on Human Rights] is directly derived from the principles of public international law relating to State liability … Those principles include both the obligation on the State responsible for the internationally wrongful act 'to cease that act, if it is continuing' and the obligation to 'make full reparation for the injury caused by the internationally wrongful act', as laid down in Articles 30 and 31 respectively of the Articles on Responsibility of States for Internationally Wrongful Acts.[1233] [155]

[A/74/83, p. 29]

International arbitral tribunal (under the ICSID Convention)

Pawlowski AG and Project Sever s.r.o. v. *Czech Republic*

In *Pawlowski AG and Project Sever s.r.o.* v. *Czech Republic*, the arbitral tribunal noted that under article 30, "the first obligation [of States] arising from internationally wrong-

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[1230] [[150] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1231] [[151] *Ibid*., para. 9.9.]

[1232] [154] ICSID, Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, para. 165.

[1233] [155] ECHR, Grand Chamber, Application No. 13255/07, Judgment, 31 January 2019, para. 54.

ful acts" was "to cease the act, if it is ongoing", and to "offer appropriate assurances and guarantees of non-repetition, if circumstances so require".[1234] [114]

[A/77/74, p. 22]

[1234] [114] See footnote [402] 52 above, para. 723.

Article 31. Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Commentary

(1) The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.[1235] 448

In this passage, which has been cited and applied on many occasions,[1236] 449 the Court was using the term "reparation" in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.

(2) In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[1237] 450

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.[1238] 451 In the second sentence, it dealt with that aspect of reparation encompassed by "compensation" for an unlawful act—that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

[1235] 448 *Case concerning the Factory at Chorzów,* Jurisdiction (footnote [28] 34 above).

[1236] 449 Cf. the ICJ reference to this decision in *LaGrand*, Judgment (footnote [236] 119 above), p. 485, para. 48.

[1237] 450 *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), p. 47.

[1238] 451 Cf. P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des États"*, Collected Courses … 1984–V* (Dordrecht, Martinus Nijhoff, 1986), vol. 188, p. 9, at p. 94, who uses the term *restauration*.

(3) The obligation placed on the responsible State by article 31 is to make "full reparation" in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed"[1239] [452] through the provision of one or more of the forms of reparation set out in chapter II of this part.

(4) The general obligation of reparation is formulated in article 31 as the immediate corollary of a State's responsibility, *i.e.* as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility,[1240] [453] the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

(5) The responsible State's obligation to make full reparation relates to the "injury caused by the internationally wrongful act". The notion of "injury", defined in paragraph 2, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, "injury" includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individually unaffected by the breach.[1241] [454] "Material" damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. "Moral" damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.[1242] [455]

(6) The question whether damage to a protected interest is a necessary element of an internationally wrongful act has already been discussed.[1243] [456] There is in general no such requirement; rather this is a matter which is determined by the relevant primary rule. In some cases, the gist of a wrong is the causing of actual harm to another State. In some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs. In some cases there is an outright commitment to perform a

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[1239] [452] *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), p. 47.

[1240] [453] For the States entitled to invoke responsibility, see articles 42 and 48 and commentaries. For the situation where there is a plurality of injured States, see article 46 and commentary.

[1241] [454] Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. Generally on notions of injury and damage, see B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973); B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", *Collected Courses … 1984–II* (The Hague, Nijhoff, 1985), vol. 185, p. 95; A. Tanzi, "Is damage a distinct condition for the existence of an internationally wrongful act?", Simma and Spinedi, eds., *op. cit.* (footnote [689] 175 above), p. 1; and Brownlie, *System of the Law of Nations …* (footnote [195] 92 above), pp. 53–88.

[1242] [455] See especially article 36 and commentary.

[1243] [456] See paragraph (9) of the commentary to article 2.

specified act, *e.g.* to incorporate uniform rules into internal law. In each case the primary obligation will determine what is required. Hence, article 12 defines a breach of an international obligation as a failure to conform with an obligation.

(7) As a corollary there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation. In the *"Rainbow Warrior"* arbitration it was initially argued that "in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation", but the parties subsequently agreed that:

> Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.[1244] 457

The tribunal held that the breach by France had "provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage … of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well".[1245] 458

(8) Where two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed. For the secondary rules of State responsibility to intervene at this stage and to prescribe that there is no responsibility because no identifiable harm or damage has occurred would be unwarranted. If the parties had wished to commit themselves to that formulation of the obligation they could have done so. In many cases, the damage that may follow from a breach (*e.g.* harm to a fishery from fishing in the closed season, harm to the environment by emissions exceeding the prescribed limit, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless, States may enter into immediate and unconditional commitments in their mutual long-term interest in such fields. Accordingly, article 31 defines "injury" in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case.

(9) Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only "[i]njury … caused by the internationally wrongful act of a State" for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.

(10) The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses "attributable to [the wrongful] act as

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[1244] 457 *"Rainbow Warrior"* (footnote [40] 46 above), pp. 266–267, paras. 107 and 109.

[1245] 458 *Ibid.*, p. 267, para. 110.

a proximate cause",[1246] [459] or to damage which is "too indirect, remote, and uncertain to be appraised",[1247][460] or to "any direct loss, damage—including environmental damage and the depletion of natural resources—or injury to foreign Governments, nationals and corporations as a result of" the wrongful act.[1248] [461] Thus, causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used,[1249] [462] in others "foreseeability"[1250] [463] or "proximity".[1251] [464] But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.[1252] [465] In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage "is not a part of the law which can be satisfactorily solved by search for a single verbal formula".[1253][466] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

[1246] [459] See United States-German Mixed Claims Commission, *Administrative Decision No. II*, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 23, at p. 30 (1923). See also *Dix* (footnote [692] 178 above), p. 121, and the Canadian statement of claim following the disintegration of the *Cosmos 954* Soviet nuclear-powered satellite over its territory in 1978, ILM, vol. 18 (1979), p. 907, para. 23.

[1247] [460] See the *Trail Smelter* arbitration (footnote [817] 253 above), p. 1931. See also A. Hauriou, "Les dommages indirects dans les arbitrages internationaux", RGDIP, vol. 31 (1924), p. 209, citing the *"Alabama"* arbitration as the most striking application of the rule excluding "indirect" damage (footnote [146] 87 above).

[1248] [461] Security Council resolution 687 (1991) of 3 April 1991, para. 16. This was a resolution adopted with reference to Chapter VII of the Charter of the United Nations, but it is expressed to reflect Iraq's liability "under international law … as a result of its unlawful invasion and occupation of Kuwait". UNCC and its Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under paragraph 16. See, *e.g.*, Recommendations made by the panel of Commissioners concerning individual claims for serious personal injury or death (category "B" claims), report of 14 April 1994 (S/AC.26/1994/1), approved by the Governing Council in its decision 20 of 26 May 1994 (S/AC.26/Dec.20 (1994)); Report and recommendations made by the panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC claim"), of 15 November 1996 (S/AC.26/1996/5/Annex), paras. 66–86, approved by the Governing Council in its decision 40 of 17 December 1996 (S/AC.26/Dec.40 (1996)).

[1249] [462] As in Security Council resolution 687 (1991), para. 16.

[1250] [463] See, *e.g.*, the *"Naulilaa"* case (footnote [990] 337 above), p. 1031.

[1251] [464] For comparative reviews of issues of causation and remoteness, see, *e.g.*, H. L. A. Hart and A. M. Honoré, *Causation in the Law*, 2nd ed. (Oxford, Clarendon Press, 1985); A. M. Honoré, "Causation and remoteness of damage", *International Encyclopedia of Comparative Law*, A. Tunc, ed. (Tübingen, Mohr/The Hague, Martinus Nijhoff, 1983), vol. XI, part I, chap. 7; Zweigert and Kötz, *op. cit.* (footnote [815] 251 above), pp. 601–627, in particular pp. 609 *et seq.*; and B. S. Markesinis, *The German Law of Obligations: Volume II—The Law of Torts: A Comparative Introduction*, 3rd ed. (Oxford, Clarendon Press, 1997), pp. 95–108, with many references to the literature.

[1252] [465] See, *e.g.*, the decision of the Iran-United States Claims Tribunal in *The Islamic Republic of Iran* v. *The United States of America*, cases A15 (IV) and A24, Award No. 590–A15 (IV)/A24–FT, 28 December 1998, *World Trade and Arbitration Materials*, vol. 11, No. 2 (1999), p. 45.

[1253] [466] P. S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford, Clarendon Press, 1995), p. 466.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.[1254] [467] The point was clearly made in this sense by ICJ in the *Gabčíkovo-Nagymaros Project* case:

> Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained".
>
> It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.[1255] [468]

(12) Often two separate factors combine to cause damage. In the *United States Diplomatic and Consular Staff in Tehran* case,[1256] [469] the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students' own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,[1257] [470] the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes,[1258] [471] except in cases of contributory fault.[1259] [472] In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines even though Albania had not itself laid

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[1254] [467] In the WBC claim, a UNCC panel noted that "under the general principles of international law relating to mitigation of damages … the Claimant was not only permitted but indeed obligated to take reasonable steps to … mitigate the loss, damage or injury being caused" report of 15 November 1996 (S/AC.26/1996/5/Annex) (footnote [1248] 461 above), para. 54.

[1255] [468] *Gabčíkovo-Nagymaros Project* (footnote [31] 37 above), p. 55, para. 80.

[1256] [469] *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), pp. 29–32.

[1257] [470] *Corfu Channel, Merits* (footnote [29] 35 above), pp. 17–18 and 22–23.

[1258] [471] This approach is consistent with the way in which these issues are generally dealt with in national law. "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause … In other words, the liability of a tortfeasor is not affected *vis-à-vis* the victim by the consideration that another is concurrently liable": T. Weir, "Complex liabilities", A. Tunc, ed., *op. cit.* (footnote [1251] 464 above), part 2, chap. 12, p. 43. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident of 27 July 1955* case when it said, referring to Article 38, paragraph 1 (*c*) and (*d*), of the ICJ Statute, that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage" (Memorial of 2 December 1958 (footnote [1033] 363 above), p. 229).

[1259] [472] See article 39 and commentary.

the mines.[1260] [473] Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *United States Diplomatic and Consular Staff in Tehran* case, the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.[1261] [474]

(13) It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct. Indeed, in the *Zafiro* claim the tribunal went further and in effect placed the onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

> We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.
>
> In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.[1262] [475]

(14) Concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach. However, the notion of "proportionality" applies differently to the different forms of reparation.[1263] [476] It is addressed, as appropriate, in the individual articles in chapter II dealing with the forms of reparation.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Panel of Commissioners of the United Nations Compensation Commission

S/AC.26/2003/15

In its 2003 report and recommendations concerning part three of the third instalment of "F3" claims,[1264] [182] the Panel of Commissioners of the United Nations Compensation Commission found that the loss resulting from the use or diversion of Kuwait's resources to fund the costs of putting right the loss and damage arising directly from Iraq's invasion and occupation of Kuwait (which it termed "direct financing losses") fell "squarely within the types

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[1260] [473] See *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949,* p. 244, at p. 250.

