

PART FOUR

GENERAL PROVISIONS

This Part contains a number of general provisions applicable to the articles as a whole, specifying either their scope or certain matters not dealt with. First, article 55 makes it clear by reference to the *lex specialis* principle that the articles have a residual character. Where some matter otherwise dealt with in the articles is governed by a special rule of international law, the latter will prevail to the extent of any inconsistency. Correlatively, article 56 makes it clear that the articles are not exhaustive, and that they do not affect other applicable rules of international law on matters not dealt with. There follow three saving clauses. Article 57 excludes from the scope of the articles questions concerning the responsibility of international organizations and of States for the acts of international organizations. The articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State, and this is made clear by article 58. Finally, article 59 reserves the effects of the Charter of the United Nations itself.

Article 55. *Lex specialis*

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Commentary

(1) When defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach. The question then is whether those provisions are exclusive, *i.e.* whether the consequences which would otherwise apply under general international law, or the rules that might otherwise have applied for determining a breach, are thereby excluded. A treaty may expressly provide for its relationship with other rules. Often, however, it will not do so and the question will then arise whether the specific provision is to coexist with or exclude the general rule that would otherwise apply.

(2) Article 55 provides that the articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. It reflects the maxim *lex specialis derogat legi generali*. Although it may provide an important indication, this is only one of a number of possible approaches towards determining which of several rules potentially applicable is to prevail or whether the rules simply coexist. Another gives priority, as between the parties, to the rule which is later in time.^{[2140] 817} In certain cases the consequences that follow from a breach of some overriding rule may themselves have a preemptory character. For example, States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to preemptory norms of general international law. Thus, the assumption of article 55 is that the special rules in question have at least the same legal rank as those expressed in the articles. On that basis, article 55 makes it clear that the present articles operate in a residual way.

(3) It will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases, it will be clear from the language of a treaty or other text that only the consequences specified are to flow. Where that is so, the consequence will be “determined” by the special rule and the principle embodied in article [55] will apply. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example of the former is the WTO Understanding on Rules and Procedures governing the Settlement of Disputes as it relates to certain remedies.^{[2141] 818} An example of the latter is article 41 of Protocol No. 11 to the European Convention on Human Rights.^{[2142] 819} Both

^{[2140] 817} See paragraph 3 of article 30 of the 1969 Vienna Convention.

^{[2141] 818} See Marrakesh Agreement establishing the World Trade Organization, annex 2, especially art. 3, para. 7, which provides for compensation “only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement”. For WTO purposes, “compensation” refers to the future conduct, not past conduct, and involves a form of countermeasure. See article 22 of the Understanding. 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 (footnote [1205] 431 above).

^{[2142] 819} See paragraph (2) of the commentary to article 32.

concern matters dealt with in Part Two of the articles. The same considerations apply to Part One. Thus, a particular treaty might impose obligations on a State but define the “State” for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II.^[2143] 820 Or a treaty might exclude a State from relying on *force majeure* or necessity.

(4) For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus, the question is essentially one of interpretation. For example, in the *Neumeister* case, the European Court of Human Rights held that the specific obligation in article 5, paragraph 5, of the European Convention on Human Rights for compensation for unlawful arrest or detention did not prevail over the more general provision for compensation in article 50. In the Court’s view, to have applied the *lex specialis* principle to article 5, paragraph 5, would have led to “consequences incompatible with the aim and object of the Convention”.^[2144] 821 It was sufficient, in applying article 50, to take account of the specific provision.^[2145] 822

(5) Article 55 is designed to cover both “strong” forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as “weaker” forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution. PCIJ referred to the notion of a self-contained regime in the S.S. “*Wimbledon*” case with respect to the transit provisions concerning the Kiel Canal in the Treaty of Versailles,^[2146] 823 as did ICJ in the *United States Diplomatic and Consular Staff in Tehran* case with respect to remedies for abuse of diplomatic and consular privileges.^[2147] 824

(6) The principle stated in article 55 applies to the articles as a whole. This point is made clear by the use of language (“the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State”) which reflects the content of each of Parts One, Two and Three.

^[2143] 820 Thus, article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment only applies to torture committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. This is probably narrower than the bases for attribution of conduct to the State in Part One, chapter II. Cf. “federal” clauses, allowing certain component units of the State to be excluded from the scope of a treaty or limiting obligations of the federal State with respect to such units (e.g. article 34 of the Convention for the Protection of the World Cultural and Natural Heritage).