[1261] [474] *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), pp. 31–33.

[1262] [475] The *Zafiro* case (footnote [567] 154 above), pp. 164–165.

[1263] [476] See articles 35 (*b*), 37, paragraph 3, and 39 and commentaries.

[1264] [182] "F3" claims before the United Nations Compensation Commission are claims filed by the Government of Kuwait, excluding environmental claims.

of loss contemplated by articles 31 and 35 of the International Law Commission articles, and the principles established in the [*Factory at*] *Chorzów* case, and so are compensable".[1265] [183]

[A/62/62, para. 103]

S/AC.26/2005/10

In the 2005 report and recommendations concerning the fifth instalment of "F4" claims,[1266] [184] the Panel of Commissioners of the United Nations Compensation Commission noted that the claimants had asked for compensation for loss of use of natural resources damaged as a result of Iraq's invasion and occupation of Kuwait during the period between the occurrence of the damage and the full restoration of the resources. While Iraq had argued that there was no legal justification for compensating claimants for "interim loss" of natural resources that had no commercial value, the claimants invoked, *inter alia*, the principle whereby reparation must "wipe out all consequences of the illegal act", first articulated by the Permanent Court of International Justice in the *Factory at Chorzów* case and then "accepted by the International Law Commission".[1267] [185] The Panel concluded that a loss due to depletion of or damage to natural resources, including resources that may have a commercial value, was compensable if such loss was a direct result of Iraq's invasion and occupation of Kuwait. Although this finding was based on an interpretation of Security Council resolution 687 (1991) and United Nations Compensation Commission Governing Council decision 7, the panel noted that it was not "inconsistent with any principle or rule of general international law".[1268] [186]

[A/62/62, para. 104]

International arbitral tribunal (under the ICSID Convention)

ADC Affiliate Limited and ADC & ADMC Management Limited v. *Republic of Hungary*

In its 2006 award, the arbitral tribunal constituted to hear the *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Hungary* case, in determining the "customary international law standard" for damages assessment applicable in the case, referred, together with case law and legal literature, to article 31, paragraph 1, finally adopted by the International Law Commission in 2001. The tribunal noted that the said provision, which it quoted, "expressly rel[ies] on and closely follow[s] *Chorzów Factory*". In addition, the tribunal recalled that the Commission's commentary on this article states that "The general principle of the consequences of the commission of an internationally wrongful act was stated by the Permanent Court in the Factory of Chorzów case".[1269] [187]

[A/62/62, para. 105]

[1265] [183] S/AC.26/2003/15, para. 220 (footnote omitted).

[1266] [184] "F4" claims before the United Nations Compensation Commission are claims for damage to the environment.

[1267] [185] S/AC.26/2005/10, para. 49.

[1268] [186] *Ibid.*, paras. 57 and 58.

[1269] [187] ICSID, Case No. ARB/03/16, Award, 2 October 2006, paras. 494 and 495.

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, having found that the Respondent had failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide, referred to article 31 finally adopted by the International Law Commission in 2001 in the context of its examination of the question of reparation:

> The principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the *Factory at Chorzów* case: that 'reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed' (*P.C.I.J. Series A, No. 17*, p. 47: see also Article 31 of the ILC's Articles on State Responsibility).[1270] 10

[A/62/62/Add.1, para. 6]

International arbitral tribunal (under the ICSID Convention)

LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. *Argentine Republic*

The arbitral tribunal constituted to hear the *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc.* v. *Argentina* case, having previously found Argentina to be in breach of its obligations under the 1991 bilateral investment treaty between the United States and Argentina,[1271] 38 proceeded to consider the applicable standard for reparation in its 2007 award. The tribunal stated that it agreed with the claimants that "the appropriate standard for reparation under international law is 'full' reparation as set out by the Permanent Court of International Justice in the *Factory at Chorzów* case and codified in Article 31 of the International Law Commission Draft articles on Responsibility of States for Internationally Wrongful Acts".[1272] 39

[A/65/76, para. 28]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. *the United Mexican States*

In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc.* v. *Mexico* considered article 31 to reflect a rule applicable under customary international law.[1273] 40

[A/65/76, para. 29]

[1270] 10 [ICJ, Judgment, *I.C.J. Reports 2007*, p. 43], para. 460.

[1271] 38 See footnote [1103] 166, and accompanying text, above.

[1272] 39 *Ibid*., award, 25 July 2007, para. 31.

[1273] 40 See footnote [3] 4 above, para. 275.

International arbitral tribunal (under the ICSID Convention)

Biwater Gauff (Tanzania) Ltd. v. *United Republic of Tanzania*

In its 2008 award, the tribunal in the *Biwater Gauff (Tanzania) Ltd.* v. *Tanzania* case cited the definition of the term "injury" in article 31, paragraph 2 ("… any damage, whether material or moral, caused by the internationally wrongful act of a State") in support of its assertion that "[c]ompensation for any violation of the [investment treaty between the United Kingdom and the United Republic of Tanzania], whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach … and the loss sustained".[1274] [41] The tribunal then proceeded to quote *in extenso* extracts from the commentary to article 31 describing the necessary link between the wrongful act and the injury in order for the obligation of reparation (here in the form of compensation) to arise,[1275] [42] and held that "in order to succeed in its claims for compensation, [the claimant] has to prove that the value of its investment was diminished or eliminated, and the actions [it] complains of were the *actual and proximate cause* of such dimunition in, or elimination of, value".[1276] [43] The tribunal also found occasion to refer to the definition of "injury" in paragraph 2 in support of its view that

> [i]t is … insufficient to assert that simply because there has been a 'taking', or unfair or inequitable conduct, there must necessarily have been an '*injury*' caused such as to ground a claim for compensation. Whether or not each wrongful act by the [respondent] 'caused injury' such as to ground a claim for compensation must be analysed in terms of each specific 'injury' for which [the claimant] has in fact claimed damages.[1277] [44]

[A/65/76, para. 30]

Duke Energy Electroquil Partners & Electroquil S.A. v. *Republic of Ecuador*

In its 2008 award, the tribunal in the *Duke Energy Electroquil Partners & Electroquil S.A.* v. *Ecuador* case, referred to article 31 as having, in its view, "codified" the principle of "full" compensation, as earlier established by the Permanent Court of International Justice in the *Factory at Chorzów* case.[1278] [45] The tribunal saw "no reason not to apply this provision by analogy to investor-state arbitration".[1279] [46]

[A/65/76, para. 31]

[1274] [41] See footnote [5] 6 above, paras. 779 and 783.

[1275] [42] *Ibid*., para. 785, quoting extracts from paragraph (10) of the commentary to article 31.

[1276] [43] *Ibid*., para. 787, emphasis added.

[1277] [44] *Ibid*., para. 804 and footnote 369, (footnotes omitted) emphasis in the original.

[1278] [45] *Case concerning the Factory at Chorzów, Merits*, p. 21 (footnote [28] 34 above).

[1279] [46] ICSID, Case No. ARB/04/19, Award, 18 August 2008, para. 468.

ERITREA-ETHIOPIA CLAIMS COMMISSION

Ethiopia's Damages Claims, Final Award, 17 August 2009, and Eritrea's Damages Claims, Final Award, 17 August 2009

In its 2009 final awards on *Ethiopia's Damages Claims* and *Eritrea's Damages Claims*, the Eritrea-Ethiopia Claims Commission recalled that an earlier version of the State responsibility articles had included a qualification that "[i]n no case may a people be deprived of its own means of subsistence", which was also reflected in article 1, paragraph 2, of both Human Rights Covenants.[1280] [47] The Claims Commission further observed that the principle set out by the Permanent Court of International Justice in the *Chorzów Factory* case, that the purpose of compensation payable by a responsible State is "to seek to wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" was reflected in article 31 of the State responsibility articles.[1281] [48]

[A/65/76, para. 32]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Ioannis Kardassopoulos and Ron Fuchs v. the Republic of Georgia

In *Ioannis Kardassopoulos and Ron Fuchs* v. *the Republic of Georgia*, the arbitral tribunal cited article 31, and the commentary thereto, as authority for the proposition that "a State is under an obligation to make full reparation for the injury *caused by* an internationally wrongful act".[1282] [147]

[A/68/72, para. 103]

COURT OF JUSTICE OF THE EUROPEAN UNION

Axel Walz v. *Clickair SA*

In its judgment in *Axel Walz* v. *Clickair SA*, the Court of Justice of the European Union sought to determine the ordinary meaning to be given to the term "damage" by reference, *inter alia*, to article 31, paragraph 2, of the State responsibility articles,[1283] [148] which it considered as "codify[ing] the current state of general international law [and could] thus

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[1280] [47] Eritrea-Ethiopia Claims Commission, *Ethiopia's Damages Claims*, Final Award, 17 August 2009, para. 19, and Eritrea-Ethiopia Claims Commission, *Eritrea's Damages Claims*, Final Award, 17 August 2009, para. 19, reference to the predecessor to article 31, namely draft article 42 [6 *bis*], at paragraph 3, as adopted by the Commission on first reading, at its forty-eighth session in 1996. The provision was deleted during the second reading, at the fifty-second session of the Commission in 2000. See *Yearbook of the International Law Commission, 2000*, vol. II, Part Two, paras. 79, 100 and 101. A reference to the qualification, as contained in article 1, paragraph 2, of the two Human Rights Covenants was, however, retained in the commentary to article 50, at paragraph (7). See further the discussion under article 56 below.

[1281] [48] *Ibid*., *Ethiopia's Damages Claims*, para. 24, and *Eritrea's Damages Claims*, para. 24, quoting *Case concerning the Factory at Chorzów*, (footnote [28] 34 above), p. 47.

[1282] [147] See footnote [288] 36 above, paras. 467 and 468 (emphasis in the original).

[1283] [148] CJEU, Third Chamber, *Axel Walz* v. *Clickair*, Case C-63/09, Judgment, 6 May 2010, para. 27.

be regarded as … expressing the ordinary meaning to be given to the concept of damage in international law".[1284] 149

[A/68/72, para. 104]

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*

In its award, the arbitral tribunal in the *Gemplus S.A. et al.* v. *The United Mexican States* and *Talsud S.A.* v. *The United Mexican States* cases, in analysing the causal link between the breach of the treaty in question and the loss sustained by the claimant, indicated that "[a]s to causation generally, it [was] … useful to refer to" article 31 of the State responsibility articles, and in particular to the obligation to make full reparation for the injury "caused by the intentionally wrongful act of a State".[1285] 150 The tribunal proceeded to quote, *in extenso*, paragraph (10) of the commentary on article 31 on the question of the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise.[1286] 151

The tribunal subsequently indicated that, "[a]s to the general approach to the assessment of compensation", it was guided by both the decision of the Permanent Court of International Justice in the *Chorzów Factory* case, and by article 31 of the State responsibility articles which it considered to be "declaratory of international law".[1287] 152

[A/68/72, paras. 105–106]

International Tribunal for the Law of the Sea (Seabed Disputes Chamber)

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area

In its advisory opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber, in analysing the scope of liability under UNCLOS, confirmed that the "obligation for a State to provide for a full compensation or *restituto in integrum* [was] currently part of customary international law."[1288] 153 In support of its conclusion, the Chamber referred to the decision of the Permanent Court of International Justice in the *Chorzów Factory* case,[1289] 154 and indicated that: "[t]his obligation was further reiterated by the International Law Commission [in] article 31, paragraph 1, of the ILC Articles on State Responsibility … ".[1290] 155

[A/68/72, para. 107]

[1284] 149 *Ibid*., para. 28.

[1285] 150 See footnote [866] 116 above, para. 11.9.

[1286] 151 *Ibid*., para. 11.10.

[1287] 152 *Ibid*., para. 12–51.

[1288] 153 See footnote [12] 10 above, para. 194.

[1289] 154 *Case concerning the Factory at Chorzów, Merits* (footnote [28] 34 above), p. 47.

[1290] 155 See footnote [12] 10 above, para. 194.

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Joseph C. Lemire v. *Ukraine*

The arbitral tribunal in *Joseph C. Lemire* v. *Ukraine* cited article 31 as authority for the proposition that "a wrong committed by a State against an investor must always give rise to a right for compensation of the economic harm sustained".[1291] 156

[A/68/72, para. 108]

El Paso Energy International Company v. *The Argentine Republic*

The commentary to article 31 was cited by the arbitral tribunal in *El Paso Energy International Company* v. *The Argentine Republic* in support of the assertion that "the test of causation is whether there is a sufficient link between the damage and the treaty violation".[1292] 157

[A/68/72, para. 109]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Chevron Corporation & Texaco Petroleum Company v. *the Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation & Texaco Petroleum Company* v. *the Republic of Ecuador* referred to Part Two of the State responsibility articles as expressing the legal principle concerning claims for moral damages.[1293] 158

[A/68/72, para. 110]

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* considered article 31, paragraph 1, to reflect the customary international law rule applicable in ascertaining the "minimum standard of treatment" to be applied in the case of breaches of the treaty in question.[1294] 159

[A/68/72, para. 111]

Occidental Petroleum Corporation and Occidental Exploration and Production Company v. *The Republic of Ecuador*

In its award in *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *The Republic of Ecuador*, the arbitral tribunal, in an analysis of the

[1291] 156 ICSID, Case No. ARB/06/18, Award, 28 March 2011, para. 147.

[1292] 157 See footnote [56] 16 above, para. 682, note 644.

[1293] 158 See footnote [304] 45 above, para. [9.6].

[1294] 159 See footnote [789] 105 above, para. 260.

concept of "contributory negligence", referred to articles 31 and 39 of the State responsibility articles, and took note of paragraph (13) of the commentary to article 31.[1295] [160]

In its subsequent consideration of the claimant's claims for consequential damages, the tribunal held that "[t]he availability of consequential loss in international law is uncontroversial", and referred to the principle of "full reparation" expressed in the *Chorzów Factory* case.[1296] [161] The tribunal indicated further that "[t]his principle is now also embodied in Article 31 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts … ".[1297] [162]

[A/68/72, paras. 112–113]

[International Tribunal for the Law of the Sea

Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission

In *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission*, the International Tribunal for the Law of the Sea found that articles 1, 2 and 31, paragraph 1 "are the rules of general international law relevant to the second question", namely to what extent the flag State shall be held liable for illegal, unreported and unregulated fishing activities conducted by vessels sailing under its flag.[1298] [15]

[A/71/80, para. 16]]

International arbitral tribunal (under the ICSID Convention)

Mr Franck Charles Arif v. *Republic of Moldova*

In *Mr Franck Charles Arif* v. *Republic of Moldova*, the arbitral tribunal cited article 31 as reflecting the "general obligation of a State guilty of an internationally wrongful act to make reparation".[1299] [140]

[A/71/80, para. 100]

The Rompetrol Group N.V. v. *Romania*

The arbitral tribunal constituted to hear *The Rompetrol Group N.V.* v. *Romania* case discussed article 31 as follows:

> While the Tribunal cannot fault the Claimant's submission that, under the draft Articles, breach of an international obligation has wider consequences than the duty to pay damages, it notes (subject to what will appear later) that, in its final form, the Claimant's claim is primarily a claim for damages. The crux therefore lies in draft Article 31, and specifically the ILC's commentary to that article (read together with its commentary to draft Article 2). In both places, the ILC states clearly that there is no general rule requiring damage as a constituent element of an international wrong giving rise to State

[1295] [160] See footnote [309] 50 above, paras. 665–668.

[1296] [161] *Ibid*., para. 792.

[1297] [162] *Ibid*., para. 793.

[1298] [[15] ITLOS, Advisory Opinion, 2 April 2015, para. 144.]

[1299] [140] See footnote [320] 46 above, para. 559.

responsibility. The ILC goes on to say that whether damage is or is not actually required depends on the nature of the primary obligation that has been breached. Moreover the ILC goes on to make explicit that its formulation of the rule in terms of an automatic obligation borne by the wrongful State is designed to side-step the problems that would otherwise be caused by the possible existence of more than one State 'specially affected by the breach,' the latter being a phrase repeatedly used in the draft Articles, along with the expression 'injured State,' to express the idea of a State which has suffered damage in some direct sense sufficient to entitle it to 'invoke the responsibility of' the wrongful State. … Transposing the above from the State-to-State to the investment treaty context leads, in the Tribunal's opinion, to the following conclusions. The starting point, as the ILC points out, is the nature of the particular international obligation (the 'primary obligation') breach of which is being invoked.[1300] 141

[A/71/80, para. 101]

The tribunal further cited article 31 to support the statement that "[i]n general international law … the award of moral damages is certainly accepted".[1301] 142

[A/71/80, para. 102]

International arbitral tribunal (under the ICSID Convention)

Ioan Micula and others v. *Romania*

The arbitral tribunal in *Ioan Micula and others* v. *Romania* cited article 31 and the commentary thereto, as emphasizing the principle that there is a "need for a causal link between the internationally wrongful act and the injury for which compensation is due".[1302] 143 In relation to the directness of the causal link, the tribunal further "note[d] that under the ILC Articles not every event subsequent to the wrongful act and antecedent to the occurrence of the injury will necessarily break the chain of causation and qualify as an intervening cause".[1303] 144

[A/71/80, para. 103]

International Tribunal for the Law of the Sea

The M/V "Virginia G" Case (Panama/Guinea-Bissau)

The International Tribunal for the Law of the Sea in *The M/V "Virginia G" Case (Panama/Guinea-Bissau)* observed that article 31, paragraph 1 provided that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".[1304] 145

[A/71/80, para. 104]

[1300] 141 See footnote [17] 5 above, paras. 189–190, also referring to Part III of the State responsibility articles (footnotes omitted).

[1301] 142 *Ibid*., para. 289.

[1302] 143 See footnote [1188] 133 above, para. 923.

[1303] 144 *Ibid*., para. 925, referring to comments 12 and 13 to article 31.

[1304] 145 See footnote [58] 11 above, para. 429 (quoting article 31).

Permanent Court of Arbitration (under UNCITRAL Rules)

Enkev Beheer B.V. v. *Republic of Poland*

In *Enkev Beheer B.V.* v. *Republic of Poland*, the arbitral tribunal "derived no decisive assistance from Article 31 of the International Law Commission's Articles on State Responsibility and its Commentary", because "[c]ompensation for unlawful expropriation may entail more than compensation for lawful expropriation".[1305] 146

[A/71/80, para. 105]

Hulley Enterprises Limited (Cyprus) v. *The Russian Federation*

In *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation*, the arbitral tribunal noted that it will "assess damages in the light of the foregoing accepted principles of international law",[1306] 147 including articles 31, 36 and 39. In assessing contributory fault, the tribunal, quoting the commentary to article 31, stated that

> [i]t is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct.[1307] 148

In relation to the quantification of damage in cases of multiple causes for the same damage, the tribunal also cited the commentary to article 31, emphasizing that

> as the commentary makes clear, the mere fact that damage was caused not only by a breach, but also by a concurrent action that is not a breach does not, as such, interrupt the relationship of causation that otherwise exists between the breach and the damage. Rather, it falls to the Respondent to establish that a particular consequence of its actions is severable in causal terms (due to the intervening actions of Claimants or a third party) or too remote to give rise to Respondent's duty to compensate.[1308] 149

[A/71/80, para. 106]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Gold Reserve Inc. v. *Bolivarian Republic of Venezuela*

The arbitral tribunal in *Gold Reserve Inc.* v. *Bolivarian Republic of Venezuela* noted that the principles found in the State responsibility articles, and particularly in article 31 "to make full reparation for injury caused through violating an international obligation an international obligation",[1309] 150 reflect customary international law.

[A/71/80, para. 107]

[1305] 146 PCA, Case No. 2013–01, First Partial Award, 29 April 2014, para. 363.

[1306] 147 See footnote [19] 7 above, para. 1593.

[1307] 148 *Ibid*., para. 1598 (quoting para. (13) of the commentary to article 31).

[1308] 149 *Ibid*., para. 1775.

[1309] 150 See footnote [61] 14 above, para. 679.

International arbitral tribunal (under the ICSID Convention)

Flughafen Zurich A.G. and Gestión Ingenería IDC S.A. v. *Bolivarian Republic of Venezuela*

In *Flughafen Zurich A.G. and Gestión Ingenería IDC S.A.* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal cited, *inter alia*, the State responsibility articles in support of the proposition that it "[e]s un principio firme del Derecho internacional consuetudinario que la víctima de un acto ilícito perpetrado por un Estado tiene derecho a recibir una reparación íntegra, como si el acto ilícito no hubiera ocurrido".[1310] 151

[A/71/80, para. 108]

Permanent Court of Arbitration (under UNCITRAL Rules)

British Caribbean Bank Limited v. *The Government of Belize*

The arbitral tribunal, in *British Caribbean Bank Limited* v. *The Government of Belize*, considered that "[i]n the absence of an applicable provision within the Treaty itself, establishing the standard of compensation as a matter of *lex specialis*, the applicable standard of compensation is that existing in customary international law, as set out by the Permanent Court of International Justice in the *Factory at Chorzów*" and articles 31, 34 and 35 of the Articles of State Responsibility, as cited by the tribunal.[1311] 152

[A/71/80, para. 109]

The arbitral tribunal also noted that "the approach it has taken in the application of the *Chorzów Factory* standard and the ILC Articles on State Responsibility to provide the Claimant with full reparation calls for the Tribunal to place the Claimant in the circumstances in which it would have found itself, but for the unlawful act. The Tribunal considers that this logic leads to the application of the regular rate of interest under the contract, rather than the penalty rate".[1312] 153

[A/71/80, para. 110]

International arbitral tribunal (under the ICSID Convention)

Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. *The Argentine Republic*

The arbitral tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* v. *The Argentine Republic*, noted that, as per article 31, a State is responsible for the full reparation for any damage caused by its internationally wrongful act and there must be a causal link between the internationally wrongful act and the injury for which reparation is claimed. "If such a link exists, then Argentina is required to make 'full reparation' for the injury it has caused".[1313] 154

[A/71/80, para. 111]

[1310] 151 ICSID, Case No. ARB/10/19, Award 18 November, 2014, para. 746.