^[2144] 821 *Neumeister v. Austria*, Eur. Court H.R., Series A, No. 17 (1974), paras. 28–31, especially para. 30.

^[2145] 822 See also *Mavrommatis* (footnote [800] 236 above), pp. 29–33; *Marcu Colleanu v. German State*, *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (Paris, Sirey, 1930), vol. IX, p. 216 (1929); WTO, Report of the Panel, Turkey–Restrictions on Imports of Textile and Clothing Products (footnote [502] 130 above), paras. 9.87–9.95; *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI (Sales No. E/F.95.V.2), p. 53, at p. 100, para. 39 (1977). See further C. W. Jenks, “The conflict of law-making treaties”, *BYBIL*, 1953, vol. 30, p. 401; M. McDougal, H. D. Lasswell and J. C. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven Press, 1994), pp. 200–206; and P. Reuter, *Introduction to the Law of Treaties* (footnote [945] 300 above), para. 201.

^[2146] 823 S.S. “*Wimbledon*” (footnote [28] 34 above), pp. 23–24.

^[2147] 824 *United States Diplomatic and Consular Staff in Tehran* (footnote [80] 59 above), at p. 40, para. 86. See paragraph (15) of the commentary to article 50 and also B. Simma, “Self-contained regimes”, *NYIL*, 1985, vol. 16, p. 111.

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. the United Mexican States* considered the question of the relationship between the State responsibility articles and NAFTA. It recalled that

... the ILC Articles may be derogated from by treaty, as expressly recognized in Article 55 in relation to *lex specialis* ... Accordingly, customary international law does not affect the conditions for the existence of a breach of the investment protection obligations under the NAFTA, as this is a matter which is specifically governed by Chapter Eleven [of NAFTA]^{[2148] 87}

and further that

[t]he customary international law [rules] that the ILC Articles codify do not apply to matters which are specifically governed by *lex specialis*—*i.e.*, Chapter Eleven of the NAFTA in the present case.^{[2149] 88}

However, notwithstanding its finding regarding Chapter Eleven of NAFTA, the tribunal went on to add that “customary international law continues to govern all matters not covered by Chapter Eleven” and that, “[i]n the context of Chapter Eleven, customary international law—as codified in the ILC Articles therefore operates in a residual way”. This was confirmed by article 1131, paragraph 1, of NAFTA, endorsing the Tribunal’s mandate to “... decide the issues in dispute in accordance with [NAFTA] and applicable rules of international law”.^{[2150] 89} This latter finding of the continued application of the State responsibility articles related to the tribunal’s treatment of the question of countermeasures. It held that “Chapter Eleven neither provides nor specifically prohibits the use of countermeasures. Therefore, the question of whether the countermeasures defence is available to the Respondent is not a question of *lex specialis*, but of customary international law”. Since, other than the special situation provided for in article 2019 of NAFTA, no provision is made for countermeasures, the tribunal held that “the default regime under customary international law applies to the present situation”.^{[2151] 90}

[A/65/76, para. 54]

ARBITRATIONS UNDER ARTICLE 22(6) OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING AND ARTICLES 4(11) AND 7(10) OF THE WTO AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

United States—Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement and United States—

^[2148] ⁸⁷ See footnote [3] 4 above, para. 116.

^[2149] ⁸⁸ *Ibid.*, para. 118.

^[2150] ⁸⁹ *Ibid.*, para. 119.

^[2151] ⁹⁰ *Ibid.*, para. 122.

Subsidies on Upland Cotton, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement

In two decisions taken in 2009, the arbitrator in the *United States—Subsidies on Upland Cotton, Recourse to Arbitration* case noted that “by their own terms, the Articles of the ILC on State Responsibility do not purport to prevail over any specific provisions relating to the areas it covers that would be contained in specific legal instruments”, and quoted the following passage from the commentary to Part Three, Chapter II (“Countermeasures”) of the State responsibility articles:

In common with other chapters of these articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus, a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. Likewise, a regime for dispute resolution to which States must resort in the event of a dispute, especially if (as with the WTO dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.^{[2152] 91}

[A/65/76, para. 55]

WORLD TRADE ORGANIZATION PANEL

United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China

In *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, the panel, after finding that there existed “no basis for the assertion that as a general matter the Appellate Body and panels have found that the Draft Articles [on State responsibility] must be ‘taken into account’ as ‘rules of international law applicable in the relations between the parties’ in interpreting the WTO Agreement”,^{[2153] 200} and that “even by their own terms, the Draft Articles ‘do not attempt to define the content of the international obligations the breach of which gives rise to responsibility’”,^{[2154] 201} recalled that the State responsibility articles also contain a provision on *lex specialis*.^{[2155] 202} The panel then proceeded to explain why it considered article 1.1 of the SCM Agreement to be a special rule of international law:

[w]e view the taxonomy set forth in Article 1.1 of the SCM Agreement at heart as an attribution rule in the sense that it identifies what sorts of entities are and are not part of ‘government’ for purposes of the Agreement, as well as when ‘private’ actors may be said to be acting on behalf of ‘government’. This has precisely to do with ‘the content or implementation of the international responsibility of a State’ for purposes of the SCM Agreement, a further indication that the Draft Articles are not relevant to interpreting Article 1.1 of the SCM Agreement.^{[2156] 203}

[A/68/72, para. 139]

^{[2152] 91} Case No. WT/DS267/ARB/1, Decision by the Arbitrator, 31 August 2009, footnote 129, and Case No. WT/DS267/ARB/2, Decision by the Arbitrator, 31 August 2009, footnote 69, quoting paragraph (9) of the introductory commentary to Part Three, Chapter II.

^{[2153] 200} See footnote [7] 5 above, para. 8.89.

^{[2154] 201} *Ibid.*, para. 8.90 (quoting para. (1) of the General commentary of the State responsibility articles).

^{[2155] 202} *Ibid.*, para. 8.90.

^{[2156] 203} *Ibid.* (quoting, *inter alia*, article 55).

WORLD TRADE ORGANIZATION APPELLATE BODY

United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China

In *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, the Appellate Body considered the scope and meaning of article 55 of the State responsibility articles in the following terms:

[a]s we see it, Article 55 of the ILC Articles does not speak to the question of whether, for the purpose of interpreting Article 1.1(a)(1) of the SCM Agreement, a panel or the Appellate Body can take into account provisions of the ILC Articles ... Article 55 addresses the question of which rule to *apply* where there are multiple rules addressing the same subject matter. The question in the present case, however, is not whether certain of the ILC Articles are to be *applied* ... There is no doubt that the provision being applied in the present case is Article 1.1(a)(1). Rather, the question is, whether, when interpreting the terms of Article 1.1(a)(1), the relevant provisions of the ILC Articles may be taken into account as one among several interpretative elements. Thus, the treaty being *applied* is the SCM Agreement, and the attribution rules of the ILC Articles are to be *taken into account* in interpreting the meaning of the terms of that treaty. Article 55 of the ILC Articles does not speak to the issue of how the latter should be done.^{[2157] 204}

[A/68/72, para. 140]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Adel A Hamadi Al Tamimi v. Sultanate of Oman

In *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, the arbitral tribunal accepted the respondent's submission that "contracting parties to a treaty may, by specific provision (*lex specialis*), limit the circumstances under which the acts of an entity will be attributed to the State. To the extent that the parties have elected to do so, any broader principles of State responsibility under customary international law or as represented in the ILC Articles cannot be directly relevant".^{[2158] 236}

[A/71/80, para. 158]

PERMANENT COURT OF ARBITRATION (UNDER UNCITRAL RULES)

Mesa Power Group v. Government of Canada

In *Mesa Power Group v. Government of Canada*, the arbitral tribunal referred to article 55 of the State responsibility articles when finding that "Article 1503(2) [of NAFTA] constitutes a *lex specialis* that excludes the application of Article 5 of the ILC Articles".^{[2159] 249}

[A/74/83, p. 42]

^{[2157] 204} See footnote [13] 11 above, para. 316.

^{[2158] 236} See footnote [340] 66 above, para. 321 (footnote omitted).

^{[2159] 249} PCA, Case No. 2012–17, Award, 24 March 2016, paras. 359, 362 and 365.

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Vestey Group Limited v. Bolivarian Republic of Venezuela

The arbitral tribunal in *Vestey Group Limited v. Bolivarian Republic of Venezuela* cited article 55 to note that “States are free to derogate from this general framework of responsibility”.^{[2160] 250}

[A/74/83, p. 42]

^{[2160] 250} ICSID, Case No. ARB/06/4, Award, 15 April 2016, para. 326 and footnote 307.

Article 56. Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Commentary

(1) The present articles set out by way of codification and progressive development the general secondary rules of State responsibility. In that context, article 56 has two functions. First, it preserves the application of the rules of customary international law concerning State responsibility on matters not covered by the articles. Secondly, it preserves other rules concerning the effects of a breach of an international obligation which do not involve issues of State responsibility but stem from the law of treaties or other areas of international law. It complements the *lex specialis* principle stated in article 55. Like article 55, it is not limited to the legal consequences of wrongful acts but applies to the whole regime of State responsibility set out in the articles.