[1311] 152 PCA Case No. 2010–18, Award, 19 December 2014, paras. 287–291.

[1312] 153 *Ibid*., para. 299.

[1313] 154 See footnote [63] 16 above, para. 26 (quoting article 31).

African Court on Human and Peoples' Rights

Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe Human and Peoples' Rights Movement v. *Burkina Faso*

In *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe Human and Peoples' Rights Movement* v. *Burkina Faso*, the African Court on Human and Peoples' Rights referred to article 31, paragraph 1 of the State responsibility articles,[1314] [155] noting that "in accordance with international law, for reparation to accrue, there must be a causal link between the wrongful act that has been established and the alleged prejudice".[1315] [156] The Court explained that "Article 31(2) of the Draft Articles on Responsibility of States mentioned above indeed refers to a 'prejudice … resulting from an internationally wrongful act'".[1316] [157] The Court cited article 31, paragraph 2 in support of the statement that "according to international law, both material and moral damages have to be repaired".[1317] [158]

[A/71/80, para. 112]

International arbitral tribunal (under the ICSID Convention)

Bernhard von Pezold and others v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal, referring to article 31, paragraph 1, observed that "the ILC Articles confirm restitution as the principal form of reparation in international law".[1318] [159] The tribunal further cited article 31 and the accompanying commentary in noting that "[a] State's obligation to provide reparation for an 'injury' may include moral damage, as well as material damage". Such "moral damages include 'such things as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life' … . Nevertheless, moral damages will be awarded only in exceptional circumstances".[1319] [160]

[A/71/80, para. 113]

Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. *Plurinational State of Bolivia*

In *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún* v. *Plurinational State of Bolivia*, the arbitral tribunal noted that compensation for unlawful expropriation is "governed by the full reparation principle as articulated by the PCIJ in the *Chorzów* case and later expressed in the ILC Articles",[1320] [161] and cited the text of article 31 in support of

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[1314] [155] ACHPR, Application No. 013/2011, Judgment on Reparations, 5 June 2015, para. 21.

[1315] [156] *Ibid*., para. 24.

[1316] [157] *Ibid*.

[1317] [158] *Ibid*., para. 26.

[1318] [159] See footnote [114] 24 above, para. 684. See also the reference to article 31 in the text accompanying footnote [1324] 177 below.

[1319] [160] *Ibid*., para. 908 (quoting para. (5) of the commentary to article 31).

[1320] [161] See footnote [65] 18 above, para. 326.

the principle that a "responsible state must repair the damage caused by its internationally wrongful act".[1321] 162

[A/71/80, para. 114]

Hrvatska Elektroprivreda d.d. v. *Republic of Slovenia*

The arbitral tribunal in *Hrvatska Elektroprivreda d.d.* v. *Republic of Slovenia* indicated that, "[t]aken together, Article 31(1) and the *Chorzów Factory* decision require that [the Claimant] be placed in the same situation 'which would, in all probability, have existed'" had the internationally unlawful act not been committed "while also providing 'damages for loss sustained'".[1322] 163 The tribunal found that "consistent with the above principles, the preferred approach to calculate the X factor is the replacement cost approach. The focus compelled by Article 31 and the *Chorzów Factory* decision is on the loss suffered to the harmed party".[1323] 164

[A/71/80, para. 115]

[*Bernhard von Pezold and others* v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal referred to article 34 of the State responsibility articles as expanding on the principle contained in article 31.[1324] 177 Based on the commentary to article 34, the tribunal explained that reparation must achieve "re-establishment of the situation which existed before the breach" and explained that "restitution is only one form of reparation. If restitution alone fails to adequately restore a claimant to the situation it was in prior to the wrong, then other forms of reparation may also be awarded".[1325] 178

[A/71/80, para. 125]]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Hulley Enterprises Limited (Cyprus) v. *The Russian Federation*

In assessing the contributory fault of the claimants, the arbitral tribunal in *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation* referred to article 39 and the commentary thereto, in conjunction with article 31, to "decide, on the basis of the totality of the evidence before it, whether there is a sufficient causal link between any wilful or negligent act or omission of the Claimants (or of Yukos, which they controlled) and the loss Claimants ultimately suffered at the hands of the Russian Federation through the destruction of Yukos".[1326] 227 …

[A/71/80, para. 153]]

[1321] 162 *Ibid*., para. 327.

[1322] 163 ICSID, Case No. ARB/05/24, Award, 17 December 2015, para. 363 (quoting the *Case concerning the Factory at Chorzów, Merits*, (footnote [28] 34 above), Series A, No. 17, p. 47.

[1323] 164 *Ibid*., para. 364.

[1324] [177 See footnote [114] 24 above, para. 684.]

[1325] [178 *Ibid*., para. 686 (quoting para. (2) of the commentary to article 34).]

[1326] [227 See footnote [19] 7 above, paras. 1592. See also the reference to article 39 in text accompanying footnote [1306] 147 above.]

[*Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* referred to articles 28 to 39 of the State responsibility articles under, part III, "Principal legal and other texts",[1327] [150] which were relevant with regard to the parties' claims for relief.[1328] [151]

[A/74/83, p. 28]]

International Arbitral tribunal (under the ICSID Convention)

Joseph Houben v. *Republic of Burundi*

In *Joseph Houben* v. *Republic of Burundi*, the arbitral tribunal stated that article 31 of the State responsibility articles codified the customary international law standard of integral reparation in cases in which a State violates its international obligations.[1329] [157] Interpreting articles 35 and 36 of the State responsibility articles, the tribunal noted that the responsible States may only provide compensation to the extent that restitution is not possible.[1330] [158]

[A/74/83, p. 29]

[European Court of Human Rights

Case of Georgia v. *Russia (I)*

In *Case of Georgia* v. *Russia (I)*, the European Court of Human Rights stated

> [t]hat the just-satisfaction rule [under the European Convention on Human Rights] is directly derived from the principles of public international law relating to State liability … Those principles include both the obligation on the State responsible for the internationally wrongful act 'to cease that act, if it is continuing' and the obligation to 'make full reparation for the injury caused by the internationally wrongful act', as laid down in Articles 30 and 31 respectively of the Articles on Responsibility of States for Internationally Wrongful Acts.[1331] [155]

[A/74/83, p. 29]]

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* referred to article 31 when discussing the applicable standard of compensation,[1332] [159] and observed that "compensation for violation of a treaty will only

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[1327] [150 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1328] [151 *Ibid*., para. 9.9.]

[1329] 157 ICSID, Case No. ARB/13/7, Award, 12 January 2016, para. 222.

[1330] 158 *Ibid*., paras. 223–224.

[1331] [155 ECHR, Grand Chamber, Application No. 13255/07, Judgment, 31 January 2019, para. 54.]

[1332] 159 ICSID (Additional Facility), Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 849.

be due from a respondent state if there is a sufficient causal link between the treaty breach by that state and the loss sustained by the claimant".[1333] [160]

[A/74/83, p. 29]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Vestey Group Limited Ltd. v. *Bolivarian Republic of Venezuela*

In *Vestey Group Limited Ltd.* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal cited article 31 when finding that Venezuela had committed an internationally wrongful act that "gives rise to an obligation to make full reparation for the injury caused by the illicit act".[1334] [161] The tribunal also noted that "while the ILC Articles govern a State['s] responsibility *vis-à-vis* another State and not a private person, it is generally accepted that the key provisions of the ILC, such as Article 31(1) can be transposed in the context of the investor-State disputes".[1335] [162]

[A/74/83, p. 29]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Murphy Exploration and Production Company International v. *The Republic of Ecuador*

The arbitral tribunal in *Murphy Exploration and Production Company International* v. *The Republic of Ecuador*, referring to article 31 of the State responsibility articles, explained that the "principle of full reparation applies to breaches of investment treaties unrelated to expropriations. This is reflected in the practice of investment tribunals."[1336] [163] The tribunal further noted that "[t]he applicable international law standard of full reparation, as reflected in the *Chorzów Factory* judgment and Article 31 of the ILC Articles on State Responsibility, does not determine the valuation methodology".[1337] [164] Therefore, "[t]ribunals enjoy a large margin of appreciation in order to determine how an amount of money may 'as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'".[1338] [165]

[A/74/83, p. 30]

Flemingo DutyFree Shop Private Limited v. *The Republic of Poland*

In *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland*, the arbitral tribunal observed that the Poland-India BIT

itself does not set forth the standard of compensation for these breaches. Under customary international law, as codified in Article 31(1) of the ILC Articles, Claimant is entitled to full reparation in an amount

[1333] [160] *Ibid*., para. 860 and footnote 1247.

[1334] [161] ICSID, Case No. ARB/06/4, Award, 15 April 2016, para. 326 and footnote 306.

[1335] [162] *Ibid*., para. 326.

[1336] [163] PCA, Case No. 2012–16, Partial Final Award, 6 May 2016, para. 425.

[1337] [164] *Ibid*., para. 481.

[1338] [165] *Ibid*.

sufficient to wipe out all of the injury it has incurred due to Respondent's wrongful acts. Full reparation encompasses both actual losses (*damnum emergens*) and loss of profits (*lucrum cessans*).[1339] 166

[A/74/83, p. 30]

International arbitral tribunal (under the ICSID Additional Facility Rules)

Rusoro Mining Limited v. *The Bolivarian Republic of Venezuela*

In *Rusoro Mining Limited* v. *The Bolivarian Republic of Venezuela*, the arbitral tribunal indicated that "absent any specific Treaty language, damages must be calculated in accordance with the rules of international law", including, in particular, article 31 of the State responsibility articles.[1340] 167

[A/74/83, p. 30]

International arbitral tribunal (under the ICSID Convention)

Victor Pey Casado and President Allende Foundation v. *Republic of Chile*

The arbitration tribunal in *Victor Pey Casado and President Allende Foundation* v. *Republic of Chile* observed, that

> [i]t is a basic tenet of investment arbitration that a claimant must prove its pleaded loss, must show, in other words, what alleged injury or damage was caused by the breach of its legal rights … . But equally it follows directly from the principles of State responsibility in international law reflected in Article 31 of the ILC Articles.[1341] 168

The tribunal further noted that "the distinction between injury (and the associated question of causation) and the assessment of the compensation due for that injury […] is fundamental to the operation of Article 31 of the ILC Articles".[1342] 169

[A/74/83, p. 30]

Burlington Resources Inc. v. *Republic of Ecuador*

In *Burlington Resources Inc.* v. *Republic of Ecuador*, the arbitral tribunal stated that "the appropriate standard of compensation is thus the customary international law standard of full reparation set out in Article 31 of the ILC Articles, applied by analogy".[1343] 170 Relying on the commentary to article 31, the tribunal further noted that "[t]he only unlawful act identified in the Decision on Liability was the expropriation of Burlington's investment through Ecuador's permanent physical takeover of the Blocks. As a result, the Tribunal's task is circumscribed to awarding damages 'arising from and ascribable to' that takeover."[1344] 171 On the question of whether "using information post-dating the expropria-

[1339] 166 PCA, Award, IIC 883 (2016), 12 August 2016, para. 865 (original emphasis).

[1340] 167 ICSID (Additional Facility), Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 640.

[1341] 168 ICSID, Case No. ARB/98/2, Award, 13 September 2016, para. 205.

[1342] 169 *Ibid*., para. 215 (see also para. 204).

[1343] 170 ICSID, Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 177.

[1344] 171 *Ibid*., para. 212.

tion would somehow conflict with the requirement of causation", the tribunal determined, further citing the commentary to article 31, that "the fact that some of the information used to quantify lost profits on the date of the award may not have been foreseeable on the date of the expropriation does not break the chain of causation. What matters is that the injury suffered must have been caused by the wrongful act".[1345] 172

[A/74/83, p. 30]

Cervin Investissements S.A. and Rhone Investissements S.A. v. *Republic of Costa Rica*

In *Cervin Investissements S.A. and Rhone Investissements S.A.* v. *Republic of Costa Rica*, the arbitral tribunal observed that article 31 of the State responsibility articles codified the principle of full reparation.[1346] 173

[A/74/83, p. 31]

Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. *Kingdom of Spain*

The arbitration tribunal in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l.* v. *Kingdom of Spain*

regards Article 31 [of the State responsibility articles] as accurately reflecting the international law rules that are to be applied here. International law requires that Respondent make full reparation for the injury caused by failing to comply with its obligation to accord fair and equitable treatment under ECT article 10(1), so as to remove the consequences of the wrongful act.[1347] 174

[A/74/83, p. 31]

Valores Mundiales, S.L. and Consorcio Andino S.L. v. *Bolivarian Republic of Venezuela*

In *Valores Mundiales, S.L. and Consorcio Andino S.L.* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal stated that the International Commission, in article 31 of the State responsibility articles, had codified the principle of full reparation.[1348] 175

[A/74/83, p. 31]

Karkey Karadeniz Elektrik Uretim A.S. v. *Islamic Republic of Pakistan*

The arbitral tribunal in *Karkey Karadeniz Elektrik Uretim A.S.* v. *Islamic Republic of Pakistan* concluded, in the view of articles 31, 35 and 36 of the State responsibility articles, that "Karkey is entitled to an award of damages that will erase the consequences of Pakistan's wrongful acts and re-establish the situation that would have existed but for such wrongful acts".[1349] 176

[A/74/83, p. 31]

[1345] 172 *Ibid*., para. 333.

[1346] 173 ICSID, Case No. ARB/13/2, Final Award (Spanish), 7 March 2017, para. 700.

[1347] 174 ICSID, Case No. ARB/13/36, Final Award, 4 May 2017, para. 424.

[1348] 175 ICSID, Case No. ARB/13/11, Award (Spanish), 25 July 2017, para. 693.

[1349] 176 ICSID, Case No. ARB/13/1, Award, 22 August 2017, para. 663.

UAB E Energija (Lithuania) v. *Republic of Latvia*

In *UAB E Energija (Lithuania)* v. *Republic of Latvia*, the arbitral tribunal stated that "[u]nder Article 31 of the ILC Articles the State responsible for an internationally wrongful act must make 'full reparation for the injury caused' by such act;" and noted that for damage to be recoverable under the terms of article 36 of the State responsibility articles, "the damage must have been caused by the State's internationally wrongful act complained of by the investor, Article 31 of the ILC Articles".[1350] [177]

[A/74/83, p. 31]

Masdar Solar & Wind Cooperatief U.A. v. *Kingdom of Spain*

The arbitral tribunal in *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain* concluded that the "Claimant is entitled to full reparation of the damage caused by Respondent's breach of the ECT FET [fair and equitable treatment] standard. This is the standard prescribed by the *Chorzów Factory* principle and Article 31(1) of the ILC Articles, which the Tribunal considers fully applicable here".[1351] [178] The arbitral tribunal also observed that "[t]he status of the principles set out in the ILC Articles as customary international law is also undisputed between the Parties".[1352] [179]

[A/74/83, p. 32]

Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. *Kingdom of Spain*

The arbitral tribunal in *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.* v. *Kingdom of Spain* considered article 31 of the State responsibility articles

> as reflecting the international law rules that are to be applied here and therefore, the Claimants under international law are entitled to full reparation for damages caused by the breach by the Respondent of its obligation to accord FET [fair and equitable treatment] under ECT [Energy Charter Treaty] Article 10(1), so as to remove the consequences of the wrongful act.[1353] [180]

[A/74/83, p. 32]

International Criminal Court

Prosecutor v. *Germain Katanga*

In *Prosecutor* v. *Germain Katanga*, the Trial Chamber cited the commentary to article 31 of the State responsibility articles when finding that "if the person who committed the initial act could not have reasonably foreseen the event in question, the initial act cannot be con-

[1350] [177] ICSID, Case No. ARB/12/33, Award, 22 December 2017, paras. 1127–1129.

[1351] [178] ICSID, Case No. ARB/14/1, Award, 16 May 2018, para. 552.

[1352] [179] *Ibid*., para. 551.

[1353] [180] ICSID, Case No. ARB/13/31, Award, 15 June 2018, para. 664.

sidered to be the proximate cause of the harm suffered by the victim and, consequently, the person who committed the initial act cannot be held liable for the harm in question".[1354] 181

[A/74/83, p. 32]

Arbitration Institute of the Stockholm Chamber of Commerce

Novenergia II—Energy and Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. *The Kingdom of Spain*

In *Novenergia II—Energy and Environment (SCA) (Grand Duchy of Luxembourg), SICAR* v. *The Kingdom of Spain*, the arbitral tribunal, relying, *inter alia*, on article 31 of the State responsibility articles, held that

[t]he principle of full reparation under customary international law therefore dictates that the aggrieved investor shall through monetary compensation be placed in the same situation it would have been but for the breaches of the state's international law obligations. The compensation includes the loss already sustained as well as loss of profits.[1355] 182

[A/74/83, p. 32]

International Chamber of Commerce

Olin Holdings Limited v. *State of Libya*

In *Olin Holdings Limited* v. *State of Libya*, the tribunal "reviewed the ILC Articles on State Responsibility which require a State '*to make a full reparation for the injury caused by the internationally wrongful act*', covering '*any financially assessable damage including loss of profits insofar as it is established*.'".[1356] 183

[A/74/83, p. 32]

International arbitral tribunal (under the ICSID Convention)

UP and CD Holding Internationale v. *Hungary*

In *UP and CD Holding Internationale* v. *Hungary*, the arbitral tribunal noted that

the customary international law principle of full reparation was defined in the oft-cited PCIJ Chorzow Factory case, and this principle has since been reflected in Art. 31 of the ILC Articles. Under this standard, compensation must wipe out the consequences of the illegal act. Thus, the customary international law principle of full reparation includes reparation for consequential damages.[1357] 184

[A/74/83, p. 33]

[1354] 181 International Criminal Court, Trial Chamber II, Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, ICC-01/04–01/07, 19 July 2018, para. 17 and footnote 36.

[1355] 182 SCC, Case No. 2015/063, Final Arbitral Award, 15 February 2018, para. 808.

[1356] 183 ICC, Case No. 20355/MCP, Final Award, 25 May 2018, para. 473.

[1357] 184 ICSID, Case No. ARB/13/35, Award, 9 October 2018, para. 512.

Arbitration Institute of the Stockholm Chamber of Commerce

Foresight Luxembourg Solar 1 S.À.R.L. et al. v. *The Kingdom of Spain*

In *Foresight Luxembourg Solar 1 S.À.R.L. et al.* v. *The Kingdom of Spain*, the arbitral tribunal quoted article 31 of the State responsibility articles when "look[ing] to customary international law for the applicable standard of compensation".[1358] [185] The tribunal "further consider[ed] that the principle of full reparation is generally accepted in international investment law".[1359] [186]

[A/74/83, p. 33]

[International arbitral tribunal (under the ICSID Convention)

Caratube International Oil Company LLP and Devincci Salah Hourani v. *Republic of Kazakhstan*

The arbitral tribunal in *Caratube International Oil Company LLP and Devincci Salah Hourani* v. *Republic of Kazakhstan* concluded, after referring to articles 31, 34 and 36 of the State responsibility articles, that

> the damages actually incurred by CIOC [Caratube International Oil Company LLP] as a result of the Respondent's unlawful expropriation of the Contract (as determined by a majority of the Tribunal) are appropriately assessed using a subjective and concrete valuation approach providing full reparation for the damages actually incurred by CIOC, without FMV [fair market value].[1360] [191]

[A/74/83, p. 34]]

Marco Gavazzi and Stefano Gavazzi v. *Romania*

The arbitral tribunal in *Marco Gavazzi and Stefano Gavazzi* v. *Romania*, agreeing with the discussion of articles 31, 36 and 39 of the State responsibility articles in previous arbitral cases, "determine[d] that the Respondent caused the losses suffered by the Claimants as assessed in this Award, without any reduction for 'contributory negligence' or other fault, as alleged by the Respondent".[1361] [236]

[A/74/83, p. 39]

Unión Fenosa Gas, S.A. v. *Arab Republic of Egypt*

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal stated that

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[1358] [185] SCC, Case No. V (2015/150), Final Award, 14 November 2018, paras. 432 and 435.

[1359] [186] *Ibid*., para. 436.

[1360] [[191] ICSID, Case No. ARB/13/13, Award, 27 September 2017, para. 1085.]

[1361] [[236] ICSID, Case No. ARB/12/25, Award, 18 April 2017, para. 280, referring to *CME Czech Republic B.V.* v. *Czech Republic*, Partial Award (13 September 2001), para. 583; *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd* v. *Republic of Kazakhstan* (footnote [1656] 196 below), paras. 1330–1332; and *Gemplus, S.A., SLP, S.A., Gemplus Industrial, S.A. de C.V. and Talsud S.A.* v. *United Mexican States* ICSID Cases Nos. ARB(AF)/04/03 & ARB(AF)/04, Award, 16 June 2009, para. 11.12.]