(2) As to the first of these functions, the articles do not purport to state all the consequences of an internationally wrongful act even under existing international law and there is no intention of precluding the further development of the law on State responsibility. For example, the principle of law expressed in the maxim *ex injuria jus non oritur* may generate new legal consequences in the field of responsibility.^{[2161] 825} In this respect, article 56 mirrors the preambular paragraph of the 1969 Vienna Convention which affirms that “the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention”. However, matters of State responsibility are not only regulated by customary international law but also by some treaties; hence article 56 refers to the “applicable rules of international law”.

(3) A second function served by article 56 is to make it clear that the present articles are not concerned with any legal effects of a breach of an international obligation which do not flow from the rules of State responsibility, but stem from the law of treaties or other areas of law. Examples include the invalidity of a treaty procured by an unlawful use of force,^{[2162] 826} the exclusion of reliance on a fundamental change of circumstances where the change in question results from a breach of an international obligation of the invoking State to any other State party,^{[2163] 827} or the termination of the international obligation violated in the case of a material breach of a bilateral treaty.^{[2164] 828}

^{[2161] 825} Another possible example, related to the determination whether there has been a breach of an international obligation, is the so-called principle of “approximate application”, formulated by Sir Hersch Lauterpacht in *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23, at p. 46. In the *Gabčíkovo-Nagymaros Project* case (footnote [31] 37 above), the Court said that “even if such a principle existed, it could by definition only be employed within the limits of the treaty in question” (p. 53, para. 76). See also S. Rosenne, *Breach of Treaty* (footnote [1150] 411 above), pp. 96–101.

^{[2162] 826} 1969 Vienna Convention, art. 52.

^{[2163] 827} *Ibid.*, art. 62, para. 2 (b).

^{[2164] 828} *Ibid.*, art. 60, para 1.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

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 award on *Ethiopia's Damages Claims*, the Eritrea-Ethiopia Claims Commission noted that the “size of the Parties’ claims raised potentially serious questions involving the intersection of the law of State responsibility with fundamental human rights norms”. It 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.^{[2165] 92} The Claims Commission proceeded to confirm that, while such qualification was not included in the 2001 text, that did “not alter the fundamental human rights law rule of common Article 1(2) in the Covenants, which unquestionably applies to the Parties”.^{[2166] 93}

[A/65/76, para. 56]

^[2165] ⁹² See article 31.

^[2166] ⁹³ *Ethiopia's Damages Claims* (footnote [1280] 47 above), para. 19, and *Eritrea's Damages Claims* (footnote [1280] 47 above), para. 19.

Article 57. Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Commentary

(1) Article 57 is a saving clause which reserves two related issues from the scope of the articles. These concern, first, any question involving the responsibility of international organizations, and secondly, any question concerning the responsibility of any State for the conduct of an international organization.

(2) In accordance with the articles prepared by the Commission on other topics, the expression “international organization” means an “intergovernmental organization”.^{[2167] 829} Such an organization possesses separate legal personality under international law,^{[2168] 830} and is responsible for its own acts, *i.e.* for acts which are carried out by the organization through its own organs or officials.^{[2169] 831} By contrast, where a number of States act together through their own organs as distinct from those of an international organization, the conduct in question is that of the States concerned, in accordance with the principles set out in chapter II of Part One. In such cases, as article 47 confirms, each State remains responsible for its own conduct.

(3) Just as a State may second officials to another State, putting them at its disposal so that they act for the purposes of and under the control of the latter, so the same could occur as between an international organization and a State. The former situation is covered by article 6. As to the latter situation, if a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributable to the organization, not the sending State, and will fall outside the scope of the articles. As to the converse situation, in practice there do not seem to be convincing examples of organs of international organizations which have been “placed at the disposal of” a State in the sense of article 6,^{[2170] 832} and there is no need to provide expressly for the possibility.

^{[2167] 829} See article 2, paragraph 1 (*i*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter “the 1986 Vienna Convention”).

^{[2168] 830} A firm foundation for the international personality of the United Nations is laid in the advisory opinion of the Court in *Reparation for Injuries* (footnote [32] 38 above), at p. 179.

^{[2169] 831} As the Court has observed, “the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts”, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (footnote [50] 56 above).