[i]t follows that any compensation to be awarded by this Tribunal is to be decided by applying principles of customary international law, namely 'full reparation' to wipe out, as far as possible, the consequences of the Respondent's international wrongs under the general principle long established in the PCIJ's judgment in *Chor[z]ów Factory* (1928), as also confirmed by Articles 31 and 36 of the ILC Articles on State Responsibility.[1362] 211

The tribunal

decide[d] to use Three-Month LIBOR + 2.0% compounded quarterly as the appropriate rate for pre-award interest [and] considered that rate to reflect a reasonable rate of interest applicable to the Project as an investment by the Claimant, in concordance with the principles in *Chorzów Factory* (1928) and Article 36 of the ILC Articles on State Responsibility.[1363] 212

[A/74/83, p. 36]

In *Unión Fenosa Gas, S.A.* v. *Arab Republic of Egypt*, the tribunal found that

[t]he Claimant cannot claim compensation from the Respondent to the extent that the Claimant has failed unreasonably to mitigate its loss in accordance with international law. In the Tribunal's view, the legal test is based upon a reasonable and not an absolute standard, as confirmed by Comment (11) to Article 31 of the ILC Articles and Article 39 of the ILC Articles.[1364] 238

[A/74/83, p. 40]]

Permanent Court of Arbitration (under UNCITRAL Rules)

William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. *Government of Canada*

In *William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc.* v. *Government of Canada*, the arbitral tribunal referred to the commentary to article 31, noting that "[u]nder international law, a failure by an injured State to take reasonable steps to limit the losses it incurred as a result of an internationally wrongful act by another State may result in a reduction of recovery to the extent of the damage that could have been avoided".[1365] 115

The arbitral tribunal noted that "the duty to mitigate is a restriction on compensatory damages", whose rationale "is to encourage efficiency and to minimize the consequences of unlawful conduct (such as a breach of a treaty)".[1366] 116 The tribunal specified that the "duty to mitigate applies if: (i) a claimant is unreasonably inactive following a breach of a treaty; or (ii) a claimant engages in unreasonable conduct following a breach of treaty".[1367] 117 The tribunal explained that the "first limb of the mitigation principle concerns the unreasonable failure by the claimant to act subsequent to a breach of treaty, where it could have reduced the damages arising (including by incurring certain additional expenses)", while the second

[1362] [211 ICSID, Case No. ARB/14/4, Award, 31 August 2018, paras. 10.96–10.97.]

[1363] [212 *Ibid*., para. 10.138.]

[1364] [238 *Ibid*., paras. 10.124–10.125.]

[1365] 115 PCA, Case No. 2009–04, Award on Damages, 10 January 2019, para. 196.

[1366] 116 *Ibid*., para. 204.

[1367] 117 *Ibid*.

limb, "conversely, concerns the unreasonable incurring of expenses by the claimant subsequent to a treaty breach, which results in increasing the size of its claim".[1368] [118]

[A/77/74, p. 22]

International Tribunal for the Law of the Sea

M/V "Norstar" (Panama v. *Italy)*

In *M/V "Norstar" (Panama* v. *Italy)*, the International Tribunal for the Law of the Sea recalled that article 31 "is part of customary international law",[1369] [119] and emphasized "the requirement of a causal link between the wrongful act committed and damage suffered".[1370] [120]

[A/77/74, p. 23]

Permanent Court of Arbitration (under UNCITRAL Rules)

Serafín García Armas and Karina García Gruber v. *Bolivarian Republic of Venezuela*

In *Serafín García Armas and Karina García Gruber* v. *Bolivarian Republic of Venezuela*, the arbitral tribunal cited article 31, noting that "customary international law also recognizes the right of the Claimants to full reparation for the damage suffered as a consequence of the acts of the Defendant".[1371] [121]

[A/77/74, p. 23]

International arbitral tribunal (under the ICSID Convention)

9REN Holding S.à.r.l. v. *Kingdom of Spain*

In *9REN Holding S.à.r.l.* v. *Kingdom of Spain*, the arbitral tribunal noted that in absence of pertinent "explicit guidance to quantum" in the Energy Charter Treaty, "resort is had to the customary international law principle of full compensation", referring to article 31.[1372] [122]

[A/77/74, p. 23]

SolEs Badajoz GmbH v. *Kingdom of Spain*

In *SolEs Badajoz GmbH* v. *Kingdom of Spain*, the arbitral tribunal considered that the compensation owed by the State to the investor was "governed by the customary international law of State responsibility", referring to the *Case concerning the Factory at Chorzów*

[1368] [118] *Ibid*., para. 205.

[1369] [119] ITLOS, see footnote [72] 12 above, p. 95, para. 318, citing *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 62, para. 194.

[1370] [120] *Ibid*., pp. 97–98, para. 333, citing *M/V "Virginia G" (Panama/Guinea Bissau)* (footnote [58] 11 above), pp. 118–120, paras. 435, 439 and 442.

[1371] [121] PCA, Case No. 2013–03, Final Award, 26 April 2019, para. 476.

[1372] [122] ICSID, Case No. ARB/15/15, Award, 31 May 2019, para. 373.

and article 31.[1373] [123] The tribunal emphasized that "the injury for which reparation is due includes damage 'caused by' the State's internationally wrongful act", and, quoting the commentary to article 31, noted that the "notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31".[1374] [124]

[A/77/74, p. 23]

Glencore International A.G. and C.I. Prodeco S.A. v. *Republic of Colombia*

In *Glencore International A.G. and C.I. Prodeco S.A.* v. *Republic of Colombia*, the arbitral tribunal stated that the principle of full reparation was adopted in the *Case concerning the Factory at Chorzów* and "subsequently codified" in the articles.[1375] [125] The tribunal concluded that "[c]ustomary international law rules on reparation for breaches of international law are set out in the ILC Articles", citing in particular article 31.[1376] [126]

[A/77/74, p. 24]

Inter-American Court of Human Rights

Álvarez Ramos v. *Venezuela*

In *Álvarez Ramos* v. *Venezuela*, the Inter-American Court of Human Rights cited the State responsibility articles and the American Convention on Human Rights, indicating "that any violation of an international obligation that has produced harm entails the obligation to make adequate reparation and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary law on State responsibility".[1377] [127]

[A/77/74, p. 24]

International arbitral tribunal (under the ICSID Convention)

OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. *Kingdom of Spain*

The arbitral tribunal in *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG* v. *Kingdom of Spain* observed that while the applicable investment protection treaty did not "specify the consequences of a breach …, customary international law applies". The tribunal recalled that "the relevant principles of customary international law are derived from the … judgment [of the Permanent Court of International Justice] in the *Chorzów Factory Case* and are recorded in Articles 31–38 of the ILC Draft Articles".[1378] [128]

[A/77/74, p. 24]

[1373] [123] ICSID, Case No. ARB/15/38, Award, 31 July 2019, para. 476, citing Permanent Court of International Justice, *Case concerning the Factory at Chorzów, Merits, Judgment No. 13* (footnote [28] 34 above)*, Series A, No. 17*, p. 1, at p. 47.

[1374] [124] ICSID, Case No. ARB/15/38, *ibid*., para. 477.

[1375] [125] ICSID, Case No. ARB/16/6, Award, 27 August 2019, para. 1567.

[1376] [126] *Ibid*., paras. 1569–1570.

[1377] [127] IACHR, Series C, No. 380, Judgment (Preliminary Objection, Merits, Reparations and Costs), 30 August 2019, para. 192.

[1378] [128] ICSID, Case No. ARB/15/36, Award, 6 September 2019, para. 609.

Perenco Ecuador Limited v. *Ecuador*

While assessing the amount of compensation owed by the State to the investor, the arbitral tribunal in *Perenco Ecuador Limited* v. *Ecuador* found that no compensation was owed during the period prior to the promulgation of a decree that had violated the standard of protection contained in the relevant investment treaty, recalling that according to the commentary to article 31, "it is only '[i]njury … caused by the internationally wrongful act of a State' for which full reparation must be made".[1379] [129]

[A/77/74, p. 24]

Inter-American Court of Human Rights

Cesti Hurtado v. *Peru*

In an order in *Cesti Hurtado* v. *Peru*, the Inter-American Court of Human Rights cited articles 1 and 31, recalling that "whenever a State is found responsible for an internationally wrongful act that has caused damage, an obligation arises for that State to make full reparation for the damage".[1380] [130]

[A/77/74, p. 24]

International arbitral tribunal (under the ICSID Convention)

RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. *Kingdom of Spain*

The arbitral tribunal in *RWE Innogy GmbH and RWE Innogy Aersa S.A.U.* v. *Kingdom of Spain* referred to article 31 and the commentary thereto, noting the "basic proposition that reparation must, 'as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'".[1381] [131]

[A/77/74, p. 25]

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

[1379] [129] ICSID, Case No. ARB/08/6, Award, 27 September 2019, para. 127.

[1380] [130] IACHR, Order (Request for Provisional Measures and Monitoring Compliance with Judgment), 14 October 2019, para. 30.

[1381] [131] ICSID, Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, 30 December 2019, paras. 685 (see also paras. 733 and 741), citing *Case concerning the Factory at Chorzów*, Merits (footnote [28] 34 above), p. 47.

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".[1382] 132

[A/77/74, p. 25]

IRAN-UNITED STATES CLAIMS TRIBUNAL

Award No. 604-A15 (II:A)/A26 (IV)/B43-FT

In a partial award rendered in 2020, the Iran-United States Claims Tribunal noted that "[u]nder customary international law, as reflected in Article 31 (1) of the ILC Articles, '[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act'".[1383] 133 Referring to the commentary to article 31, the Tribunal indicated that "[u]nder international law, a failure by an injured State to take reasonable steps to limit the losses it incurred as a result of an internationally wrongful act by another State may result in a reduction of recovery to the extent of the damage that could have been avoided".[1384] 134

[A/77/74, p. 25]

(DS)2, S.A., Peter de Sutter and Kristof de Sutter v. *Republic of Madagascar*

In (*DS)2, S.A., Peter de Sutter and Kristof de Sutter* v. *Republic of Madagascar*, the arbitral tribunal referred to article 31, paragraph 2, recalling that "injury 'includes any damage, whether material or moral, caused by the internationally wrongful act of a State'".[1385] 135

[A/77/74, p. 25]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA)

The "Enrica Lexie" Incident (Italy v. *India)*

The arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea in *The "Enrica Lexie" Incident (Italy* v. *India)* recalled that

> under customary international law as codified in the ILC Draft Articles on State Responsibility, '[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act', which may include 'any damage, whether material or moral, caused by the internationally wrongful act'. Specifically, full reparation shall take the form of restitution, compensation and satisfaction, either singly or in combination.[1386] 136

[A/77/74, p. 25]

[1382] 132 See footnote [860] 132 above, para. 681.

[1383] 133 See footnote [380] 31 above, para. 1787.

[1384] 134 *Ibid*., para. 1796.

[1385] 135 See footnote [1029] 108 above, para. 396.

[1386] 136 See footnote [384] 34 above, para. 1082.

Permanent Court of Arbitration (under UNCITRAL Rules)

Deutsche Telekom AG v. *Republic of India*

In *Deutsche Telekom AG* v. *Republic of India*, the arbitral tribunal opined that it "must seek to implement the full reparation principle under customary international law as set out in *Chorzów* and restated in the ILC Articles, a point which is undisputed".[1387] [137] Furthermore, the tribunal recalled that:

> [I]n accordance with Article 31 of the ILC Articles, the determination of damages under international law implies a three-step process:
>
> i. establishing a breach;
>
> ii. ascertaining that the injury was caused by that breach (causation); and
>
> iii. determining the amount of compensation due for the injury caused (valuation or quantification of damages).[1388] [138]

[A/77/74, p. 26]

Inter-American Court of Human Rights

Galindo Cárdenas et al. v. *Peru*

In a provisional measures order in the case of *Galindo Cárdenas et al.* v. *Peru*, the Inter-American Court of Human Rights cited articles 1 and 31, noting that "under international law, whenever a State is found responsible for an internationally wrongful act that has caused damage, an obligation arises for that State to make full reparation for the damage".[1389] [139]

[A/77/74, p. 26]

International arbitral tribunal (under the ICSID Convention)

STEAG GmbH v. *Kingdom of Spain*

The arbitral tribunal in *STEAG GmbH* v. *Kingdom of Spain* found that in the absence of a specific rule on compensation in the applicable investment treaty, the general rule of article 31 was applicable,[1390] [140] pursuant to which "the internationally wrongful conduct of the State must be the actual and proximate cause of the damage".[1391] [141]

[A/77/74, p. 26]

[1387] [137] PCA, Case No. 2014–10, Final Award, 27 May 2020, para. 287.

[1388] [138] *Ibid*., para. 119.

[1389] [139] IACHR, Order (Request for Provisional Measures and Monitoring Compliance with Judgment), 3 September 2020, para. 17.

[1390] [140] ICSID, Case No. ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020, para. 745.

[1391] [141] *Ibid*., para. 748.

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Cairn Energy PLC and Cairn UK Holdings Limited v. *Republic of India*

In *Cairn Energy PLC and Cairn UK Holdings Limited* v. *Republic of India*, the arbitral tribunal, citing article 31 and the commentary thereto, noted that India was "only under an obligation to repair 'the injury caused by the internationally wrongful act', which includes 'any damage, whether material or moral, caused by the internationally wrongful act'", and that "it is only 'the injury resulting from or ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act', that must be repaired".[1392] 142

[A/77/74, p. 26]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Silver Ridge Power B.V. v. *Italian Republic*

The arbitral tribunal in *Silver Ridge Power B.V.* v. *Italian Republic* considered that under article 31, paragraph 1,

> which represents customary international law, the State responsible for an internationally wrongful act is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Hence, there can be no doubt that, under general international law, the existence of a causal link between the alleged infringement of obligations under international law and the damage ensuing from it is an indispensable prerequisite for a compensation claim.[1393] 143

The tribunal also cited articles 1 and 2.[1394] 144

[A/77/74, p. 26]

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Ronald Enrique Castedo Allerding v. *Bolivia*

In *Ronald Enrique Castedo Allerding* v. *Bolivia*, the Inter-American Commission on Human Rights, citing article 31, mentioned that it is a "cardinal principle of public international law … that when a State violates any of its international obligations, it incurs international responsibility, which immediately places upon it the obligation to make full reparation for the damage caused by its incompliance".[1395] 145 Thus, reparation "is a secondary obligation that arises for a State as a consequence of its violation of a primary obligation under international law".[1396] 146

[A/77/74, p. 27]

[1392] 142 PCA, Case No. 2016–07, Final Award, 21 December 2020, para. 1862.

[1393] 143 ICSID, Case No. ARB/15/37, Award, 26 February 2021, para. 513.

[1394] 144 *Ibid*., para. 512.

[1395] 145 Inter-American Commission of Human Rights, Petition No. 1178–13, Admissibility Report No. 117/21, 13 June 2021, para. 40.

[1396] 146 *Ibid*.

Permanent Court of Arbitration (under UNCITRAL Rules)

OOO Manolium Processing v. *Republic of Belarus*

Citing articles 31 and 36, the arbitral tribunal in *OOO Manolium Processing* v. *Republic of Belarus* indicated that the provision of the treaty concerned in that case

stating that adequate compensation shall be calculated as the fair market value is in line with the principle of full reparation of the injury caused, firmly established in jurisprudence since the seminal *Chorzów Factory* decision of the Permanent Court of International Justice and subsequently codified in the ILC Articles.[1397] 147

[A/77/74, p. 27]

Ad hoc committee (under the ICSID Convention)

Infrastructure Services Luxembourg S.à.r.l. and Energía Termosolar B.V. v. *Kingdom of Spain*

The *ad hoc* committee in the annulment proceeding *Infrastructure Services Luxembourg S.à.r.l. and Energía Termosolar B.V.* v. *Kingdom of Spain* cited the text of article 31, indicating that international law "provides that reparation must 'as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'".[1398] 148

[A/77/74, p. 27]

International arbitral tribunal (under the ICSID Convention)

Eco Oro Minerals Corp. v. *Republic of Colombia*

The arbitral tribunal in *Eco Oro Minerals Corp.* v. *Republic of Colombia* noted that, pursuant to article 31, "Colombia is only required to make full reparation for damage 'caused by' the wrongful act".[1399] 149 However, the investor "must adduce 'persuasive evidence' that its loss was proximately caused by Colombia's actions".[1400] 150 The tribunal accepted, in terms of ascertaining the quantum of loss, "that the appropriate standard is full reparation for the loss suffered as a result of the breach, as provided for in the ILC Draft Articles".[1401] 151

[A/77/74, p. 27]

[1397] 147 See footnote [799] 86 above, para. 618.

[1398] 148 ICSID, Case No. ARB/13/31, Decision on Annulment, 30 July 2021, para. 251, citing *Case concerning the Factory at Chorzów, Merits,* (footnote [28] 34 above), p. 47.

[1399] 149 See footnote [401] 51 above, para. 839.

[1400] 150 *Ibid*., para. 839.

[1401] 151 *Ibid*., para. 894.

International arbitral tribunal (under the ICSID Additional Facility Rules)

Lion Mexico Consolidated L.P. v. *United Mexican States*

The arbitral tribunal in *Lion Mexico Consolidated L.P.* v. *United Mexican States* indicated that "[t]he customary international law principle of full reparation has been embodied in Art. 31(1)".[1402] 152

[A/77/74, p. 28]

International arbitral tribunal (under the ICSID Convention)

Pawlowski AG and Project Sever s.r.o. v. *Czech Republic*

In *Pawlowski AG and Project Sever s.r.o.* v. *Czech Republic*, the arbitral tribunal cited article 31, which, as a "second consequence" of internationally wrongful acts, "requires that the delinquent State make 'full reparation' for the 'injury caused'".[1403] 153

[A/77/74, p. 28]

Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. *Argentine Republic*

The arbitral tribunal in *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft* v. *Argentine Republic* stated that the duty to provide full reparation was part of "customary international law … and is enshrined in Article 31 (1) of the ILC Articles".[1404] 154 The tribunal emphasized that "there must be a proximate causal link between the violation of international law and the injury caused to Claimants" and that "only 'the injury caused by the internationally wrongful act' has to be fully repaired. By contrast, hypothetical, speculative as well as undetermined and remote damage cannot be compensated".[1405] 155

Additionally, the arbitral tribunal found that the duty to provide full compensation "also encompasses consequential damages that Claimants would not have incurred 'but for' Respondent's unlawful conduct", including "consequential damage that occurred after the internationally wrongful act occurred".[1406] 156

[A/77/74, p. 28]

Permanent Court of Arbitration (under UNCITRAL Rules)

Bank Melli Iran and Bank Saderat Iran v. *Kingdom of Bahrain*

The arbitral tribunal in *Bank Melli Iran and Bank Saderat Iran* v. *Kingdom of Bahrain* cited the text of article 31 and recalled that "it is a basic principle of international law that States incur responsibility for their internationally wrongful acts. The corollary to this

[1402] 152 ICSID, Case No. ARB(AF)/15/2, Award, 20 September 2021, para. 623.

[1403] 153 See footnote [402] 52 above, para. 725.

[1404] 154 See footnote [193] 26 above, para. 441.

[1405] 155 *Ibid*., para. 442.

[1406] 156 *Ibid*., para. 575.

principle is that the responsible State must repair the damage caused by its internationally wrongful act".[1407] [157] The tribunal also referred to articles 36[1408] [158] and 37.[1409] [159]

[A/77/74, p. 28]

International Court of Justice

Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. *Uganda)*

In its judgment on reparations in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda)*, the International Court of Justice noted that article 31 "reflects customary international law".[1410] [160] In its analysis of expert evidence on the loss of lives during the conflict, the Court stated that "[s]ome of the lives lost during the conflict (the number of which cannot be determined) may be regarded as having a cause that is too remote from the internationally wrongful acts of Uganda to be a basis for a claim of reparation against it", and concluded that "the mortality surveys presented as evidence cannot contribute to the determination of the number of lives lost that are attributable to Uganda".[1411] [161]

[A/77/74, p. 28]

[…] the International Court of Justice referred to the commentary to articles 31 and 47, noting that

in certain situations in which multiple causes attributable to two or more actors have resulted in injury, a single actor may be required to make full reparation for the damage suffered … . In other situations, in which the conduct of multiple actors has given rise to injury, responsibility for part of such injury should instead be allocated among those actors.[1412] [233]

[A/77/74, p. 38]]

[1407] [157] PCA, Case No. 2017–25, Final Award, 9 November 2021, para. 738.

[1408] [158] *Ibid*., para. 740.

[1409] [159] *Ibid*., para. 701.

[1410] [160] ICJ, Judgment (Reparations), 9 February 2022, para. 70.

[1411] [161] *Ibid*., para. 148.

[1412] [[233] *Ibid*., para. 98.]

Article 32. Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Commentary

(1) Article 3 concerns the role of internal law in the characterization of an act as wrongful. Article 32 makes clear the irrelevance of a State's internal law to compliance with the obligations of cessation and reparation. It provides that a State which has committed an internationally wrongful act may not invoke its internal law as a justification for failure to comply with its obligations under this part. Between them, articles 3 and 32 give effect for the purposes of State responsibility to the general principle that a State may not rely on its internal law as a justification for its failure to comply with its international obligations.[1413]477 Although practical difficulties may arise for a State organ confronted with an obstacle to compliance posed by the rules of the internal legal system under which it is bound to operate, the State is not entitled to oppose its internal law or practice as a legal barrier to the fulfilment of an international obligation arising under Part Two.