^{[2170] 832} Cf. *Yearbook ... 1974*, vol. II (Part One), pp. 286–290. The High Commissioner for the Free City of Danzig was appointed by the League of Nations Council and was responsible to it; see *Treatment of Polish Nationals* (footnote [134] 75 above). Although the High Commissioner exercised powers in relation to Danzig, it is doubtful that he was placed at the disposal of Danzig within the meaning of article 6. The position of the High Representative, appointed pursuant to annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina of 14 December 1995, is also unclear. The Constitutional Court of Bosnia and Herzegovina has held that the High Representative has a dual role, both as an international agent and as an official in certain circumstances acting in and for Bosnia and

(4) Article 57 also excludes from the scope of the articles issues of the responsibility of a State for the acts of an international organization, *i.e.* those cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization. Formally, such issues could fall within the scope of the present articles since they concern questions of State responsibility akin to those dealt with in chapter IV of Part One. But they raise controversial substantive questions as to the functioning of international organizations and the relations between their members, questions which are better dealt with in the context of the law of international organizations.^{[2171] 833}

(5) On the other hand article 57 does not exclude from the scope of the articles any question of the responsibility of a State for its own conduct, *i.e.* for conduct attributable to it under chapter II of Part One, not being conduct performed by an organ of an international organization. In this respect the scope of article 57 is narrow. It covers only what is sometimes referred to as the derivative or secondary liability of member States for the acts or debts of an international organization.^{[2172] 834}

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Prosecutor v. Dragan Nikolić (“Sušica Camp”)

In its 2002 decision on defence motion challenging the exercise of jurisdiction by the tribunal in the *Nikolić (“Sušica Camp”)* case, Trial Chamber II needed to consider the situation in which “some unknown individuals arrested the Accused in the territory of the [Federal Republic of Yugoslavia] and brought him across the border with Bosnia and Herzegovina and into the custody of SFOR”.^{[2173] 238} In this context, the Trial Chamber noted

Herzegovina; in the latter respect, the High Representative’s acts are subject to constitutional control. See *Case U 9/00 on the Law on the State Border Service*, Official Journal of Bosnia and Herzegovina, No. 1/01 of 19 January 2001.

^{[2171] 833} This area of international law has acquired significance following controversies, *inter alia*, over the International Tin Council: *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry*, case 2 A.C. 418 (1990) (England, House of Lords); *Maclaine Watson and Co., Ltd. v. Council and Commission of the European Communities*, case C-241/87, *Reports of cases before the Court of Justice and the Court of First Instance*, 1990–5, p. I–1797; and the Arab Organization for Industrialization (*Westland Helicopters Ltd. v. Arab Organization for Industrialization*, ILR, vol. 80, p. 595 (1985) (International Chamber of Commerce Award); *Arab Organization for Industrialization v. Westland Helicopters Ltd.*, *ibid.*, p. 622 (1987) (Switzerland, Federal Supreme Court); *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, *ibid.*, vol. 108, p. 564 (1994) (England, High Court). See also *Waite and Kennedy v. Germany*, *Eur. Court H.R., Reports*, 1999–I, p. 393 (1999).

^{[2172] 834} See the work of the Institute of International Law under R. Higgins, *Yearbook of the Institute of International Law*, vol. 66–I (1995), p. 251, and vol. 66–II (1996), p. 444. See also P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Brussels, Bruylant Editions de l’Université de Bruxelles, 1998). See further WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (footnote [502] 130).

^{[2173] 238} International Tribunal for the Former Yugoslavia, Trial Chamber II, *Prosecutor v. Dragan Nikolić (“Sušica Camp”), Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tri-*

in particular, quoting article 57 finally adopted by the International Law Commission in 2001, that the Commission's articles were "primarily directed at the responsibilities of States and not at those of international organizations or entities".^{[2174] 239}

[A/62/62, para. 134]

bunal, 9 October 2002, Case No. IT-94-2-PT, para. 57.

^{[2174] 239} *Ibid.*, para. 60. For the complete passage, see [pp. 174–175] above.

Article 58. Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Commentary

(1) Article 58 makes clear that the articles as a whole do not address any question of the individual responsibility under international law of any person acting on behalf of a State. It clarifies a matter which could be inferred in any case from the fact that the articles only address issues relating to the responsibility of States.

(2) The principle that individuals, including State officials, may be responsible under international law was established in the aftermath of the Second World War. It was included in the London Charter of 1945 which established the Nuremberg Tribunal^[2175] 835 and was subsequently endorsed by the General Assembly.^[2176] 836 It underpins more recent developments in the field of international criminal law, including the two *ad hoc* tribunals and the Rome Statute of the International Criminal Court.^[2177] 837 So far this principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility.^[2178] 838 As a saving clause, article 58 is not intended to exclude that possibility; hence the use of the general term “individual responsibility”.

(3) Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility.^[2179] 839 The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.^[2180] 840 Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25, paragraph 4, of the Rome Statute of the International Criminal Court, which provides that “[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” The latter is reflected, for example, in the

^[2175] 835 See footnote [1873] 636 above.

^[2176] 836 General Assembly resolution 95 (I) of 11 December 1946. See also the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, elaborated by the International Law Commission, *Yearbook ... 1950*, vol. II, p. 374, document A/1316.

^[2177] 837 See paragraph (6) of the commentary to chapter III of Part Two.

^[2178] 838 See, e.g., article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, dealing with compensation for victims of torture.

^[2179] 839 See, e.g., *Streletz, Kessler and Krenz v. Germany* (application Nos. 34044/96, 35532/97 and 44801/98), judgment of 22 March 2001, *Eur. Court H.R., Reports*, 2001-II: “If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned. It remains to be established that alongside that State responsibility the applicants individually bore criminal responsibility at the material time” (para. 104).

^[2180] 840 Prosecution and punishment of responsible State officials may be relevant to reparation, especially satisfaction: see paragraph (5) of the commentary to article 36.

well-established principle that official position does not excuse a person from individual criminal responsibility under international law.^{[2181] 841}

(4) Article 58 reflects this situation, making it clear that the articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term “individual responsibility” has acquired an accepted meaning in the light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL COURT OF JUSTICE

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)

In its 2007 judgment in the *Genocide* case, the Court, in response to the Respondent’s argument that the nature of the Genocide Convention was such as to exclude from its scope State responsibility for genocide and the other enumerated acts, referred to article 58 finally adopted by the International Law Commission in 2001, and the commentary thereto:

The Court observes that that duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: ‘No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.’ The Court notes also that the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly resolution 56/83, 12 December 2001) ... affirm in Article 58 the other side of the coin: ‘These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.’ In its commentary on this provision, the Commission said:

“Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.” (ILC commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, [*Yearbook of the International Law Commission, 2001*, vol. II (Part Two)], article 58, para. (3).)

The Commission quoted Article 25, paragraph 4, of the Rome Statute, and concluded as follows:

“Article 58 ... [makes] it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term ‘individual responsibility’ has acquired an accepted meaning in light of the Rome Statute and

^{[2181] 841} See, e.g., the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle III (footnote [2176] 836 above), p. 375; and article 27 of the Rome Statute of the International Criminal Court.

other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.”^{[2182] 13}

[A/62/62/Add.1, para. 9]

EUROPEAN COURT OF HUMAN RIGHTS

Jones and Others v. the United Kingdom

In *Jones and Others v. the United Kingdom*, the European Court of Human Rights cited article 58 as relevant international law, noting that “Article 58 clarifies the position in respect of simultaneous individual responsibility”.^{[2183] 237} It also referred to the article in support of the finding that “there is no doubt that individuals may in certain circumstances also be personally liable for wrongful acts which engage the State’s responsibility, and that this personal liability exists alongside the State’s liability for the same acts”.^{[2184] 238} With regard to the existence of “a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials”, the Court more specifically observed that “[t]aking the applicants’ arguments at their strongest, there is evidence of recent debate surrounding ... the interaction between State immunity and the rules on attribution in the Draft Articles on State Responsibility”.^{[2185] 239}

[A/71/80, para. 159]

^{[2182] 13} See footnote [283] 3 above, para. 173.

^{[2183] 237} See footnote [323] 49 above, para. 109.

^{[2184] 238} *Ibid.*, para. 207.

^{[2185] 239} *Ibid.*, para. 213.

Article 59. Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

Commentary

- (1) In accordance with Article 103 of the Charter of the United Nations, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” The focus of Article 103 is on treaty obligations inconsistent with obligations arising under the Charter. But such conflicts can have an incidence on issues dealt with in the articles, as for example in the *Lockerbie* cases.^{[2186] 842} More generally, the competent organs of the United Nations have often recommended or required that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases.
- (2) Article 59 accordingly provides that the articles cannot affect and are without prejudice to the Charter of the United Nations. The articles are in all respects to be interpreted in conformity with the Charter.

^{[2186] 842} *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 3; (Libyan Arab Jamahiriya v. United States of America), ibid., p. 114.*