(2) Article 32 is modelled on article 27 of the 1969 Vienna Convention, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This general principle is equally applicable to the international obligations deriving from the rules of State responsibility set out in Part Two. The principle may be qualified by the relevant primary rule, or by a *lex specialis*, such as article 50 of the European Convention on Human Rights, which provides for just satisfaction in lieu of full reparation "if the internal law of the High Contracting Party concerned allows only partial reparation to be made".[1414] 478

(3) The principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions. For example, the dispute between Japan and the United States in 1906 over California's discriminatory education policies was resolved by the revision of the Californian legislation.[1415] 479 In the incident concerning article 61, paragraph 2, of the Weimar Constitution (Constitution of the Reich of 11 August 1919), a constitutional amendment was provided for in order to ensure the discharge of the obligation deriving from article 80 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).[1416] 480 In the *Peter Pázmány University* case, PCIJ specified that the property to be returned should be "freed from any measure of transfer, compulsory administration, or sequestration".[1417] 481 In short, international law does not recognize that the obligations of a responsible State under

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[1413] 477 See paragraphs (2) to (4) of the commentary to article 3.

[1414] 478 Article 41 of the Convention, as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Other examples include article 32 of the Revised General Act for the Pacific Settlement of International Disputes and article 30 of the European Convention for the Peaceful Settlement of Disputes.

[1415] 479 See R. L. Buell, "The development of the anti-Japanese agitation in the United States", *Political Science Quarterly*, vol. 37 (1922), pp. 620 *et seq.*

[1416] 480 See *British and Foreign State Papers, 1919* (London, H. M. Stationery Office, 1922), vol. 112, p. 1094.

[1417] 481 *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), Judgment, 1933, P.C.I.J., Series A/B, No. 61*, p. 208, at p. 249.

Part Two are subject to the State's internal legal system nor does it allow internal law to count as an excuse for non-performance of the obligations of cessation and reparation.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Permanent Court of Arbitration (under UNCITRAL Rules)

Hulley Enterprises Limited v. *The Russian Federation, Yukos Universal Limited* v. *The Russian Federation and Veteran Petroleum Limited* v. *The Russian Federation*

The arbitral tribunal constituted to hear the *Hulley Enterprises Limited* v. *The Russian Federation*, *Yukos Universal Limited* v. *The Russian Federation* and *Veteran Petroleum Limited* v. *The Russian Federation* cases accepted an expert opinion, submitted by James Crawford, which cited articles 3 and 32 in support of the proposition that there existed "a strong presumption of the separation of international from national law".[1418] 163

[A/68/72, para. 114]

Inter-American Court of Human Rights

Case of Gelman v. *Uruguay*

In an order in the *Case of Gelman* v. *Uruguay*, the Inter-American Court of Human Rights cited the State responsibility articles in support of the assertion that "no pueden, por razones de orden interno, dejar de asumir la responsabilidad internacional ya establecida".[1419] 165

[A/71/80, para. 116]

African Court on Human and Peoples' Rights

Tanganyika Law Society and Reverend Christopher Mtikila. v. *Republic of Tanzania*

In *Tanganyika Law Society and Reverend Christopher Mtikila.* v. *Republic of Tanzania*, the African Court on Human and Peoples' Rights noted that article 32 provided that '"the Responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations"'.[1420] 166

[A/71/80, para. 117]

International arbitral tribunal (under the ICSID Convention)

Bernhard von Pezold and others v. *Republic of Zimbabwe*

In *Bernhard von Pezold and others* v. *Republic of Zimbabwe*, the arbitral tribunal noted that, "[i]nternal laws, per ILC Article 32, do not justify the failure to provide repara-

[1418] 163 See footnotes [159] 24, [160] 25 and [161] 26 above, para. 316.

[1419] 165 IACHR, Order, 20 March 2013, para. 59, footnote 38.

[1420] 166 African Court on Human and Peoples' Rights, Application Nos. 009/2011 and 011/2011, Judgment, 14 June 2013, para. 108 (quoting article 32).

tion; obstacles in administration or politics are also insufficient. Proportionality is such that restitution is only barred if 'there is a grave disproportionality' between the remedy awarded and the relevant breach".[1421] [167] The tribunal also stated that "Article 32 of the ILC Articles prohibits a state from relying on its internal laws to justify non-compliance with its international obligations".[1422] [168]

[A/71/80, para. 118]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Chevron Corporation and Texaco Petroleum Company v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* referred to articles 28 to 39 of the State responsibility articles under, part III, "Principal legal and other texts",[1423] [150] which were relevant with regard to the parties' claims for relief.[1424] [151]

[A/74/83, p. 28]]

Renco Group v. *Republic of Peru*

The arbitral tribunal in *Renco Group* v. *Republic of Peru* referred to article 32, noting that

> [w]hile international law generally holds individual States' internal law to be irrelevant to a State's obligations under international law, [the tribunal] nevertheless acknowledges that issues may arise in respect of which there is no clearly applicable treaty or customary international law obligation. … In this domain, and especially where the international rule to be applied finds its origin in analogous national law, the 'rules generally accepted by municipal legal systems' may be invoked in order that the ultimate result not 'lose touch with reality'.[1425] [162]

[A/77/74, p. 29]

Court of Justice of the European Union

European Commission v. *Hungary*

In *European Commission* v. *Hungary*, the Grand Chamber of the Court of Justice of the European Union found that it was clear from article 32 "that the responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under international law".[1426] [163]

[A/77/74, p. 29]

[1421] [167] See footnote [114] 24 above, para. 690 (quoting para. (11) of the commentary to article 35).

[1422] [168] *Ibid*., para. 725.

[1423] [[150] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1424] [[151] *Ibid*., para. 9.9.]

[1425] [162] See footnote [796] 83 above, para. 213.

[1426] [163] See footnote [189] 22 above, para. 90.

Article 33. Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Commentary

(1) Article 33 concludes the provisions of chapter I of Part Two by clarifying the scope and effect of the international obligations covered by the Part. In particular, paragraph 1 makes it clear that identifying the State or States towards which the responsible State's obligations in Part Two exist depends both on the primary rule establishing the obligation that was breached and on the circumstances of the breach. For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a single neighbouring State. Evidently, the gravity of the breach may also affect the scope of the obligations of cessation and reparation.

(2) In accordance with paragraph 1, the responsible State's obligations in a given case may exist towards another State, several States or the international community as a whole. The reference to several States includes the case in which a breach affects all the other parties to a treaty or to a legal regime established under customary international law. For instance, when an obligation can be defined as an "integral" obligation, the breach by a State necessarily affects all the other parties to the treaty.[1427] 482

(3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights.[1428] 483 The range of possibilities is demonstrated from the ICJ judgment in the *LaGrand* case, where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".[1429] 484

(4) Such possibilities underlie the need for paragraph 2 of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its

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[1427] 482 See further article 42 (*b*) (ii) and commentary.

[1428] 483 Cf. *Jurisdiction of the Courts of Danzig* (footnote [141] 82 above), pp. 17–21.

[1429] 484 *LaGrand, Judgment* (footnote [236] 119 above), para. 77. In the circumstances the Court did not find it necessary to decide whether the individual rights had "assumed the character of a human right" (para. 78).

own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (art. 55). The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State".

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Additional Facility Rules)

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. *the United Mexican States*

In its 2007 award, the tribunal established to hear the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc.* v. *Mexico*, after holding that Chapter Eleven of NAFTA enjoys the status of *lex specialis* in relation to the State responsibility articles,[1430] [49] noted that Chapter Eleven includes the possibility of private claimants (who are nationals of a NAFTA member State) invoking in an international arbitration the responsibility of another NAFTA member State. Accordingly, "it is a matter of the particular provisions of Chapter Eleven to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account". In support of this latter assertion the tribunal cited article 33, paragraph 2, of the State responsibility articles, which provides that the customary rules on state responsibility codified therein operate "… without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State". Accordingly, in the view of the tribunal:

> Customary international law—pursuant to which only sovereign States may invoke the responsibility of another State—does not therefore affect the rights of non-State actors under particular treaties to invoke state responsibility. This rule is not only true in the context of investment protection, but also in the human rights and environmental protection arena.[1431] [50]

[A/65/76, para. 33]

Permanent Court of Arbitration (under UNCITRAL Rules)

Hulley Enterprises Limited (Cyprus) v. *The Russian Federation*

The arbitral tribunal in *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation* was

[1430] [49] See article 55 below.

[1431] [50] *Archer Daniels Midland Company* (footnote [3] 4 above), para. 118.

aware that Part II of the ILC Articles on State Responsibility, which sets out the consequences of internationally wrongful acts, is concerned with claims between States and may not directly apply to cases involving persons or entities other than States. That being said, the ILC Articles reflect customary international law in the matter of state responsibility, and to the extent that a matter is not ruled by the ECT and there are no circumstances commanding otherwise, the Tribunal will turn to the ILC Articles on State Responsibility for guidance.[1432] [169]

[A/71/80, para. 119]

[*Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* referred to articles 28 to 39 of the State responsibility articles under, part III, "Principal legal and other texts",[1433] [150] which were relevant with regard to the parties' claims for relief.[1434] [151]

[A/74/83, p. 28]]

International arbitral tribunal (under the ICSID Convention)

Burlington Resources Inc. v. *Republic of Ecuador*

In *Burlington Resources Inc.* v. *Republic of Ecuador*, the arbitral tribunal cited article 33 and the commentary to article 28 of the State responsibility articles when observing that

[w]hile Part Two of the ILC Articles, which sets out the legal consequences of internationally wrongful acts and to which Article 31 belongs, is not applicable to the international responsibility of States *vis-à-vis* non-States, it is generally accepted that the ILC Articles can be transposed to the context of investor-State disputes.[1435] [187]

[A/74/83, p. 33]

ConocoPhillips Petrozuata B.V. et al. v. *Bolivarian Republic of Venezuela*

In addressing the principle of full reparation reflected in article 31, the arbitral tribunal in *ConocoPhillips Petrozuata B.V. et al.* v. *Bolivarian Republic of Venezuela* referred to article 33, indicating that "the provisions on State responsibility are 'without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State' (Art. 33(2))".[1436] [164]

[A/77/74, p. 29]

[1432] [169] See footnote [19] 7 above, footnote 10.

[1433] [[150] PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1434] [[151] *Ibid*., para. 9.9.]

[1435] [187] ICSID, Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 177 and footnote 236.

[1436] [164] ICSID, Case No. ARB/07/30, Award, 8 March 2019, para. 208.